* Together with Christian v. Waialua Agricultural Co.

CLERK'S COPY

Vol. I

175244
S.C.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 15

WAIALUA AGRICULTURAL COMPANY, LIMITED, PETITIONER,

vs.

ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON, BY HERMAN V. VON HOLT, HER GUARDIAN, ET AL.

No. 17

ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON, BY HERMAN V. VON HOLT, HER GUARDIAN, PETITIONER,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FOR CERTIORARI FILED { MARCH 30, 1938.
MARCH 31, 1938.

CERTIORARI GRANTED MAY 2, 1938.

No. 8329

United States

Circuit Court of Appeals

For the Ninth Circuit.

ELIZA R. P. CHRISTIAN, an incompetent person by HERMAN V. VON HOLT, her guardian,

Appellant,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation, JAMES L. HOLT, and ANNIE HOLT KENTWELL,

Appellees.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation,

Cross-Appellant,

vs.

ELIZA R. P. CHRISTIAN, an Incompetent person, by HERMAN V. VON HOLT, her guardian, JAMES L. HOLT and ANNIE HOLT KENTWELL,

Cross-Apellees.

Transcript of Record

In Three Volumes

VOLUME I

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Upon Appeal and Cross-Appeal From the Supreme Court of the Territory of Hawaii.

Parker Printing Company, 545 Sansome Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Eq. No. 2915

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii.

At Chambers In Equity

Bill for Cancellation, Accounting and
Incidental Relief.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN VON HOLT (substituted for GEORGE H. HOLT, deceased), her Guardian,

Petitioner,

vs.

WAIALUA AGRICULTURAL COMPANY, PANY, LIMITED, an Hawaiian corporation, and JAMES L. HOLT,

Respondents.

NOTICE OF APPEAL AND APPEAL.

Filed at 9:40 o'clock A. M. Oct. 19, 1929. (s) D. K. Sherwood. No. 1920.

Rec'd and filed in the Supreme Court October 31, 1929, at 1:29 P. M. (s) J. A. Thompson, Clerk. [1*]

Now comes WAIALUA AGRICULTURAL COMPANY, LIMITED, respondent in the above entitled case, and gives notice of appeal and hereby appeals to the Supreme Cour of the Territory of Hawaii from the decree made and entered in the

*Page numbering appearing at the foot of page of original certified Transcript of Record.

above entitled court and cause on the 16th day of October, 1929.

Dated at Honolulu, T. H. this 19th day of October, 1929.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
By ROBERTSON & CASTLE
Its Attorneys.

Service of a copy of the foregoing notice of appeal and appeal is hereby admitted this 19th day of October, 1929.

ULRICH & HITE
Attorneys for Petitioner.
JOHN R. DESHA
Attorney for Respondent,
James L. Holt. [2]

[Title of Court and Cause.]

PETITION

EXHIBITS "A", "B", "C", "D", and "E"

and

CHAMBERS SUMMONS.

Filed at 10:25 o'clock a. m, May 9, 1928. Sibyl Davis, Clerk.

Returned at 1:50 o'clock p. m. May 9, 1928. A. E. Restarick, Clerk. [3]

[Title of Court and Cause.]

PETITION.

Comes now GEORGE H. HOLT as Guardian of the Estate of ELIZA R. P. CHRISTIAN, an incompetent person, by his attorneys, ULRICH & HITE, and as grounds for the relief herein prayed, shows unto this Honorable Court as follows:

I.

That he, the said George H. Holt, was upon the first day of February, 1927, by order and decree duly entered in the above entitled Court, appointed Guardian in Hawaii of the estate of Eliza R. P. Christian, resident in England, and found and adjudged to be an incompetent person, and that upon the filing of a bond in the amount of $15,000.00, he, the said George H. Holt, did qualify as such Guardian and ever since has been and now is the duly acting and qualified guardian of said incompetent person.

II.

That respondent, Waialua Agricultural Company, Limited is now and at all times hereinafter mentioned has been a cor- [4] poration duly organized and existing under and pursuant to the provisions of the laws of the Territory of Hawaii, with its principal place of business in Honolulu in said Territory.

III.

That the respondent James L. Holt is a resident of the City and County of Honolulu, Territory of

Hawaii, and is a son of James R. Holt and grandson of Robert William Holt, all as more fully hereinafter appears.

IV.

That petitioner, Eliza R. P. Christian, formerly Eliza R. P. Holt, was and is the daughter and sole heir of John Dominis Holt, now deceased, and that the said John Dominis Holt was a son of Robert William Holt, said Robert William Holt having been a resident of the Territory of Hawaii, and the owner of large properties in said Territory, who died in the year 1862.

V.

That upon his death in the year 1862 as aforesaid, said Robert William Holt, seized of considerable properties as aforesaid, left a will wherein and whereby, among other things, it was provided that the bulk of his estate should be divided into four equal parts, one part of which to go to and become the property of his daughter, Elizabeth M. Aldrich, the remaining three-quarters thereof to be held in trust to pay the income from equal and undivided thirds thereof to each of his sons, Owen J. Holt, James R. Holt, and John Dominis Holt, for their respective lives, with remainder over in fee as to each [5] undivided one-third to the heirs at law of the said three sons as they respectively should die, a copy of which said last will and testament of Robert William Holt is hereto annexed, marked Exhibit "A", and by reference made a part hereof.

That after the distribution of one-fourth of said estate to said Elizabeth M. Aldrich, daughter of testator, as aforesaid, and after the payment of all debts and specific legacies, there was in said estate and undistributed the following pieces and parcels of real property, situate, lying and being in the district of Waialua, Island of Oahu, Territory of Hawaii, said property being more particularly described as follows:

1. Ahupaa of Paalaa, being apana 34, L.C.A. 7713, Royal Patent 4475, containing an area of 12,237 acres;

2. The lands described in Royal Patent 973 to Robinson et al, containing an area of 1,942 acres;

3. The lands described in Royal Patent 431 to Kanohanui, containing an area of 100 acres;

4. The lands described in Royal Patent 235 to Topliff et al, containing an area of 36 acres;

5. The lands described in Royal Patent 238 to Anderson, containing an area of 25.8 acres;

6. All kuleanas or grants lying within the above described land.

VI.

That under and pursuant to the provisions of said will of Robert William Holt, his son, John Dominis Holt, became and was entitled to the income for life from an undivided one-third of all of the above described lands, and that Eliza R. P. [6] Christian, the only child and sole heir

at law of her father, the said John Dominis Holt, as aforesaid, became and was entitled to accede to and become the owner in fee simple of an undivided one-third interest in all of said lands upon the death of her said father, and subject only to her survival of him.

VII.

That the said Eliza R. P. Christian is, was, and at all times hereinafter mentioned has been, insane and mentally incompetent.

VIII.

That for many years prior to 1910 and prior to the happening of the events in that year hereinafter described, the respondent Waialua Agricultural Company, Limited had used and occupied large portions of the above described lands as a tenant under leaseholds executed to it by persons holding the legal estate in trust, pending the death of the life tenant as aforesaid, on considerable portions of which land said respondent corporation had planted and grown sugar cane in the course of its business in the cultivation and production of sugar, and petitioner alleges upon information and belief that in the year 1910, becoming desirous of acquiring said lands in fee simple, and more particularly of acquiring the undivided one-third in said land as to which the said John Dominis Holt was entitled to the income for life and as to which the said Eliza R. P. Christian would be entitled to the fee upon his death, the said respondent cor-

poration did undertake, enter upon and carry through the negotiations and transactions more fully hereinafter described. [7]

IX.

That in said year 1910 the said Eliza R. P. Christian was wholly incompetent mentally as aforesaid, and was unable to care for herself or her affairs, and was then residing in Oxford, England, with her cousin, Anne Holt Kentwell, in whose care she had been for many years; that the said Anne Holt Kentwell had complete control over said incompetent person, but that she was without knowledge as to the legal status of said incompetent and concerning her inability to execute a valid conveyance of her properties; that at said time respondent James L. Holt was resident in Honolulu, Hawaii, and was on friendly terms with and related to said Anne Holt Kentwell; that the said incompetent, the only child and sole heir in expectancy of her father, John Dominis Holt, was of the age of 24 years and, aside from her said mental affliction, was in general good physical healt hand condition, whereas the said John Dominis Holt, upon whose death the vesting of the interest in fee in the said Eliza R. P. Christian alone depended, was a man of 71 years of age; that at said time the interest in expectancy in fee in an undivided one-third of said lands to which said incompetent would be entitled upon the death of her said father, was of the value of upwards of

$300,000.00, and that all of the foregoing facts and circumstances were well known to respondent corporation, notwithstanding that the true worth and value of said property, dependent upon circumstances peculiarly within the knowledge of said respondent corporation, was unknown to and not disclosed to said Anne Holt Kentwell, and was, of course, entirely impossible of being understood by said incompetent, petitioner herein. [8]

X.

Petitioner alleges upon information and belief that thereupon the respondent corporation did employ and retain the law firm of Castle & Withington of Honolulu to represent it and act for it in the matter of procuring the conveyance to it of the so-called Christian interest in said property, and that as a first step in the plan then and thereupon undertaken by said respondent and in or about the months of March or April, 1910, the said James L. Holt was induced to come to and attend certain meetings or conferences held in the office of said attorneys, Messrs. Castle & Withington, in the course of which said James L. Holt was induced to enter into an agreement, portions of which agreement were reduced to writing and signed by the parties to be bound, W. R. Castle signing as Trustee and acting for and on behalf of said respondent corporation, the substance and effect of which agreement was as follows: That it was agreed in substance that the said James L. Holt, being in the confidence of said Anne Holt Kentwell, under whose

complete influence and control was said incompetent, Eliza R. P. Christian, should endeavor to induce said Anne Holt Kentwell to procure the signature of said incompetent to a deed purporting to convey the interest of said incompetent in said land at a cost to respondent corporation not to exceed the sum of $40,000.00, which moneys, it was agreed, were to be furnished by said respondent corporation through its representatives; it being further agreed that, notwithstanding that said James L. Holt was without funds to make said purchase, and notwithstanding that said purchase was to be made for immediate retransferal to said respondent corporation or its representatives or [9] appointees in trust, the negotiations were to be had with said Anne Holt Kentwell and with said incompetent as though said James L. Holt were in fact purchasing said property, and that the conveyance, if procured, was to be taken in the name of said James L. Holt; that it was further agreed that upon the procuring of said conveyance said James L. Holt was then and thereupon to execute his conveyance of the interest to be so acquired from said Eliza R. P. Christian, together with his own similar and equal interest in expectancy in said lands as the sole heir at law of James R. Holt, and that he was to receive from said respondent as consideration for his services in the premises and for his interest in said property the sum of $60,000.00; a further sum of $20,000.00 to be paid to one John L. Colburn, at that time the assignee and holder of the life inter-

ests in said property of John Dominis Holt and James R. Holt, and trustee for James L. Holt for certain purposes, making a total contemplated expenditure to said corporation of $120,000.00 for petitioner's interest as well as for the other interest above indicated in said lands.

XI.

Petitioner alleges upon information and belief that then and thereupon said James L. Holt, pursuant to said agreement, did endeavor to ascertain from England whether or not, if attempted, said plan might be reasonably expected to be successful, and having, as it was thought, ascertained that such was the fact, David Withington, Esquire, a member of said law firm of Castle & Withington, representing respondent corporation in the premises as aforesaid, who was then in the city of Washington, District of Columbia, was instructed by [10] said respondent corporation to proceed forthwith to England and there to appear, ostensibly as attorney for James L. Holt, but in fact acting in the interests of respondent corporation as aforesaid, in an endeavor to procure through said Anne Holt Kentwell, or in such manner as could be done, a conveyance of the said Christian interest at an expenditure to said corporation of not to exceed $40,000.00.

XII.

Petitioner alleges upon information and belief that thereupon said David Withington, Esq., did forthwith proceed to England, and did there call

upon said Anne Holt Kentwell, in whose home was the said incompetent, Eliza R. P. Christian; that the said David Withington, representing said respondent corporation as aforesaid, though ostensibly representing said respondent James L. Holt as aforesaid, was then and there given and did have ample opportunity for ascertaining for himself and those whom he represented the fact of said incompetency. Upon information and belief petitioner further alleges that said David Withington, as such attorney and representative, was fully aware of said mental incompetency of said Eliza R. P. Christian at the time of the happening of all of the events which there transpired as herein described.

XIII.

Plaintiff alleges upon information and belief that the said David Withington, acting for respondent corporation as aforesaid, did then and there represent to Anne Holt Kentwell as well as to said incompetent, Eliza R. P. Christian, who was, however, incapable of understanding said representation, that the interest of said Eliza R. P. Christian was of a value of [11] not more than $30,000.00, although in truth and in fact the value of said interest was in an amount of many times that sum, and did persuade and induce said Anne Holt Kentwell to assist in procuring the signature of said incompetent to a deed purporting to convey the interest of said incompetent to the respondent James L. Holt as aforesaid, and did succeed in procuring the signature of

said incompetent to said deed, said signature being affixed by said incompetent without any knowledge or understanding of the meaning of said document or of said signature; and that in said manner, although petitioner was wholly incompetent as aforesaid, her signature was procured to said document, and that said document was signed by no person for or on her behalf as her guardian or otherwise, all of which was well known to defendant corporation, and that said document was signed on, to-wit, May 2, 1910, in the manner aforesaid by said incompetent and by said Anne Holt Kentwell, purporting to convey her interest in the said land, and by John Dominis Holt, notwithstanding that all of his interest had theretofore been alienated and assigned away; that said document was subsequently returned to Hawaii and was recorded in the Office of the Registrar of Conveyances on, to-wit, the 23rd day of June, 1910, in Liber 337, page 75, of the records of said office, and that a true and correct copy thereof is hereto annexed, by reference made a part hereof, and marked Exhibit "B".

XIV.

Petitioner alleges upon information and belief that thereafter the said respondent corporation, through its agents and representatives, did represent to the respondent James L. [12] Holt that it had disbursed in procuring the execution to said James L. Holt of the conveyance hereinabove referred to and marked Exhibit "B", annexed hereto,

through the said David Withington in England, the following sums of money, pursuant to the agreement theretofore entered into with said respondent James L. Holt by W. R. Castle as trustee as hereinabove set forth, that is to say:

Stated to have been paid to Eliza R. P. Christian £6,141/5 @ $4.88½	$30,000.00
Stated to have been paid to Anne Holt Kentwell £1,023/10/10 @ $4.88½	5,000.00
Stated to have been paid by David L. Withington for various incidental expenses £19/15 @ $4.88½	92.92
Stated to have been paid by David L. Withington for other incidentals, including present to clerk	17.50
Total	$35,110.32

That petitioner is without information as to the manner of payment of said sum of $30,000.00 stated to have been paid to said Eliza R. P. Christian as aforesaid, or as to what person said moneys were paid, or as to how said moneys were used and applied, save and except that petitioner alleges that said money could not have been paid to and disposed of by said Eliza R. P. Christian, personally, inasmuch as she was wholly and utterly unable, because of her mental condition, to receive, handle or dispose of moneys, and petitioner further alleges that said sum of $30,000.0 was grossly, utterly, and

wholly inadequate as consideration for the interest of said Eliza R. P. Christian, as was well known to said respondent corporation and to its agents and representatives, and that [13] said transaction was unconscionable and inequitable and in fraud of the rights of said incompetent, Eliza R. P. Christian.

XV.

Petitioner alleges upon information and belief that promptly after the return of said deed of May 2, 1910 to Honolulu, and in fact even before said deed had been recorded, and pursuant to the agreement theretofore entered into as aforesaid, said respondent James L. Holt, on to-wit, May 28, 1910, did execute his deed to W. R. Castle as agent and trustee for respondent corporation, purporting to convey, among other things, the one-third interest in said lands of the said incompetent, Eliza R. P. Christian, but that upon the making of said conveyance the said James L. Holt received no money or consideration of any kind for the transfer to said W. R. Castle as trustee of said interest of the said incompetent, Eliza R. P. Christian, theretofore paid for by said respondent corporation as aforesaid, and was paid compensation only for the conveyance of his own interest in said land, also covered by said indenture of May 28, 1910, and for his services in the premises as aforesaid, for which interest and for which services said James L. Holt was paid the sum of $60,000.00, the balance of the consideration of $120,000.00 recited in said conveyance of May 28, 1910 representing sums alleged to have been dis-

bursed in England in procuring the said indenture of May 2, 1910, and moneys paid to one John F. Colburn appearing as a party to said indenture of May 28, 1910; and that said deed of May 28, 1910 is hereto annexed, by reference made a part hereof, and marked Exhibit "C".

XVI.

That thereafter and for a period of approximately ten [14] years and until May 17, 1920, as petitioner is informed and believes, the said William R. Castle, attorney for said respondent corporation as aforesaid, did continue to hold in trust as aforesaid for said respondent corporation, all rights covered by said deed of May 2, 1910, being Exhibit "B", attached hereto; that at the expiration of said period and on said May 17, 1920, said William R. Castle, trustee as aforesaid, did convey said rights to certain persons as trustees in the premises, as your petitioner is informed and believes and therefore alleges the fact to be, with the knowledge of and at the instigation and request of his beneficiary, said respondent corporation, all as more fully hereinafter set forth.

XVII.

That on May 17, 1920, W. R. Castle, trustee as aforesaid, did convey, among other things, all the rights covered by said conveyance marked Exhibit "B" attached hereto, and all rights covered by Exhibit "C" attached hereto, to J. R. Galt A. L. Castle, T. H. Petrie, R. A. Cooke, and R. B.

Anderson, as trustees designated and named trustees of the "HELEMANO REAL ESTATE TRUST"; and petitioner alleges upon information and belief that notwithstanding that the sum of $127,912.49 was recited in said conveyance as consideration therefor, $120,000.00 thereof represented and was merely the $120,000.00 theretofore claimed to have been paid for said lands ten years earlier, and recited as consideration in that certain conveyance to W. R. Castle, trustee, hereinabove referred to as Exhibit "C", and that the additional amount of upwards of $7,900.00 represented additional expenses incurred in the premises by the respondent corporation through its representatives, and that no new or in- [15] dependent consideration was furnished by any person or corporation other than respondent corporation, and that said trustees of the said Helemano Real Estate Trust as above mentioned, did thereafter and at all times hold such properties and rights as were conveyed by said indenture of May 17, 1920 in trust for said Waialua Agricultural Company, Limited, respondent herein, as ultimate beneficiary, and that a copy of said indenture of May 17, 1920, conveying said properties and rights to said trustees of said Helemano Real Estate Trust in trust as aforesaid, is hereto attached, by reference made part hereof, and marked Exhibit "D".

XVIII.

That thereafter said trustees of said Helemano Real Estate Trust continued to hold said properties

in trust as aforesaid until July of the year 1921; that on July 9, 1921, the provisions of Section 55 of the Organic Act providing for the Government of the Territory of Hawaii, theretofore providing, among other things, that no corporation should acquire or hold real estate in Hawaii in excess of 1,000 acres in area, and that all real estate so acquired or held should escheat to the United States, as amended by the Congress of the United States by repealing and deleting from said Section said provisions thereof, and that immediately thereafter and on July 20, 1921, by instrument in writing of that date, the said trustees of said Helemano Trust did convey all of the aforesaid properties directly to respondent corporation, Waialua Agricultural Company, Limited; and petitioner alleges upon information and belief that, notwithstanding that said conveyance of July 20, 1921 recites a consideration of $128,045.49, said sum rep- [16] resented merely moneys theretofore expended by said corporation as hereinabove indicated for said properties, with the small additional expenditure indicated, accruing as incidental to the final conveyance to the ultimate beneficiary, respondent corporation, for whom said properties had been held throughout under various trusts as hereinabove set forth, and petitioner alleges that said respondent corporation took and received said property with full and complete knowledge of all the matters and things hereinabove set forth, and that the dealings with said property herein indicated to have taken place after

the procuring of the deed of May 2, 1910 hereinabove referred to as Exhibit "B", were dealings carried through at the instigation, request and under the direction of respondent corporation, by whose agents and representatives and at whose expense said original conveyance of May 2, 1910 has been procured;

XIX.

Petitioner alleges that on April 10, 1922, John Dominis Holt, father of petitioner and the holder of the life interest intervening prior to the vesting of the rights of said petitioner in the lands referred to, died, leaving as his sole surviving heir the said petitioner, Eliza R. P. Christian, and that from and after said day said Eliza R. P. Christian became and was as such heir vested with an estate in fee simple in and to an undivided one-third of all the lands hereinabove described, and all rights of respondent corporation acquired by leases or by other forms of assignment of the interest of the intervening life tenant terminated; but that nevertheless respondent corporation continued thereafter to use and occupy said land without right or authority in the premises, and with- [17] out accounting to petitioner for the reasonable worth of said right and user. That, however, at said time and at all times herein mentioned, said Eliza R. P. Christian was wholly and utterly incompetent mentally, and unable to act on her own behalf in the premises, and until said George H. Holt was later appointed guardian, as herein set forth, was without any person author-

ised and qualified to act for her in the premises; and that said respondent corporation has, since the death of said John Dominis Holt, wrongfully and without right or justification claimed to be the owner of the petitioner's property by virtue of the deed hereinabove referred to as Exhibit "B", notwithstanding the facts and circumstances incidental to the procuring of said indenture, and notwithstanding the total incapacity of said Eliza Christian to have entered into or bound herself by any such undertaking, and petitioner is wholly and utterly without any or adequate relief in the premises, otherwise than through the order and decree of this court, canceling said deed as to her and granting further relief as herein otherwise prayed for.

XX.

That since the appointment and qualification of said George H. Holt as guardian of the estate of the said Eliza R. P. Christian, an incompetent, all due diligence has been used in promptly investigating all matters and things having to do with the rights of the said incompetent, and with all due diligence a careful and searching investigation has been carried through, which has disclosed the facts and circumstances hereinabove set forth, which has occupied the time which has intervened since said appointment, and that promptly upon having [18] completed said investigation and ascertained said facts and circumstances, said incompetent, acting through her said guardian, made due and timely demand upon the respondent corporation that it do

account to the said Eliza R. P. Christian, incompetent as aforesaid, for the use of her lands since the death of the said John Dominis Holt, and that it otherwise do justice in the premises, and that upon refusal of said respondent to comply with said demand within a reasonable time, petitioner, by her said guardian, is promptly filing this her complaint herein.

XXI.

Petitioner alleges that the value of the lawful right and interest of the said Eliza R. P. Christian in and to the lands herein referred to and now held and claimed by said respondent corporation is in an amount greatly in excess of a million dollars, and that the reasonable rental for the use and occupancy of said interest in said land during the period of approximately six years which has intervened since the death of the said John Dominis Holt, and properly payable to petitioner herein, is in an amount of many times the sum of $30,000.00, with interest since May 2, 1910, and petitioner, that justice full and complete may be done in the premises, in such manner as to the court may seem just, equitable, and in accord with the evidence to be adduced herein, does hereby offer to allow to respondent corporation a credit in the amount of $30,000.00 with interest from May 2, 1910 to date, said sum being and representing the money originally claimed to have been expended by respondent corporation, as aforesaid, as consideration for the interest of the said Eliza R. P. Chris-

tian, [19] in the event that the court finds from the evidence that in equity such should be done, such credit to be allowed in the acounting for rentals herein prayed for, or in such other manner as to this court may seem just and proper.

XII.

Petitioner alleges that after the appointment of the said George H. Holt as guardian for said incompetent, and promptly upon the ascertaining of the facts and circumstances hereinabove set forth, petitioner, acting by her said guardian, did disaffirm the said deed of conveyance of May 2, 1910, and petitioner, proceeding by her said guardian herein, without admitting any force or effect in said conveyance, does hereby disaffirm said deed and said transaction, and in the settlement to be had herein does tender back any and all consideration which may be shown to have been paid as consideration for the conveyance of her said interest, together with the interest thereon in the event and to the extent that this court may find herein that repayment should be made in equity and in justice.

XXIII.

That petitioner has no adequate and complete remedy at law.

WHEREFORE PETITIONER PRAYS:

1. That respondents above named and each of them be cited to appear and make answer unto petitioner's foregoing Petition in the manner and

form provided by law, answer under oath being hereby expressly waived; [20]

2. That it be ordered and decreed that respondents above named surrender up for cancellation that certain deed dated May 2, 1910, a copy of which is hereto annexed and marked Exhibit "B", and that said deed be cancelled and annulled as to said Eliza R. P. Christian by order of this Court and as to her decreed to be of no further force or effect;

3. That it be ordered and decreed that respondent Waialua Agricultural Company, Limited, do fully and completely account to petitioner of and concerning the reasonable and full rental of the undivided one-third interest in fee of petitioner in and to all of the lands hereinabove described, from April 10, 1922 to and including the date of judgment entered herein, together with interest thereon, and that said respondent Waialua Agricultural Company, Limited do pay to petitioner a sum of money which shall be and represent the aggregate of rentals accrued and accruing on said lands since said April 10, 1922 to and including the date of judgment entered herein, together with interest thereon from the dates upon which said rentals shall have accrued, credit to be given to said Waialua Agricultrual Company, Limited in such accounting for such sum or sums, if any, as to this Court may seem just and proper;

4. That it be ordered and decreed that respondent Waialua Agricultrual Company, Limited make and execute a good and sufficient deed of conveyance, conveying and releasing to petitioner an un-

divided one-third interest in and to all of the lands hereinabove described.

5. And that the Court do grant such other and further relief as to the Court may seem just and equitable, to the end [21] that complete justice and equity may be done in the premises, and that petitioner do have her costs of suit incurred herein.

Dated: Honolulu, T. H., May 9, 1928.

ELIZA R. P. CHRISTIAN, an incompetent person, by GEORGE H. HOLT, her guardian,

By ULRICH & [redacted]TE

By BARRY S. ULRICH

Her Attorneys.

Territory of Hawaii,
City and County of Honolulu—ss.

GEORGE H. HOLT, being first duly sworn, deposes and says that he is the George H. Holt named as guardian of ELIZA R. P. CHRISTIAN, an incompetent person, petitioner herein, and that by him as such gaurdian said incompetent makes said Petition herein; that he has read said foregoing Petition, knows the contents thereof, and that the allegations therein contained are true, save as to those matters stated to be alleged upon information and belief, and that as to them, he believes them to be true.

GEORGE H. HOLT

Guardian of Eliza R. P. Christian, an incompetent person.

Subscribed and sworn to before me this 9th day of May, 1928.

[Notarial Seal] MARION D. RAAB

Notary Public, First Judicial Circuit, Territory of Hawaii. [22]

EXHIBIT "A"

Know all men by these presents, that I, Robert W. Holt, of Honolulu, Oahu being of sound disposing mind and memory, do make and publish this my last Will and Testament, hereby revoking any Will by me at any time before made.

After the payment of my just debts, I make the following disposition of my property.

First. I give, devise and bequeath to my wife Wati Holt for the term of her natural life the sum of Eight Hundred Dollars to be paid to her yearly in Quarterly payments of Two Hundred Dollars, by my Executor hereinafter named, for her maintenance and support.

Second. I give, devise, and bequeath to my son John Dominis Holt one Quarter of all my Estate, both real and personal the income of the same to be paid to him by my Executor hereinafter named for his use and support for the term of his natural life and after the death of my said Son, I give, devise and bequeath the said one Quarter to the heirs of the said John Dominis Holt and their assigns.

Third. I give devise and bequeath to my son *Own* Jones Holt one Quarter of all my Estate, both

real and personal, the income of the same to be paid to him by my Executor hereinafter named for his use and support, for the term of his natural life, and after the death of my said Son, I give, devise and bequeath the said one quarter to the heirs of the said Owen Jones Holt and their assigns.

Fourth. I give, devise and bequeath to my son James Robinson Holt one Quarter of all my Estate, both real and per- [23] sonal the income of the same to be paid to him by my Executor hereinafter named for his use and support for the term of his natural life, and after the death of my said Son I give, devise and bequeath the said one Quarter to the heirs of the said James R. Holt and their assigns.

Fifth: I give and devise and bequeath to my daughter Elizabeth M. Aldrich wife of W. A. Aldrich, one quarter of all my Estate both real and personal, and to her heirs and assigns.

Sixth: I ordain and appoint William A. Aldrich, Executor of this my last Will and Testament.

In testimony whereof, I have hereunto set my hand and seal and publish and declare this as my last Will and Testament in presence of the witnesses named below this Twenty-Ninth day of May, A. D. Eighteen Hundred and Sixty-Two.

(Sgd) R. W. HOLT (S)

Signed, sealed, published and declared by the said Robert W. Holt as and for his last Will and Testament in presence of us who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

(Sig) J. W. AUSTIN
CHAS. R. BISHOP
ROBERT LAWRENCE

I hereby make this Codicil to the foregoing Will, and I give devise and bequeath to the Queen's Hospital in the City of Honolulu, Oahu the sum of Five Hundred Dollars to be expended by the Trustees of the said Queen's Hospital for its benefit:

(Sig) R. W. HOLT

Subscribed in presence of us this 30th day of May, A. D. 1862.

(Sig) J. W. AUSTIN [24]
(Sig) CHAS. R. BISHOP
ROBERT LAWRENCE

Hawaiian Islands
Oahu S. S.

Be it remembered, that, on this 26th day of July 1862, the above written was duly proved before me in the Supreme Court of the Hawaiian Islands as and for the Last Will and Testament of Robert W. Holt of Honolulu, Oahu, late deceased.

In the testimony whereof, I have hereunto set my hand and caused to be affixed the Seal of the Su-

preme Court of the Hawaiian Islands the day and year above written.

(Sig) G. M. ROBERTSON

(S) Justice Supreme Court. [25]

EXHIBIT 'B"

KNOW ALL MEN BY THESE PRESENTS: That we, John Dominis Holt, Widower, Eliza R. P. Christian, wife of Albert Christian, daughter R.W V.C.

and of

~~of~~ sole heir ~~and~~ said John Dominis Holt, Annie Holt Kentwell, and Lawrence K. Kentwell, husband of the said Annie Holt Kentwell, all now commorant at Oxford, in the County of Oxford, in the United Kingdom of Great Britain and Ireland, hereafter termed the Grantors, in consideration of the sum of Thirty-five thousand dollars ($35,000.00) to them in hand paid by James Lawrence Holt of Honolulu, in the Territory of Hawaii, in the United States of America, hereafter termed the Grantee, the receipt of which sum is hereby acknowledged, have given, granted, bargained, sold and conveyed and by these presents do give, grant, bargain, sell and convey unto the said James Lawrence Holt, the said Grantee, one undivided third part of interest in and to the following parcels of land and each of them namely:

1. Ahupuaa of Paalaa, being Apana 34 of L.C.A. 7713, R. P. 4475 to V. Kamamalu, containing an area of 12237 acres, more or less.

2. Ahupuaa of Wahiawa, being R.P. (Grant) 978, containing an area of 1942 acres, more or less.

3. R.P. (Grant) 235 to Jerome Topliffe and Louis Johnson, containing an area of 36 acres, more or less.

4. R.P. (Grant) 238 to J. F. Anderson and F. Davis, containing an area of 25.8 acres, more or less.

5. R.P. (Grant) 431, containing an area of 100 acres, more or less. [26]

All of said lands being situated in the District of Waialua, in the Island of Oahu and Territory of Hawaii aforesaid; intending hereby to convey all the interest of the said Grantors, whether present, prospective or in remainder, vested or contingent, of every name and description in and to said lands or which they or either of them may hereafter acquire in and to the said lands, and particularly every interest which the said Grantors or either of them may now have or may hereafter acquire under the Will of R. W. Holt, deceased, the father of said John Dominis Holt, and grandfather of said Eliza R. P. Christian and R.W. V.C.
not including Makaha
Annie Holt Rentwell, subject, however, to a certain Deed of Trust made by said James Lawrence Holt,

the Grantee, to John F. Colburn, and to a certain lease dated the First day of April, one thousand nine hundred and five made by Carlos A. Long, Administrator and others including the Grantors herein, to the Waialua Agricultural Company, Limited, both of which instruments are of record in the Registry Office of said Territory but intending to convey all the rights of the Grantors and each of them against said Trustee and said Company and under said Deed and Lease the said Grantors assigning and setting over to the said Grantee all claims and demands which they may have arising out of either said instruments or in any other way against the said James Lawrence Holt the said Waialua Agricultural Company, Limited, or the said John F. Colburn, said Trustee, save and except the right to the personal estate of the said R. W. Holt which may be in the hands of said John F. Colburn, Trustee, it being the intention to convey all the interests of the Grantors in the estate left by said R. W. Holt or the property into which it R.W. V.C.

not including Makaha

has been converted with the excep- [27] tion of the said personal estate.

TO HAVE AND TO HOLD to the said James Lawrence Holt, the Grantee, his heirs and assigns, to his and their use and behoof forever.

The said Grantors, for themselves, their heirs, executors and administrators covenant with the

said Grantee, his heirs, executors, administrators and assigns, that they have good title in and to the described premises; that they have good right to convey the same; that the same are free from incumbrances, except as aforesaid; and that they will warrant and defend the same against the claims and demands of all persons, except as aforesaid; and that they and their heirs, executors and administrators will on demand of said Grantee, his heirs, executors, administrators or assigns, execute to him or them such instruments or instrument as may be necessary or by him or them deemed advisable at any time to perfect the title in the Grantee, his heirs, executors, administrators and assigns, in and to that portion of the estate of R. W. Holt devised by his Will to John Dominis Holt, and at his death to his heirs and assigns.

IN WITNESS WHEREOF, the Grantors have set their hands and seals this second day of May one thousand nine hundred and ten, the said Albert Christian, husband of said Eliza R. P. Christian, joining in consent thereto by a separate instrument executed within said Territory of Hawaii.

JOHN D. HOLT
ELIZA R. P. CHRISTIAN
ANNIE HOLT KENTWELL
ALBERT CHRISTIAN
LAWRENCE K. KENTWELL
DAVID L. WITHINGTON

Witness to signature of Albert Christian
W. H. PICKERING
ROBERT L. COBURN. [28]

I hereby certify that the words "of" and "and" line three, page one, were struck out and the words "and" and "of" inserted respectively, in their place, and the words "not including Makaha" line eight page two and the words "not including Makaha" line twenty-six page two, were respectively interlineated, all before signature and execution by Albert Christian.

[Notarial Seal] CHARLES EDELMAN
Notary Public, in and for the City and County of San Francisco, State of California. My commission expires April 9, 1914.

Kingdom of Great Britain and Ireland,
City of London, England,
United States Consulate General.

On this 2nd day of May, A. D. 1910, personally appeared before me John Dominis Holt, widower, Eliza R. P. Christian, wife of Albert Christian, Annie Holt Kentwell and Lawrence K. Kentwell, her husband, satisfactorily proved to me to be the persons described in and who executed the foregoing instrument by the oath of David L. Withington, a credible ~~person~~ witness for that purpose, to me known and by me duly sworn, and they the said John Dominis Holt, Eliza R. P. Christian, Annie Holt Kentwell and Lawrence K. Kentwell, acknowledged that they executed the same freely and voluntarily for the uses and purposes therein set forth.

WITNESS my hand and seal of office at London, England, this the 2nd day of May, A. D. 1910.

[Seal] RICHARD W. STACOTT
Vice-Consul of the United States of America at London, England.

American Consular Fee Stamp $2. [29]

State of California,
City and County of San Francisco—ss.

On this sixteenth day of May, A. D. 1910, before me personally appeared Albert Christian, to me known to be one of the persons referred to in the within instrument and therein described as the husband of Eliza R. P. Christian, and being one of the persons who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[Notarial Seal] CHARLES EDELMAN
Notary Public in and for the City and County of San Francisco, State of California. My commission expires April 9, 1914.

And I further certify that the words "and" and "of" in the third line of page one, and the words "not including Makaha" in the eighth line of page two, and the words "not including Makaha" in the twenty-sixth line of page two, were made before the execution of said instrument by the said Albert Christian.

[Notarial Seal] CHARLES EDELMAN,
Notary Public.

State of California,
City and County of San Francisco—ss.

I, H. I. MULCREVY, Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, which Court is a Court of Record, having a seal, do hereby certify that Charles Edelman, by and before whom the foregoing acknowledgement was taken was, at the time of taking the same, a Notary Public residing in said City and [30] County, and duly authorized by said State to take and certify acknowledgments or proofs of deed of land in said state; and further, that I am well acquainted with the handwriting of said Charles Edelman, and that I verily believe that the signature to said certificate of acknowledgment is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 16th day of May, 1910.

[Seal] H. I. MULCREVY
County Clerk and Ex-Officio
Clerk of the Superior Court.

Entered of record this 23rd day of June, A. D. 1910, at 11:24 o'clock A. M., and compared.

CHAS. H. MERRIAM,
Registrar of Conveyances. [31]

EXHIBIT "C"

THIS INDENTURE, made this 28th day of May A. D. 1910, by and between JAMES LAWRENCE HOLT, party of the first part, John F. Colburn, Trustee for James Lawrence Holt, party of the second part, and William R. Castle, Trustee, party of the third part, all of Honolulu, City and County of Honolulu, Territory of Hawaii:

WITNESSETH: That in consideration of One Hundred Twenty Thousand Dollars ($120,000.00) to the said James Lawrence Holt and John F. Colburn, Trustee, in hand paid by the said William R. Castle, Trustee, the receipt whereof is hereby acknowledged, the said James Lawrence Holt and John F. Colburn, Trustee, do and each of them does, give, grant, bargain, sell and convey unto the said William R. Castle, Trustee, his heirs and assigns, a two-third (2/3) undivided share or part of all those certain pieces or parcels of land lying and situate in the District of Waialua, in the City and County of Honolulu, aforesaid, known as the "Holt Estate Lands", to-wit:

1. The land known as the Ahupuaa of Paalaa, being Apana 34 of the land described in Royal Patent 4475, Land Commission Award 7713 to V. Kamamalu.

2. The land at Wahiawa mentioned or described in Royal Patent (Grant) 973 to James Robinson, Robert Lawrence, and Robert W. Holt.

3. The land at Paukauila mentioned or described in Royal Patent (Grant) 431 to Kauohanui.

4. The land at Kamananui mentioned or described in Royal Patent (Grant) 235 to Jerome Toplift and Lewis Johnson. [32]

5. The land at Kamananui mentioned or described in Royal Patent (Grant) 238 to John F. Anderson and Franklin Davis.

6. And all Kuleanas or Grants lying within the above lands and premises, or any or each of them, to which the said James Lawrence Holt and John F. Colburn, Trustee, or either of them, claim title or ownership.

Together with all the rents, income, right title, interest, estate, property, claims and demands, in law or in equity, vested, contingent or in expectation, of the said James Lawrence Holt and John F. Colburn, Trustee, and each of them, in and to or arising out of or in connection with said pieces or parcels of land hereinbefore described.

TO HAVE AND TO HOLD all and singular the above mentioned and described premises, properties and rights, together with all and singular the tenements, rights, easements, privileges and appurtenances to the same belonging or appertaining or held or enjoyed, unto the said William R. Castle, Trustee, his heirs and assigns forever.

And the said James Lawrence Holt, for himself and for his heirs, executors and administrators, covenants and agrees with the said William R. Castle, Trustee, his heirs and assigns, that he and the said John F. Colburn, Trustee, are seized in fee of an undivided two-thirds (2/3) part or share of

the said pieces or parcels of land hereinbefore described, with the appurtenances thereunto belonging; that the said undivided two-thirds (2/3) part or share of the said pieces or parcels of land hereinbefore described are free and clear of all incumbrances of whatsoever nature or kind; that they have good right [33] to sell and convey the same as aforesaid; that he, the said James Lawrence Holt, will and his heirs, executors and administrators shall warrant and defend the same to the said William R. Castle, Trustee, his heirs and assigns, against the lawful claims and demands of all persons whomsoever; and, further, that the said James Lawrence Holt and John F. Colburn, Trustee, and all persons claiming by, through or under them and each of them, will do and execute, acknowledge and deliver all such further deeds, transfers and assurances for the better and more effectually assuring, conveying and confirming unto the said William R. Castle, Trustee, his heirs and assigns, all and singular the property hereby conveyed or intended to be conveyed, as by him or them or by his or their counsel shall be required, and that the said William R. Castle, Trustee, his heirs and assigns, shall be held harmless and shall not be liable or responsible in any manner to see to the application of the purchase price hereof.

And James R. Holt, of said Honolulu, in consideration of the premises and of the sum of One Dollar to him paid by the said William R. Castle, Trustee, the receipt whereof is hereby acknowledged, does

bargain, sell, remise, release, quit-claim, convey and confirm to the said William R. Castle, Trustee, his heirs and assigns forever, all his estate, right, title, interest, claim and demand of whatsoever nature or kind, and whether present, prospective, in expectancy or otherwise, in, to or arising out of or in connection with the premises and property hereby conveyed or intended to be conveyed.

And Lokalia Holt, wife of said James R. Holt, in consideration of the premises and of the sum of One Dollar to her [34] paid by said William R. Castle, Trustee, the receipt whereof is hereby acknowledged, does bargain, sell, remise, release, quit-claim, convey and confirm to him, his heirs and assigns, all her estate, right, title, interest, claim and demand of whatsoever nature or kind, and whether present, prospective, in expectancy or otherwise, including dower, in, to or arising out of or in connection with the premises and property hereby conveyed or intended to be conveyed.

And Lena S. Holt, wife of said James Lawrence Holt, in consideration of One Dollar to her paid, the receipt whereof is hereby acknowledged, does remise, release, quit-claim and convey to the said William R. Castle, Trustee, his heirs and assigns, all her right, title, interest or claim of dower in and to the premises and property hereby conveyed or intended to be conveyed.

IN WITNESS WHEREOF, the said James Lawrence Holt, John F. Colburn, Trustee, James R. Holt, Lokalia Holt and Lena S. Holt, have hereto

set their hands and seals the day and year first above written.

JAMES LAWRENCE HOLT
JOHN F. COLBURN,
Trustee for James L. Holt.
JAMES R. HOLT
LENA S. HOLT
LOKALIA HOLT

Territory of Hawaii,
City and County of Honolulu,
District of Honolulu—ss.

On the 28th day of May, A. D. 1910, personally appeared before me James Lawrence Holt and Lena S. Holt, his wife, both [35] known to me, and on this 31st day of May, A. D. 1910, personally appeared before me John F. Colburn, Trustee for James L. Holt, and James R. Holt and Lokalia Holt, his wife, also known to me to be the persons described in and who executed the foregoing instrument, who severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth. And the said John F. Colburn, further acknowledged to me that he executed the said instrument as such Trustee.

[Notarial Seal] N. FERNANDEZ
Notary Public, First Judicial Circuit, Territory of Hawaii.

Entered of record this 31st day of May, A. D. 1910, at 12:15 o'clock P. M. and compared.

CHAS. H. MERRIAM,
Registrar of Conveyances. [36]

EXHIBIT "D"

KNOW ALL MEN BY THESE PRESENTS: That William R. Castle, of Honolulu, Territory of Hawaii, Trustee, hereinafter called the "Grantor", in consideration of One Hundred Twenty-seven Thousand Nine Hundred Twelve Dollars and Forty-Nine Cents ($127,912.49) to him paid by J. R. Galt, A. L. Castle, T. H. Petrie, R. A. Cooke and R. B. Anderson, all of said Honolulu, Trustees of the Helemano Real Estate Trust, hereinafter called the "Grantees", the receipt whereof is hereby acknowledged, does bargain, sell and convey unto the said Grantees, their ~~heirs~~, successors in trust and assigns:

F. L.

A two-thirds (2/3) undivided share or part of all those certain pieces or parcels of land lying and situate in the District of Waialua, in the City and County of Honolulu aforesaid, known as the "Holt Estate Lands", to-wit:

1. The land known as the Ahupuaa of Paalaa, being Apana 34 of the land described in Royal Patent 4475, on Land Commission Award 7713 to V. Kamamalu.

2. The land at Wahiawa mentioned or described in Royal Patent (Grant) 973 to James Robinson, Robert Lawrence and Robert W. Holt.

3. The land at Paukauila mentioned or described in Royal Patent (Grant) 431 to Kauohanui.

4. The land at Kamananui mentioned or described in Royal Patent (Grant) 235 to Jerome Topliff and Lewis Johnson.

5. The land at Kamananui mentioned or described in Royal Patent (Grant) 238 to John F. Anderson and Franklin Davis. [37]

6. And all Kuleanas or Grants lying within the above lands and premises, or any or each of them, to which the said Grantor claims title or ownership.

Together with all the rents, income, right, title, interest, estate, property, claims and demands, in law or in equity, vested, contingent or in expectation, of the said Grantor in and to or arising out of or in connection with said pieces or parcels of land hereinbefore described.

Hereby intending to convey all the estate, rights, title and interest of the said Grantor in the lands, tenements, hereditaments, premises and property described in and as conveyed to him by deed of James Lawrence Holt and John F. Colburn, Trustee, dated May 28, 1910, and recorded in Liber 332, on pages 148-151, Hawaiian Registry of Deeds.

Together with any and all other the estate, right, title and interest of the said Grantor in and to the above described and conveyed premises.

To have and to hold the same, together with all and singular the tenements, rights, easements, privileges and appurtenances to the same belonging or appertaining or held and enjoyed therewith, unto the said Grantees, their heirs successors in trust and assigns, forever.

F.L. N.P.
F.L. N.P.

And, as a part of the consideration of these presents, the said Grantees, for themselves, their heirs, successors in trust and assigns convenant with the said Grantor, his heirs, executors and administra-

tors, that they will, beginning June 1, 1920, and monthly thereafter, pay the annuity secured to Robert Holt and Hokela Holt, his wife, et al., to William R. [38] Castle, Trustee, dated September 21, 1917, and recorded in Liber 482, Page 314, said Registry.

IN WITNESS WHEREOF, the said Grantor and the Grantees as said Trustees, have set their hands hereunto this 17th day of May, 1920.

WILLIAM R. CASTLE,
Trustee.

J. R. GALT,
by His Attorney-in-Fact.

HAWAIIAN TRUST CO., LTD.,
[Corporate Seal] By H. H. WALKER, V. Pres.

R. K. McLEAN, Secy.,
A. L. CASTLE,
T. H. PETRIE,
R. A. COOKE,
R. B. ANDERSON,
Trustees of the Helemano Real Estate Trust

I certify that the words "heirs" was stricken from line 9 on page 1, and from lines 16 and 19 on *page of* the foregoing instrument, before execution.

FLORENCE LEE,
Notary Public.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 17th day of May, 1920, before me appeared H. H. Walker and P. K. McLean, both to me personally known, who, being by me severally duly

sworn, did say that they are the Vice-President and Secretary, respectively, of Hawaian Trust Company, Limited, an Hawaiian corporation, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in [39] behalf of said corporation as the attorney in fact for and on behalf of J. R. Galt, by authority of its Board of Directors, and said H. H. Walker and P. K. McLean severally acknowledged said instrument to be the free act and deed of said J. R. Galt, as Trustees of the Helemano Real Estate Trust; and on said 17th day of May, 1920, before me personally appeared A. L. Castle, T. H. Petrie, R. A. Cooke and R. B. Anderson, all to me known to be the persons described in and who executed the foregoing instrument, and severally acknowledged that they executed the said instrument, as thier free act and deed as Trustees of the Helemano Real Estate Trust.

And on said 17th day of May, 1920, before me personally appeared *appeared* William R. Castle, to me known to be the person described in and who executed the foregoing instrument as Trustee, and acknowledged that he executed the same as his free act and deed as Trustee.

[Notarial Seal] FLORENCE LEE,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Entered of record this 18th day of May, A. D. 1920, at 3:42 o'clock P. M. and compared.

P. H. BURNETTE,
Registrar of Conveyances.

EXHIBIT "E"

WHEREAS, on May 17, 1920, William R. Castle, Trustee, made, executed and delivered to J. R. Galt, A. L. Castle, T. H. Petrie, R. A. Cooke and R. B. Anderson, Trustees of the Helemano Real Estate Trust, a deed by way of conveyance of all the lands, tenements, hereditaments, premises and property herein and hereby conveyed and expressed as intended to be conveyed and as hereinbelow more fully described, which deed is recorded in Liber 553, on Pages 103-106, Hawaiian Registry of Deeds, all of which lands, tenements, hereditaments, premises and property are held by the said J. R. Galt, A. L. Castle, T. H. Petrie, R. A. Cooke and R. B. Anderson under the trusts set out and expressed in a declaration of trust made and executed by them on May 17, 1920, which declaration of trust is recorded in Liber 546, on Pages 435-442, said Registry; and

WHEREAS, the said A. L. Castle, one of the Trustees above named, is absent from the Territory of Hawaii; and

WHEREAS, on July 14, 1921, by an instrument in writing the owners of not less than three-fourths in value of the shares of the Helemano Real Estate Trust, pursuant to the requirement set out and expressed in the declaration of trust above referred to, directed the said J. R. Galt, A. L. Castle, T. H. Petrie, R. A. Cooke and R. B. Anderson, as such Trustees, to terminate the said trust and to sell all the trust property to the Waialua Agricultural

Company, Limited, a Hawaiian corporation, for the sum of One Hundred Twenty-eight Thousand and Forty-five Dollars and Forty-nine Cents ($128,-045.49) and to distribute the proceeds proportionately among the owners of [41] the shares in and of said Helemano Real Estate Trust, which instrument is recorded in Liber 602, Page 321, said Registry;

NOW, THEREFORE, this indenture witnesseth: That said J. R. Galt, A. L. Castle, T. H. Petrie, R. A. Cooke and R. B. Anderson, all of Honolulu, Territory of Hawaii, Trustees of the Helemano Real Estate Trust, hereinafter called the "Grantors" pursuant to the aforementioned, written declaration of the owners of not less than three-fourths in value of the shares of the Helemano Real Estate Trust, and of the powers and authority in them vested and as set out and expressed in the said declaration of trust so recorded in Liber 546, on Pages 435-442, aforesaid, and of every other power thereunto them enabling, and in consideration of the sum of One Hundred Twenty-eight Thousand and Forty-five Dollars and Forty-nine Cents ($128,-045.49) to them paid by the Waialua Agricultural Company, Limited, a Hawaiian corporation, hereinafter called the "Grantee" the receipt of which sum of money is hereby acknowledged, do bargain, sell and convey unto the Grantee, its successors and assigns:

A two-thirds (2/3) undivided share or part of all those certain pieces or parcels of land lying and

situate in the District of Waialua, in the City and County of Honolulu, Territory of Hawaii, known as the "Holt Estate Lands", to-wit:

1. The land known as the Ahupuaa of Paalaa, being Apana 34 of the land described in Royal Patent 4475, on Land Commission Award 7713 to V. Kamamalu;

2. The land at Wahiawa mentioned or described in Royal Patent (Grant) 973 to James Robinson, Robert Lawrence and Robert W. Holt; [42]

3. The land at Pavkauila mentioned or described in Royal Patent (Grant) 431 to Kauohanui;

4. The land at Kamananui mentioned or described in Royal Patent (Grant) 235 to Jerome Topliff and Lewis Johnson;

5. The land at Kamananui mentioned or described in Royal Patent (Grant) 238 to John F. Anderson and Franklin Davis;

6. And all Kuleanas or Grants lying within the above lands and premises, or any or each of them to which the said Grantors claim title or ownership.

Together with all the rents, income, right, title, interest, estate, property, claims and demands, in law or in equity, vested, contingent or in expectancy, of the said Grantors as such Trustees in and to or arising out of or in connection with said pieces or parcels of land hereinbefore described;

Hereby intending to convey all the estate, right, title, and interest of the said Grantors in the lands, tenements, hereditaments, premises and property

described in and as conveyed to them as such Trustees by deed of William R. Castle, Trustee, dated May 17, 1920, recorded in Liber 553 on Pages 103-106, said Registry;

Together with any and all the estate, right, title and interest of the said Grantors as such Trustees in and to the above described and conveyed premises;

TO HAVE AND TO HOLD the same, together with all and singular the tenements, rights, easements, privileges and appurtenances to the same belonging or appertaining or held and enjoyed therewith unto the said Grantee, its successors [43] and assigns, forever;

And as a part of the consideration of these presents, the said Grantee, for itself, its successors and assigns, covenants with the said Grantors and their respective heirs, executors and administrators, that it will, beginning August 1, 1921, and monthly thereafter, pay the annuity secured to Robert Holt and Hokela Holt, his wife, under the provisions of a deed from Robert Holt, et als, to William R. Castle, Trustee, dated September 21, 1917, and recorded in Liber 482, Page 314, said Registry.

IN WITNESS WHEREOF, the said Grantors, J. R. Galt, T. H. Petrie, R. A. Cooke and R. B. Anderson, have hereunto set their hands as such Trustees, and the Grantee has hereunto caused its corporate name to be signed and its corporate seal to be hereto affixed by its President and Treasurer

thereunto duly authorized, all this 20th day of July, 1921.

J. R. GALT,
T. H. PETRIE,
R. A. COOKE,
R. B. ANDERSON,
Trustees of the Helemano Real Estate Trust.

WAIALUA AGRICULTURAL COMPANY, LIMITED

[Corporate Seal] By E. D. TENNEY,
Its President.

By CHAS. H. ATHERTON,
Its Treasurer.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 20th day of July, A. D. 1921, personally appeared before me J. R. Galt, T. H. Petrie, R. A. Cooke and R. B. Anderson, known to me to be the persons described in [44] and who executed the foregoing instrument, who acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth, as Trustees of the Helemano Real Estate Trust.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal] ARCH'D. S. GUILD
Notary Public, First Judicial Circuit, Territory of Hawaii.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 20th day of July, A. D. 1921, before me appeared E. D. Tenney and Chas. H. Atherton, to me personally known, who, being by me duly sworn, did say that they were the President and Treasurer, respectively, of Waialua Agricultural Company, Limited, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said E. D. Tenney and Chas. H. Atherton acknowledged said instrument to be the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal] ARCH'D. S. GUILD,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Entered of record this 20th day of July, A. D. 1921, at 11:25 o'clock A. M. and compared.

P. H. BURNETTE,
Registrar of Conveyances. [45]

[Title of Court and Cause.]

CHAMBERS SUMMONS.

The Territory of Hawaii:

TO THE HIGH SHERIFF OF THE TERRITORY OF HAWAII, OR HIS DEPUTY: THE SHERIFF OF THE CITY AND COUNTY OF HONOLULU, OR HIS DEPUTY, OR ANY POLICE OFFICER IN THE TERRITORY OF HAWAII:

YOU ARE COMMANDED to summon WAIALUA AGRICULTURAL COMPANY, LIMITED, a Hawaiian corporation, and JAMES L. HOLT, to appear TEN DAYS after service hereof, if they reside in the City and County of Honolulu, otherwise TWENTY DAYS after service, before such Judge of the Circuit Court of the First Circuit as shall be sitting at Chambers in the Court Room of said Judge, in the Judiciary Building in Honolulu, City and County of Honolulu, to answer the annexed Petition.

And have you then there this writ with full return of your proceedings thereon.

WITNESS the Honorable ALBERT M. CRISTY, Presiding Judge of the Circuit Court of the First Circuit, at Honolulu aforesaid, this 9th day of May, 1928.

[Seal] SIBYL DAVIS,

Clerk. [46]

Served the within Summons as follows—

On WAIALUA AGRICULTURAL COMPANY, LTD., a Hawaiian corporation, through T. H. Petrie, its Vice President and JAMES L. HOLT, at Honolulu, T. H. this 9th day of May A. D. 1928, by delivering to each of them a certified copy thereof and of the petition or complaint hereto annexed, and at the same time showing them the original.

Dated, Honolulu, May 9th, 1928.

B. K. CUMMINS,
Police Officer. [46-A]

[Title of Court and Cause.]

ANSWER OF JAMES L. HOLT.

Filed at 1:50 o'clock P. M., May 18, 1928. A. E. Restarick, Clerk. [47]

Comes now JAMES L. HOLT, respondent above named by his attorney, JOHN R. DESHA, and for answer to the petition on file herein, shows unto this Honorable Court as follows:

I.

Respondent admits the allegations contained in Paragraphs I, II, III, IV, V, and VI of said petition.

II.

Answering the allegations contained in Paragraph VII of said petition, respondent admits that the said Eliza R. P. Christian is, and was at all

times mentioned in said petition, mentally incompetent.

III.

Answering the allegations contained in Paragraph VIII of said petition, respondent alleges that he is without definite information as to the use and occupancy of the lands in question by respondent Waialua Agricultural Company, Ltd., and leaves petitioner to her proof of the allegations in said paragraph contained in that regard, and respondent admits the [48] truth of the allegations in said paragraph referred to concerning the negotiations and transactions had by said respondent corporation of and concerning said lands insofar as your respondent was a party to such negotiations and transactions.

IV.

Answering the allegations contained in Paragraph IX of said petition, respondent admits that the said Eliza R. P. Christian was mentally incompetent as aforesaid; that she was, in the year 1910, residing at Oxford, England, in the care of her cousin Anne Holt Kentwell; that said Anne Holt Kentwell had control of said incompetent person; that your respondent was residing in Honolulu at said time and on friendly terms and related to said Anne Holt Kentwell and alleges that he is and was a first cousin of said Anne Holt Kentwell, and of said Eliza R. P. Christian; that said Eliza R. P. Christian and said John Dominis Holt were at said

time of the ages as set forth in said paragraph; but respondent is without definite knowledge as to the knowledge of said Anne Holt Kentwell concerning the legal status of said incompetent, the condition of the health of said incompetent at said time, the value of the interest of said incompetent in said lands at said time, and the extent to which disclosure of circumstances within the knowledge of respondent Waialua Agricultural Company, Ltd., was or was not made to said Anne Holt Kentwell, or attempted to be made to said incompetent, and therefore leaves petitioner to her proof of the allegations in said paragraph contained in these regards. [49]

V.

Answering the allegations contained in Paragraph X of said petition, respondent admits that in or about the months of March or April, 1910, as alleged in said paragraph, he, said respondent, James L. Holt, was induced to, and did, attend said meetings or conference held in the office of Messrs. Castle & Withington, attorneys for said respondent corporation, and that he did enter into an agreement with said respondent corporation as in said paragraph alleged.

VI.

Answering the allegations contained in Paragraph XI of said petition, respondent admits that pursuant to said agreement, as in said paragraph alleged, he did endeavor to ascertain from Eng-

land, whether or not if attempted said plan might be reasonably expected to be successful, and that he did, as he thought, ascertain such to be the fact, and did communicate this information to said attorneys for respondent corporation, and upon information and belief, your respondent admits the truth of the allegations in said paragraph contained, concerning the dispatching of said David Withington, attorney for respondent corporation, then in Washington, D. C., to England on the mission and for the purpose in said paragraph set forth.

VII.

Answering the allegations contained in Paragraph XII of said petition, respondent alleges that he is without definite knowledge as to what transpired in England between said attorney, David Withington, and said Anne Holt Kentwell and said incompetent, and therefore leaves petitioner to her [50] proof of the allegations in said paragraph contained.

VIII.

Answering the allegations contained in Paragraph XIII of said petition, respondent alleges that he is without knowledge as to what representations, if any, were made by said David Withington to said Anne Holt Kentwell or to said incompetent, or as to the manner in which the signature of said incompetent to the deed therein referred to was procured, and therefore leaves petitioner to her proof of the

allegations in said paragraph contained in these regards, and in this connection, respondent alleges that throughout his negotiations and transactions with said Waialua Agricultural Company, Ltd., through its said attorneys, it was his understanding and belief that said respondent corporation fully understood and appreciated the mental condition and incompetency of said Eliza R. P. Christian, and that he left entirely to said respondent corporation and its representatives the matter of procuring the execution of said conveyance, and of attending to the taking of such steps as might be required to give said conveyance validity, and although the details of the manner in which the conveyance of said incompetent was to be procured were not considered or discussed between respondent and said corporation respondent during the pendency of said negotiations, respondent, at all times, assumed that said respondent corporation, through its representatives as aforesaid, did take and had taken all necessary steps in this regard; and in this connection respondent alleges that said deed of May 2, 1910, [51] was never delivered to him personally, but that, to the best of his knowledge and belief, it at all times remained in the possession of said respondent corporation, or its attorneys or representatives, where, so far as he knows, it still is; but respondent admits that the deed therein referred to and marked Exhibit "B" was recorded in the office of the Registrar of Conveyances, at Honolulu, in

Hawaii, as therein alleged, and that said deed was signed by no person legally authorized to act for or on behalf of said incompetent as her guardian or otherwise.

IX.

Respondent admits the allegations contained in Paragraph XIV of said petition, save and except that respondent is without definite knowledge as to the true worth and value of the interest of said Eliza R. P. Christian in said lands and therefore leaves petitioner to her proof of the allegations in said paragraph contained in that regard.

X.

Answering the allegations contained in Paragraph XV of said petition, respondent admits that on to-wit: May 28, 1910, and before the deed to him referred to as Exhibit "B" in said petition had ever been recorded, he did execute his deed to W. R. Castle, as agent and trustee as in said paragraph alleged, and respondent admits that he received no money or consideration of any kind for said transfer to said W. R. Castle, as trustee aforesaid and that he was paid compensation only for the conveyance of his own interest in said lands and for his services in the premises as in said paragraph set forth, and respondent admits [52] the truth of the remaining allegations in said paragraph contained.

XI.

Answering the allegations contained in Paragraph XVI of said petition, respondent is without

knowledge other than as to the fact of the conveyance by him to said W. R. Castle, trustee, and the subsequent conveyance of May 17, 1920, by W. R. Castle, trustee, to the trustees of the "HELEMANO REAL ESTATE TRUST", and save and except as to these conveyances respondent leaves petitioner to her proof of the allegations in said paragraph contained.

XII.

Answering the allegations contained in Paragraph XVII of said petition, respondent is without knowledge save and except as to the fact of the conveyance of May 17, 1920, from W. R. Castle, trustee, to said trustees of the "HELEMANO REAL ESTATE TRUST", referred to as Exhibit "C", and, therefore, save and except as to that fact, leaves petitioner to her proof of the allegations in said paragraph contained.

XIII.

Answering the allegations contained in Paragraph XVIII of said petition, respondent is without knowledge except as to the fact of the conveyance from the trustees of said "HELEMANO REAL ESTATE TRUST", to said Waialua Agricultural Company, Ltd., dated July 20, 1921, and of the fact of the repeal by the Congress of the United States of the provisions of Section 55 of the Organic Act providing for the government of the Territory of Hawaii, on [53] July 9, 1921, as therein set forth, and therefore, save and except as

to these facts, respondent leaves petitioner to her proof of the allegations in said paragraph contained.

XIV.

Answering the allegations contained in Paragraph XIX of said petition, respondent admits that John Dominis Holt, father of said incompetent, died on April 10, 1922, leaving said incompetent, Eliza R. P. Christian, as his sole surviving heir; that said Eliza R. P. Christian was wholly incompetent as therein alleged and that the said George H. Holt therein referred to was appointed guardian in Hawaii for said incompetent as therein alleged, but respondent is without definite knowledge as to the other allegations in said paragraph contained, and therefore leaves petitioner to her proof thereof.

XV.

Answering the allegations contained in Paragraphs XX, XXI, XXII, and XXIII of said petition, respondent is without knowledge as to the truth thereof, and therefore leaves petitioner to her proof.

Upon the petition filed herein, upon your respondent's answer thereto herein above set forth, and upon such evidence as may be adduced at the hearing thereof, respondent submits himself to the jurisdiction of this Honorable Court, and to such judgment or decree as to this Court may seem just and equitable in the premises.

Dated at Honolulu, T. H. May 18th 1928.

JAMES L. HOLT,

Respondent. [54]

Territory of Hawaii,
City and County of Honolulu—ss.

JAMES L. HOLT, being first duly sworn, on oath deposes and says: that he is the James L. Holt named in and who signed the foregoing answer; that he has read the said answer, knows the contents thereof and that the allegations therein contained are true, save and except as to those matters stated to be alleged on information and belief, and as to them, he believes them to be true.

JAMES L. HOLT.

SUBSCRIBED and SWORN to before me this 18th day of May, 1928.

H. IWANAGA,
Notary Public, First Judicial Circuit, Territory of Hawaii. [55]

[Title of Court and Cause.]

DEMURRER OF RESPONDENT WAIALUA AGRICULTURAL COMPANY, LIMITED.

Filed at 3:10 o'clock p. m. Jun. 12, 1928. A. E. Restarick, Clerk. [56]

Now comes the respondent WAIALUA AGRICULTURAL COMPANY, LIMITED, by its attorneys Robertson & Castle, and demurs to the petition in the above entitled matter on the following grounds:

(1) That the petition sets forth no ground of equitable or other relief;

(2) That the petition shows laches on the part of the petitioner sufficient to bar said course of action;

(3) That the *petition that* petitioner is estopped from bringing such action;

(4) That the petition fails to show inadequacy of consideration;

(5) That the petition affirmatively shows that the consideration paid was adequate;

(6) That petitioner does not offer to do equity;

(7) That no facts are alleged sufficient to sustain this cause or any cause in equity. [57]

WHEREFORE said respondent prays that said petition be hence dismissed with its costs herein most wrongfully sustained.

Dated, Honolulu, T. H., June 12, 1928.

WAIALUA AGRICULTURAL
COMPANY, LIMITED,
By ROBERTSON & CASTLE
Its Attorneys.

We hereby certify that the foregoing demurrer is not intended for delay.

ROBERTSON & CASTLE
By A. L. CASTLE

Receipt of a copy of the foregoing demurrer this 12th day of June, 1928, is hereby acknowledged.

ULRICH & HITE
Attorneys for Petitioner. [58]

[Title of Court and Cause.]

DECISION ON DEMURRER.

Filed at 8:25 o'clock a. m. June 22, 1928. D. K. Sherwood, Clerk. [59]

In this proceeding the petitioner as Guardian of an alleged incompetent person sets forth that the ward has at all time been mentally incompetent to enter into a valid contract of any kind; that the ward, while so incompetent, in the year 1910 was entitled to an interest in expectancy in real estate located in the Territory of Hawaii; that the respondent, Waialua Agricultural Company, Ltd., attempted through its agents and servants to buy this interest in expectancy; that this interest would vest in fee upon the death of the then life tenant who was seventy-one years of age, the alleged incompetent person being then twenty-four years of age; that her interest in expectancy was, in 1910, of the value of $300,000.00 and upwards; that only $30,000.00 was paid in a manner, and to persons, unknown to present petitioner for the purpose of obtaining a [60] conveyance of the incompetent's interest; that the agents of the respondent corporation well knew the fact of the then incompetency of the petitioner's present ward; that the agents of the respondent corporation, to cover up the true facts, represented themselves as acting for a relative of the incompetent person whereas in truth and in fact they were representing the respondent corporation; that said agent or agents were then

and there fully aware of the mental incompetency of the ward of petitioner; that said agent falsely represented the value of said interest; that no person other than the incompetent executed said document on behalf of said incompetent; that the life tenant died on April 10th, 1922, leaving said incompetent person as his sole heir at which time said interest in expectancy vested in fee; and that said respondent corporation has continued to use and occupy the land without right and without accounting for the use thereof. It is further alleged in the petition that the reasonable rental for the use and occupancy of said interest in said land is greatly in excess of the amount of $30,000.00 plus interest and said petitioner is ready and willing to do equity in connection with the return or credit of said $30,000.00 plus interest or such part thereof as may be found equitably due to the respondent, if any.

In connection with the law as to the relief, if any, to be given against executed contracts where one of the parties is alleged to have been insane at the time of the execution of the contract, the authorities are col- [61] lected in 32—C. J., page 734, 737 and 747. On page 734, note 56 (A) is quoted the statement of the rule by Baron Pollock:

> "We are not disposed to lay down so general a proposition as that all executed contracts bona fide entered into must be taken as valid though one of the parties be of unsound mind. We think, however, that when a person

apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property, which is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in statu quo, such contract cannot afterwards be set aside by the alleged lunatic or those who represent him".

Cited, Scott v. Hay, 90 Minn. 304, 313; 97 N. W. 106.

In the instant case, the petitioner affirmatively alleges that the alleged incompetent was obviously incompetent; that the respondent's agent was fully aware of the incompetency; that the transaction was not fair nor bona fide; that the price was wholly inadequate; that the real estate sold is occupied and used by the respondent who has succeeded as the formal legal grantee and who always was the party to be benefited by the alleged illegal transaction and that the parties can be put in an equitable position substantially in statu quo by a proper account at the present time. Hence, in connection with the rule cited [62] from Baron Pollock's language, the petitioner herein has set up an allegation of fact exactly the converse of the situation which would not be interfered with by Baron Pollock's rule.

It is also stated on page 735 of 32—C. J., viz:

> "The right to avoid a voidable contract may be exercised where all the parties thereto can be placed in statu quo and the good faith of the sane party will not prevent its avoidance. The transaction may be avoided when it is accompanied with inequitable incidents. If the sane party knew of the other's insanity, or if the circumstances were such that as a reasonable and prudent person he should have known it, the contract may be avoided".

The language and the authorities cited in connection with it, all deal with the subject of avoiding an executed contract.

Under the demurrer of the respondents, Waialua Agricultural Company, Ltd., the Court finds that the allegations of the bill are sufficiently set out to give jurisdiction and the demurrer is therefore overruled with leave to said respondents to file answer on or before July 16th, 1928.

Dated, Honolulu, T. H., June 22, 1928.

[Seal] ALBERT M. CRISTY
Second Judge, First Circuit
Court, Territory of Hawaii. [63]

[Title of Court and Cause.]

ANSWER OF WAIALUA AGRICULTURAL COMPANY, LIMITED.

Filed at 2:30 o'clock p. m. July 16, 1928. John Lee Kwai, Clerk. [64]

Now comes WAIALUA AGRICULTURAL COMPANY, LIMITED, one of the respondents herein, and for answer to the petition of Eliza R. P. Christian, an alleged incompetent person suing by George H. Holt, her alleged guardian, denies each and every allegation of said petition, excepting as hereinafter admitted, qualified or explained, and except in so far as so admitted, qualified or explained, and for specific answer says:

1.

That it denies the allegations of Paragraph I.

2.

That it admits the allegations of Paragraphs II, III, IV, V and VI, except that the area of L. C. A. 7713 is 12,256.541 acres instead of 12,237 acres as alleged, and the area of [65] Grant 973 is 1902 acres instead of 1942 acres as alleged.

3.

That it denies the allegations of Paragraph VII of said petition, and further answering thereunto says that said Eliza R. P. Christian, during all the transactions referred to in said petition was legally

competent to look after her own interests and to make conveyances of her property with full knowledge of the purpose and effect thereof.

4.

That it admits the allegations of Paragraph VIII save and except those allegations that it did undertake and enter upon and carry through the negotiations and transactions more fully described elsewhere in said complaint and in the manner therein described.

5.

That in reply to Paragraph IX it denies the allegations thereof except as expressly admitted but admits that said Eliza R. P. Christian had lived in the home of said Anne Holt Kentwell for many years; that at said time respondent James L. Holt was a resident of Honolulu, Hawaii, and was on friendly terms with and related to said Anne Holt Kentwell and said Eliza R. P. Christian; that the said Eliza was the only child and sole heir in expectancy of her father, John Dominis Holt, and that said John Dominis Holt was a man approximately seventy-one years of age.

6.

That it denies all of the allegations of Paragraph X but admits and alleges that in the purchase of said Eliza's [66] interest it was represented by the law firm of Castle & Withington of Honolulu; that it, through its agents, entered into an arrangement with said James L. Holt, at his suggestion and at

his request, for the acquiring of a two-thirds interest in said lands, both in praesenti and in expectancy, including the share and expectancy of said Eliza R. P. Christian, and the interest owned by said James L. Holt, and understood that said James L. Holt would, and did in order to convey such interest, secure the conveyance of the interest of said Eliza R. P. Christian and said Anne Holt Kentwell to him so that said interest might be united with those which he had acquired from his father, J. R. Holt, his uncle J. D. Holt, and his brother Robert Holt, which latter interests were then held in trust for said James L. Holt by one John F. Colburn, together with his own interest; that the fact that the said James L. Holt was dealing with the respondent Waialua Agricultural Company, Limited, through its agents, was well known to said Eliza R. P. Christian, said Anne Holt Kentwell and John Dominis Holt, and the fact that said James L. Holt could not hope to purchase the interests of said Eliza R. P. Christian and said Anne Holt Kentwell except upon the advancing of moneys by said Waialua Agricultural Company, Limited, was perfectly understood by said Eliza R. P. Christian, said Anne Holt Kentwell and said John Dominis Holt, and fully approved by them.

7.

In answer to Paragraph XI it denies the allegations thereof, but says that David L. Withington did proceed to England to secure the conveyance of the interests of said Eliza R. P. Christian and

said Anne Holt Kentwell and did [67] represent the respondent Waialua Agricultural Company as well as said James L. Holt, and further says that when said David L. Withington went to England all terms of the agreement to convey said property and/or interests had been settled and understood by the parties to said conveyance and that it was well understood by all parties thereto that said David L. Withington represented both the respondent Waialua Agricultural Company, Limited, and said James L. Holt.

8.

In reply to Paragraph XII it denies all the allegations thereof except that it says that said David L. Withington did go to England and did meet said Anne Holt Kentwell, together with the other members of her household, including said Eliza R. P. Christian and said John Dominis Holt; that said David L. Withington did have opportunity to observe and did observe the mental condition of said Eliza R. P. Christian and was convinced and knew that she was legally capable of handling her business affairs and of making conveyances including the conveyance in this proceeding with full knowledge of their purpose and effect.

9.

In answer to Paragraph XIII it denies each and every allegation thereof except as herein expressly admitted; that it says that the deed, a copy of which is attached to the petition herein and marked Exhibit B and made a part thereof, was duly and

knowingly executed by all the parties to the same with full knowledge of the facts for an adequate consideration; that all said parties were competent to contract or to convey land and/or interests therein, and that said deed [68] having been duly executed and acknowledged was duly recorded in the Hawaiian Registry of Conveyances at set forth in said petition.

10.

In answer to Paragraph XIV it denies each and every of the allegations thereof, save and except that it admits that it rendered an account to said James L. Holt, paid to Eliza R. P. Christian the sum of $30,000.00 on behalf of said James L. Holt, paid to Anne Holt Kentwell the sum of $5,000.00 on behalf of said James L. Holt, and expended the sum of $110.32 in miscellaneous expenses.

11.

In answer to Paragraph XV it denies the allegations thereof and alleges the facts to be that in conformity with the agreement theretofore reached between the parties and the respondent, Waialua Agricultural Company, Limited, through its agents, said respondent, through its agents, paid the sum of $120,000.00 for a two thirds undivided interest in fee in said lands, including the one-third interest of James L. Holt, the life estate of John Dominis Holt, the contingent interest of Eliza R. P. Christian, the interest of Robert Holt, the interest of John F. Colburn, and the claimed interest of Anne Holt Kentwell.

12.

That answering Paragraph XVI it admits that said William R. Castle did continue to hold in trust for the respondent Waialua Agricultural Company, Limited, all the rights covered by said deed of May 2, 1910, and that on May 17, 1920, said rights were conveyed to others with the [69] knowledge of said Waialua Agricultural Company, Limited, but not at its instigation and request.

13.

Answering Paragraph XVII it denies the allegations therein contained, except that it admits the execution of the deed dated May 17, 1920, and alleges that the consideration therein mentioned was actually paid for in cash by the beneficiaries of said Helemano Real Estate Trust and said interests were actually owned by said beneficiaries;

14.

Answering Paragraph XVIII it denies the allegations thereof except that it admits that on July 20, 1921, by instrument in writing the Trustees of said Helemano Real Estate Trust did convey the properties mentioned in said instrument directly to the respondent Waialua Agricultural Company on the payment to said Trustees for the beneficiaries of said trust and in proportion to their respective interests the full consideration mentioned in said instrument.

15.

That it denies all the allegations in Paragraph XIX except that John Dominis Holt died on April 10, 1922, and left as his sole surviving heir said Eliza R. P. Christian; that it admits that since the death of said John Dominis Holt it has claimed, and now is the owner of, the property described in the petition herein by virtue of the deeds referred to in said petition as Exhibits B, C, D and E, but denies that such claim and ownership is wrongful or without right. [70]

16.

That it denies each and every allegation of Paragraphs XX and XXI.

17.

In answer to Paragraph XXII respondent admits that said George H. Holt, purporting to account as guardian for said Eliza R. P. Christian, did purport to disaffirm said deed of May 2, 1910, but denies that said purported disaffirmance was effective, or that it was made within a time sufficiently reasonable to give it effect if there had been no other defects attaching to such purported disaffirmance, and specifically denies that any tender of any moneys paid to said Eliza R. P. Christian and/or Anne Holt Kentwell has ever been made to this respondent.

18.

In answer to Paragraph XXIII of said petition it denies the allegations thereof.

19.

And it specifically denies that said Eliza R. P. Christian or George H. Holt, her purported guardian on her behalf, has any interest in the property described in said petition or in the rents, profits, or use thereof.

WHEREFORE respondent, Waialua Agricultural Company, Limited prays that the petition herein be dismissed, and for its costs herein most wrongfully sustained.

DATED, Honolulu, T. H., July 16, 1928.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
By ROBERTSON & CASTLE
FRANK E. THOMPSON
MONTGOMERY E. WINN
MARGUERITE K. ASHFORD
Its Attorneys. [71]

Receipt of a copy acknowledged this 16th day of July 1928.

ULRICH & HITE CMH
Attorneys for Petitioner. [72]

[Title of Court and Cause.]

REPLICATION

Filed at 8:30 o'clock A. M. July 18, 1928, John Lee Kwai, Clerk. [73]

Comes now ELIZA R. P. CHRISTIAN, an incompetent person, by George H. Holt, her Guardian,

and, reserving unto herself all manner of exceptions to and without waiving her rights to take advantage of the manifold insufficiencies and errors in the answer of Waialua Agricultural Company, Ltd., respondent herein, by way of replication doth say:

I.

That she admits the allegations of Paragraph 2 of respondent's bill, save that she leaves respondent to its proof with respect to the acreage of the land therein described.

II.

That she denies the allegation contained and set forth in Paragraph 6 of said answer to the effect that the fact that James L. Holt was dealing with said respondent, through its agents, was well known or could have been well known to said petitioner, by reason of her mental incompetency as in said petition set forth, and petitioner further denies that the fact [74] that said James L. Holt could not hope to purchase the interests of said incompetent except upon the advancing of moneys by said respondent was perfectly understood or could have been in any wise understood by said incompetent, and denies that Anne Holt Kentwell and John D. Holt so understood said alleged facts, or that they fully approved of the same.

III.

That petitioner denies the allegation contained in paragraph 7 of said answer that David Withington did represent the said James L. Holt in England or that all of the terms of the agreement therein

referred to were known or understood by all of the parties to said conveyance therein referred to, and says that petitioner could not possibly have understood the same even had such been the fact, owing to her mental incompetency aforesaid.

IV.

That petitioner denies the allegation contained in Paragraph 8 of said answer that said David Withington knew petitioner was legally capable of handling her business affairs and of making conveyances with full knowledge of their purpose and effect.

V.

Petitioner denies that said petitioner knowingly executed the conveyance being Exhibit "B", all as set forth in Paragraph 9 of said answer, or with full knowledge of the facts for an adequate consideration, and again denies that said petitioner was competent to contract or to convey lands and/or interests therein. [75]

VI.

Petitioner realleges, reavers, and reasserts, except as herein expressly reserved, all of the allegations and assertions contained and set forth in her petition herein, and denies the allegations of said Answer.

WHEREFORE it is prayed as in said petition set forth.

Dated Honolulu, T. H., this 17th day of July, 1928.

ELIZA R. P. CHRISTIAN, an incompetent person, by GEORGE H. HOLT, her Guardian,
By ULRICH & HITE
By CHAS. M. HITE
Her Attorneys.

Territory of Hawaii
City and County of Honolulu—ss.

CHAS. M. HITE, being first duly sworn, on oath deposes and says: That he is of counsel for petitioner hereinbefore named; that he has express authority to sign this verification for and on behalf of said petitioner; that George H. Holt, Guardian of Eliza R. P. Christian, an incompetent person, is ill, confined to his bed and unable to make this verification; that affiant has read the foregoing replication by him subscribed on behalf of said petitioner, knows the contents thereof and the same are true to the best of his knowledge and belief.

CHAS. M. HITE

Subscribed and sworn to before me this 17th day of July, 1928.

[Seal] MARION D. RAAB
Notary Public First Judicial Circuit, Territory of Hawaii. [76]

Certify served on respondent on to-wit July 18, 1928, by delivering copies hereof to attorneys named for said respondent.

CHAS M. HITE. [77]

[Title of Court and Cause.]

REPLICATION.

Filed at 2:05 o'clock p. m. July 20, 1928. John Lee Kwai, Clerk. [78]

Comes now Eliza R. P. Christian, an incompetent, by George H. Holt, her guardian, and by way of replication to the answer of James L. Holt, in the above entitled court and cause, doth say, that said answer is insufficient and that said petitioner doth re-allege, re-aver and re-affirm all the matters and things set forth and contained in her appeal herein.

Dated Honolulu, T. H. this 20th day of July, 1928.

ELIZA R. P. CHRISTIAN, an incompetent person, by GEORGE H. HOLT, her Guardian,
By ULRICH & HITE
By CHAS. M. HITE
Her Attorneys. [79]

[Title of Court and Cause.]

NOTICE TO PRODUCE.

TO: ELIZA R. P. CHRISTIAN, an alleged incompetent person by George H. Holt, her guardian, and

TO: Messrs. ULRICH & HITE, her attorneys:

YOU ARE HEREBY NOTIFIED that defendant will ask you to produce at the trial of the above

entitled action, a certain will executed by Eliza R. P. Christian during the year 1906, together with any other wills executed by her.

Dated, New York, December 4, 1928.

ROBERTSON & CASTLE
GEORGE S. LEISURE
Attorneys for Respondent
Waialua Agricultural Co. Ltd.

Service by copy is hereby admitted this 4th day of December, 1928.

ULRICH & HITE
Attorneys for Petitioner.

Filed at 9:55 o'clock a. m. Jan. 3, 1929. D. K. Sherwood, Clerk. [80]

[Title of Court and Cause.]

AMENDED PETITION.

EXHIBITS "A", "B", "C", "D" and "E"

Filed at 1:55 oclock p. m. Mar. 5, 1929. A. E. Restarick, Clerk. [81]

Comes now ELIZA R. P. CHRISTIAN, an incompetent person, by GEORGE H. HOLT, her Guardian, by her attorneys, ULRICH & HITE, and as grounds for the relief herein prayed, shows unto this Honorable Court as follows:

I.

That the said George H. Holt, was upon the first day of February, 1927, by order and decree duly entered in the above-entitled Court, appointed Guardian in Hawaii of the estate of said Eliza R. P. Christian, resident in England, and found and adjudged to be an incompetent person, and that upon the filing of a bond in the amount of $15,000.00, he, the said George H. Holt, did qualify as such Guardian and ever since has been and now is the duly acting and qualified guardian of said incompetent person.

II.

That respondent, Waialua Agricultural Company, Limited, [82] is now and at all times hereinafter mentioned has been a corporation duly organized and existing under and pursuant to the provisions of the laws of the Territory of Hawaii, with its principal place of business in Honolulu in said Territory.

III.

That the respondent James L. Holt is a resident of the City and County of Honolulu, Territory of Hawaii, and is a son of James R. Holt and grandson of Robert William Holt, all as more fully hereinafter appears.

IV.

That petitioner, Eliza R. P. Christian, formerly Eliza R. P. Holt, was and is the daughter and sole heir of John Dominis Holt, now deceased, and that the said John Dominis Holt was a son of Robert

William Holt, said Robert William Holt having been a resident of the Territory of Hawaii, and the owner of large properties in said Territory, who died in the year 1862.

V.

That upon his death in the year 1862 as aforesaid, said Robert William Holt, seized of considerable properties as aforesaid, left a will wherein and whereby, among other things, it was provided that the bulk of his estate should be divided into four equal parts, one part of which to go to and become the property of his daughter, Elizabeth M. Aldrich, the remaining three-quarters thereof to be held in trust to pay the income from equal and undivided thirds thereof to each of his sons, Owen J. Holt, James R. Holt, and John Dominis Holt, for their respective lives, with remainder over in fee as to each undivided one-third [83] to the heirs at law of the said three sons as they respectively should die, a copy of which said last will and testament of Robert William Holt is hereto annexed, marked Exhibit "A", and by reference made a part hereof. That after the distribution of one-fourth of said estate to said Elizabeth M. Aldrich, daughter of testator, as aforesaid, and after the payment of all debts and specific legacies, there was in said estate and undistributed the following pieces and parcels of real property, situate, lying and being in the district of Waialua, Island of Oahu, Territory of Hawaii, said property being more particularly described as follows:

1. Ahupaa of Paalaa, being apana 34, L. C. A. 7713, Royal Patent 4475, containing an area of 12,237 acres;

2. The lands described in Royal Patent 973 to Robinson et al, containing an area of 1,942 acres;

3. The lands described in Royal Patent 431 to Kanohanui, containing an area of 100 acres;

4. The lands described in Royal Patent 235 to Topliff et al, containing an area of 36 acres;

5. The lands described in Royal Patent 238 to Anderson, containing an area of 25.8 acres;

6. All Kuleanas or grants lying within the above described land.

VI.

That under and pursuant to the provisions of said will of Robert William Holt, his son, John Dominis Holt, became and was entitled to the income for life from an undivided one-third of all of the above described lands, and that Eliza R. P. Christian, the only child and sole heir at law of her father, [84] the said John Dominis Holt, as aforesaid, became and was entitled to accede to and become the owner in fee simple of an undivided one-third interest in all of said lands upon the death of her said father, and subject only to her survival of him.

VII.

That the said Eliza R. P. Christian is, was, and at all times hereinafter mentioned has been, insane and mentally incompetent.

VIII.

That for many years prior to 1910, and prior to the happening of the events in that year hereinafter described, the respondent, Waialua Agricultural Company, Ltd., had used and occupied large portions of the above described lands as a tenant under leaseholds executed to it by persons holding the legal estate in trust pending the death of the life tenants, as aforesaid, AND AS THE PURCHASER OF CERTAIN UNDIVIDED INTERESTS IN SAID LANDS, on a considerable portion of which lands said respondent corporation had planted and grown sugar cane in the course of its business in the cultivation and production of sugar, AND OTHER PORTIONS OF WHICH IT HAD SUBLEASED TO OTHERS FOR THE GROWTH AND CULTIVATION OF PINEAPPLES, AND IN THIS CONNECTION PETITIONER PARTICULARLY ALLEGES THAT BY INSTRUMENT DATED MARCH 17, 1905, EXECUTED BY CERTAIN PERSONS OTHER THAN THE SAID ELIZA CHRISTIAN, AS LESSORS, SAID RESPONDENT CORPORATION DID SECURE A LEASE ON SAID PREMISES FOR THE TERM OF TWENTY-FIVE YEARS AT A CERTAIN RENTAL THEREIN SPECIFIED, AND THAT THE SIGNATURE OF SAID ELIZA R. P. CHRISTIAN RECITED THEREIN AS ONE ASSENTING TO SAID LEASE WAS PROCURED, BUT IN THIS CONNECTION PETITIONER AL-

LEGES [85] THAT SAID ELIZA R. P. CHRISTIAN WAS AT SAID TIME, AS AT ALL OTHER TIMES HEREIN MENTIONED, WHOLLY AND UTTERLY INCOMPETENT TO BIND HERSELF BY EXECUTING SAID DOCUMENT, AND FURTHERMORE THAT NEITHER SHE NOR ANYONE ACTING ON HER BEHALF RECEIVED ANY CONSIDERATION WHATEVER FOR THE EXECUTION OF SAID DOCUMENT AS AFORESAID, SO THAT THE CONSIDERATION LATER PAID, IN THE MANNER HEREINAFTER DESCRIBED, IN THE ATTEMPTED PURCHASE OF THE INTEREST OF SAID ELIZA R. P. CHRISTIAN, AS HEREINAFTER SET FORTH, WAS THE SOLE AND ONLY CONSIDERATION PAID TO ANYONE IN EFFECTING THE TRANSFER TO SAID RESPONDENT CORPORATION, IN THE MANNER SET FORTH, OF THE ENTIRE INTEREST OF THE SAID ELIZA R. P. CHRISTIAN IN SAID LANDS UNENCUMBERED BY THE BURDEN OF SAID LEASE OR OF ANY LEASE, AND PETITIONER FURTHER ALLEGES IN THIS CONNECTION THAT NO RENTAL HAS EVER BEEN PAID TO THE SAID ELIZA R. P. CHRISTIAN OR TO ANY PERSON ACTING ON HER BEHALF WITH RESPECT TO OR UNDER SAID LEASE AND THAT SAID LEASE HAS BEEN LONG SINCE ABANDONED BY SAID RESPONDENT CORPORA-

TION, AND THAT NO CLAIM OF RIGHT OF ANY KIND WITH RESPECT TO SAID ELIZA R. P. CHRISTIAN OR HER INTEREST IN SAID LANDS HAS BEEN MADE OR IS BEING MADE UNDER OR BY VIRTUE OF SAID LEASE, SO THAT NOTWITHSTANDING THAT SAID ELIZA R. P. CHRISTIAN WAS *UNWHOLLY* AND UTTERLY INCOMPETENT TO EXECUTE OR TO ASSENT TO SAID LEASE AND NOTWITHSTANDING THAT THE PROCURING OF THE SIGNATURE OF THE SAID ELIZA R. P. CHRISTIAN TO SAID LEASE WAS FOR OTHER UNEQUITABLE, RELIEF IN EQUITY AGAINST SAID LEASE NEED NOT BE AND CANNOT BE HEREIN PRAYED FOR, RESPONDENT'S SOLE CLAIM OF RIGHT TO THE SAID LANDS BEING NOW BASED UPON THE SAID DEED OF MAY 2, 1910, HEREINAFTER REFERRED TO, UNDER WHICH DEED SAID RESPONDENT NOW CLAIMS THE ENTIRE RIGHT, TITLE AND INTEREST OF PETITIONER TO SAID LANDS, CLAIMING TO HAVE ACQUIRED [86] SAID RIGHT AND TITLE FREE OF ENCUMBRANCE IN CONSIDERATION OF NO PAYMENT OR CONSIDERATION OF ANY KIND MOVING TO SAID ELIZA R. P. CHRISTIAN OR TO ANY ONE ON HER BEHALF OTHER THAN AS HEREIN-

AFTER INDICATED. Petitioner alleges upon information and belief, that in the year 1910, becoming desirous of acquiring said lands in fee simple, and more particularly of acquiring the undivided one-third in said land as to which the said John Dominis Holt was entitled to the income for life and as to which the said Eliza R. P. Christian would be entitled to the fee upon his death, the said respondent corporation did undertake, enter upon and carry through the negotiations and transactions more fully hereinafter described.

IX.

That in said year 1910 the said Eliza R. P. Christian was wholly incompetent mentally as aforesaid, and was unable to care for herself or her affairs, and was then residing in Oxford, England, with her cousin, Anne Holt Kentwell, in whose care she had been for many years; THAT THE SAID ELIZA R. P. CHRISTIAN WAS THEN AND THERE COMPLETELY UNDER THE CONTROL OF ONE LAWRENCE KENTWELL, THE HUSBAND OF THE SAID ANNE HOLT KENTWELL; that at said time respondent James L. Holt was residing in Honolulu, Hawaii, and was on friendly terms with AND HAD BEEN IN CORRESPONDENCE WITH THE SAID LAWRENCE KENTWELL; that the said incompetent, the only child and sole heir in expectancy of her father, John Dominis Holt, was of the age of 24 years and, aside from her said mental affliction, was in generally good physical health and condition,

whereas the said John Dominis Holt, upon whose death the vesting of the interest in fee in the said Eliza R. P. Christian alone depended, was a man of 71 years [87] of age; that at said time the interest in expectancy in fee in an undivided one-third of said lands to which said incompetent would be entitled upon the death of her said father, was of the value of upwards of $300,000.00, and that all of the foregoing facts and circumstances were well known to respondent corporation, notwithstanding that the true worth and value of said property, dependent upon circumstances peculiarly within the knowledge of said respondent corporation was unknown to and not disclosed to said LAWRENCE KENTWELL, and was, of course, entirely impossible of being understood by said incompetent, petitioner herein.

X.

Petitioner alleges upon information and belief that thereupon the respondent corporation did employ and retain the law firm of Castle & Withington of Honolulu to represent it and act for it in the matter of procuring the conveyance to it of the socalled Christian interest in said property, and that as a first step in the plan then and thereupon undertaken by said respondent and in or about the months of March or April, 1910, the said James L. Holt was induced to come to and attend certain meetings or conferences held in the office of said attorneys, Messrs. Castle & Withington, in the course of which said James L. Holt was induced to enter into an agreement, portions of which agreement

were reduced to writing and signed by the parties to be bound, W. R. Castle signing as Trustee and acting for and on behalf of said respondent corporation, the substance and effect of which agreement was as follows: That it was agreed in substance that the said James L. Holt, being in the confidence of AND IN CONTACT WITH SAID LAWRENCE KENTWELL, under whose complete [88] influence and control was said incompetent, Eliza R. P. Christian, should endeavor to induce said LAWRENCE KENTWELL to procure the signature of said incompetent to a deed purporting to convey the interest of said incompetent in said land at a cost to respondent corporation not to exceed the sum of $40,000.00, which moneys, it was agreed, were to be furnished by said respondent corporation through its representatives; it being further agreed that, notwithstanding that said James L. Holt was without funds to make said purchase, and notwithstanding that said purchase was to be made for immediate retransferal to said respondent corporation or its represeintatives or appointees in trust, yet that the conveyance, if procured, was to be taken in the name of said James L. Holt; that it was further agreed that upon the procuring of said conveyance said James L. Holt was then and thereupon to execute his conveyance of the interest to be so acquired from said Eliza R. P. Christian, together with his own similar and equal interest in expectancy in said lands as the sole heir at law of James R. Holt, and that he was

to receive from said respondent as consideration for his services in the premises and for his interest in said property the sum of $60,000.00; a further sum of $20,000.00 to be paid to one John F. Colburn, at that time the assignee and holder of the life interests in said property of John Dominis Holt and James R. Holt, and trustee for James L. Holt for certain purposes, making a total contemplated expenditure to said corporation of $120,000.00 for petitioner's interest as well as for the other interest above indicated in said lands.

XI.

Petitioner alleges upon information and belief that then and thereupon said James L. Holt, pursuant to said agreement, [89] did endeavor to ascertain from England whether or not, if attempted said plan might be reasonably expected to be successful, and having, as it was thought, ascertained that such was the fact, David Withington, Esquire, a member of said law firm of Castle & Withington, representing respondent corporation in the premises as aforesaid, who was then in the CITY OF BOSTON, STATE OF MASSACHUSETTS, was instructed by said respondent corporation to proceed forthwith to England and there to appear, ostensibly as attorney for James L. Holt, but in fact acting in the interests of respondent corporation as aforesaid, in an endeavor to procure through said LAWRENCE KENTWELL, or in such manner as could be done, a conveyance of the said Christian interes at an ex-

penditure to said corporation of not to exceed $40,000.00.

XII.

Petitioner alleges upon information and belief that thereupon said David Withington, Esq., did forthwith proceed to England, and did there call upon said LAWRENCE KENTWELL in whose home was the said incompetent, Eliza R. P. Christian; that the said David Withington, representing said respondent corporation as aforesaid, though ostensibly representing said respondent James L. Holt as aforesaid, was then and there given and did have ample opportunity for ascertaining for himself and those whom he represented the fact of said incompetency. Upon information and belief petitioner further alleges that said David Withington, as such attorney and representative, was fully aware of said mental incompetency of said Eliza R. P. Christian at the time of the happening of all the events which there transpired as herein described. [90]

XIII.

Plaintiff alleges upon information and belief that the said David Withington, acting for respondent corporation as aforesaid, did then and there represent to LAWRENCE KENTWELL as well as to said incompetent, Eliza R. P. Christian, who was, however, incapable of understanding said representation, that the interest of said Eliza R. P. Christian was of a value of not more than $30,000.00, although in truth and in fact the value of said inter-

est was in an amount of many times that sum, and did persuade and induce said LAWRENCE KENTWELL to assist in procuring the signature of said incompetent to a deed purporting to convey the interest of said incompetent to the respondent James L. Holt as aforesaid, and did succeed in procuring the signature of said incompetent to said deed, said signature being affixed by said incompetent without any knowledge or understanding of the meaning of said document or of said signature; and that in said manner, although petitioner was wholly incompetent as aforesaid, her signature was procured to said document, and that said document was signed by no person for or on her behalf as her guardian or otherwise, all of which was well known to defendant corporation, and that said document was signed on, to-wit, May 2, 1910, in the manner aforesaid by said incompetent and by said Anne Holt Kentwell, purporting to convey her interest in the said land, and by John Dominis Holt, notwithstanding that all of his interest had theretofore been alienated and assigned away; that said document was subsequently returned to Hawaii and was recorded in the Office of the Registrar of Conveyances on, to wit, the 23rd day of June, 1910, in Liber 337, page 75, of the records of said office, and that a true and [91] correct copy thereof is hereto annexed, by reference made a part hereof, and marked Exhibit "B".

XIV.

Petitioner alleges upon information and belief that thereafter the said respondent corporation,

through its agents and representatives, did represent to the respondent James L. Holt that it had disbursed in procuring the execution to said James L. Holt of the conveyance hereinabove referred to and marked Exhibit "B", annexed hereto, through the said David Withington in England, the following sums of money, pursuant to the agreement theretofore entered into with said respondent James L. Holt by W. R. Castle as trustee as hereinabove set forth, that is to say:

Stated to have been paid to Eliza R. P. Christian £6,141/5 at $4.88½	$30,000.00
Stated to have been paid to Anne Holt Kentwell £1,023/10/10 at $4.88½	5,000.00
Stated to have been paid by David L. Withington for various incidental expenses £19/15 at $4.88½	92.92
Stated to have been paid by David L. Withington for other incidentals, including present to clerk	17.50
Total	$35,110.32

That petitioner is without information as to the manner of payment of said sum of $30,000.00 stated to have been paid to said Eliza R. P. Christian as aforesaid, or as to what person said moneys were paid, or as to how said moneys were used and applied, save and except that petitioner alleges that said money could not have been paid to and disposed [92] of by said Eliza R. P. Christian, personally, inasmuch as she was wholly and utterly

unable, because of her mental condition, to receive, handle or dispose of moneys, and petitioner further alleges that said sum of $30,000.00 was grossly, utterly, and wholly inadequate as consideration for the interest of said Eliza R. P. Christian, as was well known to said respondent corporation and to its agents and representatives, and that said transaction was unconscionable and inequitable and in fraud of the rights of said incompetent, Eliza R. P. Christian.

XV.

Petitioner alleges upon information and belief that promptly after the return of said deed of May 2, 1910 to Honolulu, and in fact even before said deed had been recorded, and pursuant to the agreement theretofore entered into as aforesaid, said respondent James L. Holt, on to-wit, May 28, 1910, did execute his deed to W. R. Castle as agent and trustee for respondent corporation, purporting to convey, among other things, the one-third interest in said lands of the said incompetent, Eliza R. P. Christian, but that upon the making of said conveyance the said James L. Holt received no money or consideration of any kind for the transfer to said W. R. Castle as trustee of said interest of the said incompetent, Eliza R. P. Christian, theretofore paid for by said respondent corporation as aforesaid, and was paid compensation only for the conveyance of his own interest in said land, also covered by said indenture of May 28, 1910, and for his services in the premises as aforesaid, for which

interest and for which services said James L. Holt was paid the sum of $60,000.00, the balance of the consideration of [93] $120,000.00 recited in said conveyance of May 28, 1910, representing sums alleged to have been disbursed in England and procuring the said indenture of May 2, 1910, and moneys paid to one John F. Colburn appearing as a party to said indenture of May 28, 1910; and that said deed of May 28, 1910 is hereto annexed, by reference made a part hereof, and marked Exhibit "C".

XVI.

That thereafter and for a period of approximately ten years and until May 17, 1920, as petitioner is informed and believes, the said William R. Castle, attorney for said respondent corporation as aforesaid, did continue to hold in trust as aforesaid for said respondent corporation, all rights covered by said deed of May 2, 1910, being Exhibit "B", attached hereto; that at the expiration of said period and on said May 17, 1920, said William R. Castle, trustee as aforesaid, did convey said rights to certain persons as trustees in the premises, as your petitioner is informed and believes and therefore alleges the fact to be, with the knowledge of and at the instigation and request of his beneficiary, said respondent corporation, all as more fully hereinafter set forth.

XVII.

That on May 17, 1920, W. R. Castle, trustee as aforesaid, did convey, among other things, all the

rights covered by said conveyance marked Exhibit "B" attached hereto, and all rights covered by Exhibit "C" attached hereto, to J. R. Galt, A. L. Castle, T. H. Petrie, R. A. Cooke, and R. B. Anderson, as trustees designated and named trustees of the "HELEMANO REAL ESTATE TRUST"; [94] and petitioner alleges upon information and belief that notwithstanding that the sum of $127,912.49 was recited in said conveyance as consideration therefor, $130,000.00 thereof represented and was merely the $120,000.00 theretofore claimed to have been paid for said lands ten years earlier, and recited as consideration in that certain conveyance to W. R. Castle, trustee, hereinabove referred to as Exhibit "C", and that the additional amount of upwards of $7,900.00 represented additional expenses incurred in the premises by the respondent corporation through its representatives, and that no new or independent consideration was furnished by any person or corporation other than respondent corporation, and that said trustees of the said Helemano Real Estate Trust as above mentioned, did thereafter and at all times hold such properties and rights as were conveyed by said indenture of May 17, 1920, in trust for said Waialua Agricultural Company, Limited, respondent herein, as ultimate beneficiary, and that a copy of said indenture of May 17, 1920, conveying said properties and rights to said trustees of said Helemano Real Estate Trust in trust as aforesaid, is hereto attached, by reference made a part hereof, and marked Exhibit "D".

XVIII.

That thereafter said trustees of said Helemano Real Estate Trust continued to hold said properties in trust as aforesaid until July of the year 1921; that on July 9, 1921, the provisions of Section 55 of the Organic Act providing for the government of the Territory of Hawaii, theretofore providing, among other things, that no corporation should acquire or hold real [95] estate in Hawaii in excess of 1,000 acres in area, and that all real estate so acquired or held should escheat to the United States, was amended by the Congress of the United States by repealing and deleting from said Section said provisions thereof, and that immediately thereafter and on July 20, 1921, by instrument in writing of that date, the said trustees of said Helemano Trust did convey all of the aforesaid properties directly to respondent corporation, Waialua Agricultural Company, Limited; and petitioner alleges upon information and belief that, notwithstanding that said conveyance of July 20, 1921 recites a consideration of $128,045.49, said sum represented merely moneys theretofore expended by said corporation as hereinabove indicated for said property, with the small additional expenditure indicated, accruing as incidental to the final conveyance to the ultimate beneficiary, respondent corporation, for whom said properties had been held throughout under various trusts as hereinabove set forth, and petitioner alleges that said respondent corporation took and received said property with full and complete

knowledge of all the matters and things hereinabove set forth, and that the dealings with said property herein indicated to have taken place after the procuring of the deed of May 2, 1910 hereinabove referred to as Exhibit "B", were dealings carried through at the instigation, request and under the direction of respondent corporation, by whose agents and representatives and at whose expense said original conveyance of May 2, 1910 had been procured.

XIX.

Petitioner alleges that on April 10, 1922, John Dominis [96] Holt, father of petitioner and the holder of the life interest intervening prior to the vesting of the rights of said petitioner in the lands referred to, died leaving as his sole surviving heir the said petitioner, Eliza R. P. Christian, and that from and after said day said Eliza R. P. Christian became and was as such heir vested with an estate in fee simple in and to an undivided one-third of all the lands hereinabove described, and all rights of respondent corporation acquired by leases or by other forms of assignment of the interest of the intervening life tenant terminated; but that nevertheless respondent corporation continued thereafter to use and occupy said land without right or authority in the premises, and without accounting to petitioner for the reasonable worth of said right and user. That however, at said time and at all times herein mentioned, said Eliza R. P. Christian was wholly and utterly incompetent mentally, and

unable to act on her own behalf in the premises, and until said George H, Holt was later appointed guardian, as herein set forth, was without any person authorized and qualified to act for her in the premises; and that said respondent corporation has, since the death of said John Dominis Holt, wrongfully and without right or justification claimed to be the owner of petitioner's property by virtue of the deed hereinabove referred to as Exhibit "B", notwithstanding the facts and circumstances incidental to the procuring of said indenture, and notwithstanding the total incapacity of said Eliza Christian to have entered into or bound herself by any such undertaking, and petitioner is wholly and utterly without any or adequate relief in the premises, otherwise than through the order and [97] decree of this Court, cancelling said deed as to her and granting further relief as herein otherwise prayed for.

XX.

That since the appointment and qualification of said George H. Holt as guardian of the estate of the said Eliza R. P. Christian, an incompetent, all due diligence has been used in promptly investigating all matters and things having to do with the rights of the said incompetent, and with all due diligence a careful and searching investigation has been carried through, which has disclosed the facts and circumstances hereinabove set forth, which has occupied the time which has intervened since said appointment, and that promptly upon having

completed said investigation and ascertained said facts and circumstances, said incompetent, acting through her said guardian, made due and timely demand upon the respondent corporation that it do account to the said Eliza R. P. Christian, incompetent as aforesaid, for the use of her lands since the death of the said John Dominis Holt, and that it otherwise do justice in the premises, and that upon refusal of said respondent to comply with said demand within a reasonable time, petitioner, by her said guardian, is promptly filing this her complaint herein.

XXI.

Petitioner alleges that the value of the lawful right and interest of the said Eliza R. P. Christian in and to the lands herein referred to and now held and claimed by said respondent corporation is in an amount greatly in excess of a million dollars, and that the reasonable rental for the use and [98] occupancy of said interest in said land during the period of approximately six years which has intervened since the death of the said John Dominis Holt, and properly payable to petitioner herein, is in an amount of many times the sum of $30,000.00, with interest since May 2, 1910; AND THAT THE PROPERTIES WHICH WOULD BE RESTORED TO PETITIONER UNDER THE DECREE PRAYED FOR HEREIN AND THE MONEYS WHICH WOULD BE PAYABLE TO HER ON ACCOUNTING AS HEREIN PRAYED FOR WOULD BE AND ARE IN VALUE

GREATLY IN EXCESS OF SAID SUM OF $30,000.00 TOGETHER WITH INTEREST SINCE May 2, 1910, AND TOGETHER WITH ANY AND ALL MONEYS EXPENDED IN THE PERMANENT IMPROVEMENT OF SAID PROPERTY SINCE THE VESTING OF PETITIONER'S INTEREST THEREIN OR FOR THAT MATTER SINCE May 2, 1910; and petitioner, that justice full and complete may be done in the premises in such manner as to the court may seem just, equitable, and in accord with the evidence to be adduced herein, does hereby offer to allow to respondent corporation a credit in the amount of $30,000.00 with interest from May 2, 1910 to date, AND SUCH SUM OR SUMS, IF ANY, AS THIS COURT MAY FIND SHOULD REASONABLY BE RESTORED TO DEFENDANT AS MONEYS EXPENDED IN THE PERMANENT IMPROVEMENT OF SAID PROPERTIES, in the event that the court finds from the evidence that in equity, such should be done, such credit to be allowed in the accounting for rentals herein prayed for, AND/OR AS A CHARGE AGAINST THE PROPERTIES, RESTORATION OF WHICH TO PETITIONER IS HEREIN PRAYED FOR, or in such other manner OR TO SUCH OTHER EXTENT as to this Court may seem just and proper.

XXII.

Petitioner alleges that after the appointment of the [99] said George H. Holt as guardian for said

incompetent, and promptly upon the ascertaining of the facts and circumstances hereinabove set forth, petitioner, acting by her said guardian, did disaffirm the said deed of conveyance of May 2, 1910;

And petitioner, proceeding by her said guardian herein, without admitting any force or effect in said conveyance, does hereby disaffirm said deed and said transaction, AND DOES LIKEWISE DISAFFIRM THE ASSENT OF SAID INCOMPETENT PROCURED TO SAID LEASE OF MARCH 17, 1905, LONG SINCE IN FACT ABANDONED AND OF NO EFFECT, AS HEREINBEFORE SET FORTH, and in the settlement to be had herein does tender back any and all consideration which may be shown to have been paid as consideration for the SAID conveyance of her said interest, together with the interest thereon, TOGETHER WITH MONEYS EXPENDED IN THE PERMANENT IMPROVEMENT OF SAID PROPERTY, in the event and to the extent that this Court may find herein that repayment should be made in equity and in justice.

XXIII.

That petitioner has no adequate and complete remedy at law.

WHEREFORE PETITIONER PRAYS:

1. That respondents above named and each of them be cited to appear and make answer unto petitioner's foregoing Petition in the manner and form provided by law, answer under oath being hereby expressly waived;

2. That it be ordered and decreed that respondents above named surrender up for cancellation that certain deed dated May 2, 1910, a copy of which is hereto annexed and marked Ex- [100] hibit "B", and that said deed be cancelled and annulled as to said Eliza R. P. Christian by order of this Court and as to her decree to be of no further force or effect.

3. That it be ordered and decreed that respondent Waialua Agricultural Company, Limited, do fully and completely account to petitioner of and concerning the reasonable and full rental of the undivided one-third interest in fee of petitioner in and to all of the lands hereinabove described, from April 10, 1922 to and including the date of judgment entered herein, together with interest thereon, and that said respondent Waialua Agricultural Company, Limited, do pay to petitioner a sum of money which shall be and represent the aggregate of rentals accrued and accruing on said lands since said April 10, 1922, to and including the date of judgment entered herein, together with interest thereon from the dates upon which said rentals shall have accrued, credit to be given to said Waialua Agricultural Company, Limited, in such accounting for such sum or sums, if any, as to this Court may seem just and proper.

4. That it be ordered and decreed that respondent Waialua Agricultural Company, Limited, make and execute a good and sufficient deed of conveyance, conveying and releasing to petitioner an

undivided one-third interest in and to all of the lands hereinabove described.

5. And that the Court do grant such other and further relief as to the Court may seem just and equitable, to the end that complete justice and equity may be done in the premises, and that petitioner do have her costs of suit incurred herein.

Dated: Honolulu, T. H., March 5th, 1929. [101]

ELIZA R. P. CHRISTIAN,
An incompetent person, by
GEORGE H. HOLT,
Her Guardian.
By ULRICH & HITE.
By BARRY S. ULRICH,
Her Attorneys.

Territory of Hawaii
City and County of Honolulu.—ss.

GEORGE H. HOLT, being first duly sworn, deposes and says: That he is the George H. Holt named as guardian of ELIZA R. P. CHRISTIAN, an incompetent person, petitioner herein, and that by him as such guardian said incompetent makes said Amended Petition herein; that he has read said foregoing Amended Petition, knows the contents thereof, and that the allegations therein contained are true, save as to those matters stated to be alleged upon information and belief, and that as to them, he believes them to be true.

GEORGE H. HOLT,
Guardian of Eliza R. P. Christian,
an incompetent person.

Subscribed and sworn to before me this 5th day of March, 1929.

[Seal] D. K. SHERWOOD,
First Judicial Circuit, Territory of Hawaii.
Clerk, Circuit Court. [102]

[Title of Court and Cause.]

ANSWER OF WAIALUA AGRICULTURAL COMPANY, LIMITED TO AMENDED COMPLAINT.

Filed at 2:03 o'clock p. m., Mar. 8, 1929. D. K. Sherwood, Clerk. [103]

Now comes WAIALUA AGRICULTURAL COMPANY, LIMITED, one of the respondents herein, and for answer to the petition of Eliza R. P. Christian, an alleged incompetent person suing by George H. Holt, her alleged guardian, denies each and every allegation of said petition, excepting as hereinafter admitted, qualified or explained, and except in so far as so admitted, qualified or explained, and for specific answer says:

1.

That it denies the allegations of Paragraph I.

2.

That it admits the allegations of Paragraphs II, III, IV, V and VI, except that the land described includes only a portion of Ahupuaa of Paalaa, being a portion of Apana 34, L. C. A. 7713, R. P. 4475

containing 12,018.44 acres, and a portion of Grant 973 which contains 1902 acres instead of 1942 acres as alleged, and [104] respondent denies that all kuleanas within the demised lands were demised by the will of Robert William Holt, or owned by him.

3.

That it denies the allegations of Paragraph VII of said petition, and further answering thereunto says that said Eliza R. P. Christian, during all the transactions referred to in said petition was legally competent to look after her own interests and to make conveyances of her property with full knowledge of the purpose and effect thereof.

4.

That respondent denies the allegations of Paragraph VIII of the complaint except as expressly admitted, but admits that for several years prior to 1910, it used and occupied large portions of the lands described in the complaint as tenant of persons having the legal estate in trust and with the assent of the beneficiaries of the said trust and as purchaser of certain undivided interests in said land; that on a considerable portion of which it planted and grew sugar cane in the course of its business and sublet other portions for the growth and cultivation of pineapples; it admits it secured by instrument dated March 17, 1905, a lease of said lands for twenty-five years at a certain rental to which Eliza R. P. Christian had assented; it admits that relief from said

lease cannot be prayed for in this action and alleges that relief cannot be granted from said lease in this action.

5.

That in reply to Paragraph IX it denies the allegations thereof except as expressly admitted, but admits that said [105] Eliza R. P. Christian had lived in the house of said Anne Holt Kentwell for many years; that at said time respondent James L. Holt was a resident of Honolulu, Hawaii, and was on friendly terms and had been in correspondence with said Lawrence Kentwell and said Eliza R. P. Christian; that the said Eliza was the only child and sole heir in expectancy of her father, John Dominis Holt and that said John Dominis Holt was a man approximately seventy-one years of age.

6.

That it denies all of the allegations of Paragraph X but admits and alleges that in the purchase of said Eliza's interest it was represented by the law firm of Castle & Withington of Honolulu; that it, through its agents, entered into an arrangement with said James L. Holt, at his suggestion and at his request, for the acquiring of a two-thirds interest in said lands, both in praesenti and in expectancy, including the share and expectancy of said Eliza R. P. Christian, and the interest owned by said James L. Holt, and understood that said James L. Holt would, and did in order to convey such interest, secure the conveyance of the interest of said

Eliza R. P. Christian and said Anne Holt Kentwell to him so that said interest might be united with those which he had acquired from his father, J. R. Holt, his uncle J. D. Holt, and his brother Robert Holt, which latter interests were then held in trust for said James L. Holt by one John F. Colburn, together with his own interest; that the fact that the said James L. Holt was dealing with the respondent Waialua Agricultural Company, Limited, through its agents, was well known to said Eliza R. P. Christian, said Anne Holt Kentwell and John Dominis Holt, and said Lawrence Kentwell, and the fact that said James L. Holt could not hope to [106] purchase the interests of said Eliza R. P. Christian and said Anne Holt Kentwell except upon the advancing of moneys by said Waialua Agricultural Company, Limited, was perfectly understood by said Eliza R. P. Christian, said Anne Holt Kentwell, said Lawrence Kentwell and said John Dominis Holt, and fully approved by them.

7.

In answer to Paragraph XI it denies the allegations thereof, but says that David L. Withington did proceed to England to secure the conveyance of the interests of said Eliza R. P. Christian and said Anne Holt Kentwell and did represent the respondent Waialua Agricultural Company as well as said James L. Holt, and further says that when said David L. Withington went to England all terms of the agreement to convey said property and/or

interests had been settled and understood by the parties to said conveyance and that it was well understood by all parties thereto that said David L. Withington represented both the respondent Waialua Agricultural Company, Limited, and said James L. Holt.

8.

In reply to Paragraph XII it denies all the allegations thereof except that it says that said David L. Withington did go to England and did meet said Anne Holt Kentwell, together with the other members of her household, including said Eliza R. P. Christian and said John Dominis Holt; that said David L. Withington did have opportunity to observe and did observe the mental condition of said Eliza R. P. Christian and was convinced and knew that she was legally capable of handling her business affairs and of making conveyances including [107] the conveyance in this proceeding with full knowledge of their purpose and effect.

9.

In answer to Paragraph XIII it denies each and every allegation thereof except as herein expressly admitted; that it says that the deed, a copy of which is attached to the petition herein and marked Exhibit B and made a part thereof, was duly and knowingly executed by all the parties to the same with full knowledge of the facts for an adequate consideration; that all said parties were competent to contract or to convey land and/or interests

therein, and that said deed having been duly executed and acknowledged was duly recorded in the Hawaiian Registry of Conveyances as set forth in said petition.

10.

In answer to Paragraph XIV it denies each and every of the allegations thereof, save and except that it admits that it rendered an account to said James L. Holt, paid to Eliza R. P. Christian the sum of $30,000.00 on behalf of said James L. Holt, paid to Annie Holt Kentwell the sum of $5,000.00 on behalf of said James L. Holt, and expended the sum of $110.32 in miscellaneous expenses.

11.

In answer to Paragraph XV it denies the allegations thereof and alleges the facts to be that in conformity with the agreement theretofore reached between the parties and the respondent, Waialua Agricultural Company, Limited, through its agents, said respondent, through its agents, paid the sum [108] of $120,000.00 for a two thirds undivided interest in fee in said lands, including the one-third interest of James L. Holt, the life estate of John Dominis Holt, the contingent interest of Eliza R. P. Christian, the interest of Robert Holt, the interest of John F. Colburn and the interest of Anne Holt Kentwell.

12.

That answering Paragraph XVI it admits that said William R. Castle did continue to hold in trust

for the respondent Waialua Agricultural Company, Limited all the rights covered by said deed of May 2, 1910, and that on May 17, 1920 said rights were conveyed to others with the knowledge of said Waialua Agricultural Company, Limited, but not at its instigation and request.

13.

Answering Paragraph XVII it denies the allegations therein contained, except that it admits the execution of the deed dated May 17, 1920, and alleges that the consideration therein mentioned was actually paid for in cash by the beneficiaries of said Helemano Real Estate Trust and said interests were actually owned by said beneficiaries;

14.

Answering Paragraph XVIII it denies the allegations thereof except that it admits that on July 20, 1921, by instrument in writing the Trustees of said Helemano Real Estate Trust did convey the properties mentioned in said instrument directly to the respondent Waialua Agricultural Company on the payment to said Trustees for the beneficiaries of said trust and in [109] proportion to their respective interests the full consideration mentioned in said instrument.

15.

That it denies all the allegations in Paragraph XIX except that John Dominis Holt died on April 10, 1922, and left as his sole surviving heir said Eliza

R. P. Christian; that it admits that since the death of said John Dominis Holt it has claimed, and now is the owner of, the property described in the petition herein by virtue of the deeds referred to in said petition as Exhibits B, C, D and E, but denies that such claim and ownership is wrongful or without right.

16.

That it denies each and every allegation of Paragraphs XX and XXI.

17.

In answer to Paragraph XXII of the complaint the respondent admits that said George H. Holt purporting to act as guardian for said Eliza R. P. Christian did purport to disaffirm said deed of May 2, 1910, but denies that said purported disaffirmance was effective or that it was within a sufficiently reasonable time to give it effect if there had been no other defects attaching to such purported disaffirmance, and respondent says that said George H. Holt purporting to act as such guardian purported to disaffirm the said lease of March 17, 1905, but denies that said purported disaffirmance was effective or that it was made within a time sufficiently *reasonable give* it effect if there had been no other defects attaching to such purported disaffirmance and the respondent specifically denies [110] that any tender of any moneys paid to said Eliza R. P. Christian and/or Anne Holt Kentwell has never been made to this respondent.

18.

In answer to Paragraph XXIII of said petition it denies the allegations thereof.

19.

And it specifically denies that said Eliza R. P. Christian or George H. Holt, her purported guardian on her behalf, has any interest in the property described in said petition or in the rents, profits, or use thereof.

20.

That it appears by the complaint that the complainant has neglected to avail herself of any rights which she might have had in the lands mentioned in the complaint for an undue and unreasonable length of time during which time the respondent, Waialua Agricultural Company, Limited, to the knowledge of the complainant expended large sums of money in permanent improvements on said land as the owner thereof, and that she, the complainant, has been guilty of such laches as to bar her from relief prayed for by the bill or from any relief in equity.

WHEREFORE respondent, Waialua Agricultural Company, Limited, prays that the petition herein be dismissed, and for its costs herein most wrongfully sustained.

Dated, Honolulu, T. H., March 8, 1929.

WAIALUA AGRICULTURAL COMPANY, LTD.
By ROBERTSON & CASTLE
GEORGE S. LEISURE
Its Attorneys. [111]

[Title of Court and Cause.]

STIPULATION.

Filed at 1:50 o'clock P. M. Mar. 12, 1929. A. E. Restarick, Clerk. [112]

It is stipulated by and between the parties to and in the above entitled Court and cause that the name of H. V. VON HOLT as Guardian of the estate of Eliza R. P. Christian, an incompetent person, may be substituted in the place and stead of GEORGE H. HOLT as such Guardian.

Dated Honolulu, T. H. March 12th, 1929.

ELIZA R. P. CHRISTIAN, an incompetent person, by George H. Holt, her Guardian,

Petitioner

By ULRICH & HITE
By CHAS. M. HITE
Her Attorneys

WAIALUA AGRICULTURAL CO., LTD.,

Respondent,

By ROBERTSON & CASTLE and GEO. S. LEISURE
By ROBERTSON & CASTLE.
Its Attorneys

JAMES L. HOLT,

Respondent

By JOHN R. DESHA
His Attorney

Approved this 12 day of March, 1929, and let the name of H. V. Von Holt be substituted in place and stead of George H. Holt herein.

[Seal] ALBERT M. CRISTY
Judge, Circuit Court, First Judicial Circuit, Territory of Hawaii. [113]

[Title of Court and Cause.]

DECISION

Filed at 11:40 o'clock A. M. May 11, 1929. A. E. Restarick, Clerk. [114]

This is a suit in equity by an alleged imbecile to cancel a deed. Eliza R. P. Christian, claiming to be an imbecile and instituting this proceeding through a guardian, seeks to cancel a deed, executed by her for the benefit of respondents May 2, 1910, of an undivided one-third contingent remainder in upwards of 14,000 acres of land at Waialua, Oahu, (which contingent undivided interest vested on April 10, 1922). The basis of the bill is the alleged pre-existing and continuous imbecility of the petitioner—(grantor), from childhood, constructive fraud and the alleged gross inadequacy of consideration, and the bill prays for an accounting for the reasonable rental value of said one-third interest since April 10, 1922.

Stripped of verbiage and incidental issues (which will appear in the findings of facts where material), the amended [115] petition, in the light of admissions made during the trial, alleges that, on May 2, 1910, respondent, Waialua Agricultural Company, Limited, (hereinafter called Waialua Company or the Company), procured a conveyance to be executed for its benefit by the petitioner of a contingent one-third undivided interest in the land described in the petition; that said interest vested on April 10, 1922; that said petitioner has always been, and was on May 2, 1910, wholly incompetent mentally to execute a conveyance; that said conveyance purported to be for a consideration of $30,000.00 to petitioner; that petitioner never received said funds and that said amount was grossly inadequate; that said respondent, Waialua Company, has occupied and used said lands continuously from 1910 to date claiming to be the owner under said conveyance, and has refused to account for the undivided interest of petitioner in the rents, issues and profits since April 10, 1922; that a proper guardian was appointed as soon as may be and now prays for cancellation and accounting.

The answer of the Waialua Company denies the incompetency and alleges her competency; denies inadequacy of consideration and maintains that it is a bona fide purchaser for adequate consideration; and claims to be the owner in fee simple of at least eight-ninths of the entire property, including the interest claimed by petitioner. The answer also

raises the questions of adequacy of legal remedy, insufficient tender and claim of laches.

Petitioner's bill further alleges the undivided interest [116] of the petitioner to be worth in excess of $1,000,000.00 and that, in addition thereto, petitioner is entitled to many times $30,000.00 plus interest for the reasonable value of unpaid rents for her undivided interest since 1922 and offers to do complete equity in restoring respondent to "statu quo" in the event of cancellation and accounting.

Upon this state of the pleadings, (including an answer by James L. Holt admitting petitioner's bill), the cause was tried and witnesses were produced on behalf of the parties hereto.

THE TITLE TO WAIALUA LANDS PRIOR TO MAY 2, 1910.

It is admitted and the Court finds that R. W. Holt, grandfather of petitioner, died in 1862, leaving a large estate, which included the Waialua lands, in trust to pay the income in equal shares for life to his three sons, (a) Owen J. Holt, (b) James R. Holt, and (c) John Dominis Holt; and AT THE DEATH of each respective life tenant the one-third remainder in fee was to vest in the heirs-at-law of the respective son so dying. The said Owen J. Holt, born February 17, 1842, died on June 10, 1891, leaving nine children him surviving. In each of these children was then, (1891), vested an undivided one-twenty-seventh interest in fee simple in said

lands. The said James R. Holt, born October 17, 1838, was 71 years of age on May 2, 1910, and was living in Hawaii. The said John Dominis Holt, born December 17, 1839, was, on May 2, 1910, 70 years of age and living in Oxford, England, with his niece, Annie Holt [117] Kentwell and her husband, and with his only child, Eliza Christian, (petitioner herein).

James Lawrence Holt, (one of the respondents herein), is the son of James R. Holt and had acquired, in 1893, the sole title to the expectancy as to one-third interest should he survive his father, James R. Holt. He, James Lawrence Holt had also acquired, prior to July, 1902, assignments and control of the life interests of his father, James R. Holt, and of his uncle, John Dominis Holt, subject to paying these life tenants each a weekly stipend which amounted to $35.00 a week in 1910. These assignments also carried an appointment of James Lawrence Holt as attorney-in-fact for the life tenants. This control of the two-thirds life interest was held in the name of John F. Colburn, Trustee. Both James Lawrence Holt and John F. Colburn were residents of Honolulu in 1910.

Eliza (Holt) Christian, born December 30, 1885, was the sole living child of John Dominis Holt on May 2, 1910. She was living with her father and the Kentwells at Oxford, England at that time. There was of record at Honolulu, as of June 17, 1907, a purported assignment by Eliza (Holt) Christian to Annie Kentwell, of Eliza's interest (if any) in the

rents, issues and profits under a lease of the Waialua lands made in 1905 to Waialua Company. This purported assignment by Eliza was "in consideration of" a covenant by Annie Kentwell to support Eliza during her life.

It is further uncontradicted that, between June 9, 1900 and July 1, 1907, Waialua Company had purchased, at different [118] times for a total recited consideration of $46,300.00, the undivided vested interests in fee to the Waialua lands from six of the children of Owen J. Holt. The Waialua Company was, thereby in 1910, a tenant-in-common with the other Holt heirs of a two-ninths undivided interest in fee in said lands. (Ex. A-7, A-11, A-12, A-13 and A-14). These deeds, also, concern interests in other small parcels, but the major interests conveyed to Waialua Company involved the lands in the present suit.

The Waialua Company had also obtained a lease from the owners of vested interests, the life tenants and the administrator of the original testator's estate as of April 1, 1905, for a term of 25 years upon the lands in question. This lease purports to have been signed by Eliza Christian, (petitioner) then 19 years old, not as a lessor but as consenting, without present consideration, to the lease by others who were named as lessors. (Ex. A-8). This lease called for an annual rental, net above taxes and improvements, (which were to be left on the land), of $9,000.00, (or at the rate per annum of $3,000.00 per one-third interest).

In other words on May 2, 1910, Waialua Company was in possession of all of the Waialua lands in controversy as lessee and was the owner of two-ninths undivided interest in fee. James R. Holt and John D. Holt had respective rights against James Lawrence Holt and John F. Colburn, Trustee, to receive weekly income and maintenance for the balance of their lives. Ann Kentwell had assignments of income rights from John D. and [119] Eliza. Subject to this obligation of maintenance, James Lawrence Holt, through and with John F. Colburn, Trustee, owned the life interests in two-thirds of said lands and the expectancy in remainder in one-third, should James Lawrence Holt survive his father, James R. Holt. Eliza Christian (petitioner) held a contingent remainder in one-third, should she survive her father, John Dominis Holt.

(It is admitted that James R. Holt died on April 18, 1916, leaving him surviving, James Lawrence Holt. John Dominis Holt died on April 10, 1922, leaving him surviving, Eliza Christian, as his sole heir at law).

WAS ELIZA R. P. CHRISTIAN INCOMPETENT TO EXECUTE A DEED ON MAY 2, 1910?

In determining the issue of fact as to competency or incompetency, the legal tests to be applied should first be ascertained. Then the evidence itself can be analyzed with respect to (1) the general background and education of petitioner; (2) the observations of

associates and acquaintances; (3) the observations of physicians who do not claim to be expert alienists; (4) the opinions of experts; (5) recorded acts of and concerning Eliza. Ultimate findings of fact as to the competency or incompetency of petitioner may then be made.

THE TEST OF MENTAL COMPETENCY.

The common law of England, approved by the United States Supreme Court, has established a general rule that "to constitute such unsoundness of mind as should avoid a deed AT LAW, [120] the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life". Ball vs. Manning (Eng.) 1 Dowl. & C., 254; Dexter vs. Hall, 82 U. S. (15 Wall.) 9; Edwards vs. Davenport, 20 Fed. 756, 758. Further elaborating this general statement, it is said in 2 Black on Rescission and Cancellation, (2nd Ed.), Sec. 262, pages 736 to 737 that the test generally agreed upon is this: "A deed or contract cannot be set aside on the ground of insanity if the person had sufficient mental capacity to understand in a reasonable manner the nature of the particular transaction in which he was engaged and its consequences and effects upon his rights and interests.—The proper inquiry is whether he was capable of understanding and appreciating the nature and effect of the one particular act or transaction which is challenged".

And again in the same work and section on page 738, Mr. Black summarizes the authorities cited by

him in these words: "If the effect of the instrument as a conveyance of property is understood, it is not necessary that he should have the ability to understand the LEGAL effect of the words employed. But contractual capacity cannot be predicated of a person whose mind and memory are so impaired that he cannot understand the nature of the property being dealt with, nor his relation to it or power over it, and that he is incapable of recognizing facts as to its previous disposition which should be within his own knowledge, nor of a grantor who is incapable of comprehending that the effect of a deed is to dispossess him of [121] the title to the land described therein, nor of one whose mind is so weak that he had no intelligent conception of the quantity or quality of the land he is about to convey, cannot count money and does not know whether ten dollars is more or less than a hundred dollars".

And again on page 739: "Further a person cannot be said to be capable of giving an intelligent assent to a transaction unless he has the mental ability to exercise some measure of JUDGMENT and WILL in relation to it. If his mind is so far a blank that he will register automatically the wishes of another, it is clear that he does not possess the requisite degree of intelligence".

And again on page 740: "And indeed it has been said, in one of the cases on the subject, that, while one may have the mental capacity to execute a deed as a gift to a child in consideration of love and affection, if he can understand his ordinary business

and what disposition he is making of his property, yet to have sufficient capacity to make a valid deed on a sale of the property, he must possess sufficient mental strength to judge of values and successfully to oppose fraud and undue influence".

In discussing feeble mindedness and the true test of a capacity to understand and assent in a reasonable manner Mr. Black further summarizes the law in section 263, pages 743 to 744 of his work, saying: "On the other hand it is equally true that a grantor in a deed, for instance, though he is not positively insane nor utterly imbecile, may yet be so far [122] incapacitated as to be unable to bring an intelligent judgment and understanding to bear on any business matter, and so be incompetent to execute a valid deed".

In the case at bar, the guardian of the petitioner does not claim that his ward was insane in the sense of having a diseased mind. His claim is that Eliza Christian was an imbecile from birth; that is to say, that she, both before and at the time of the deed in question, was so lacking in mental capacity that she could not have intelligently comprehended the nature of the transaction engaged in, the extent and value of her own property rights, or the most elementary facts upon which to form an independent judgment to guide her; but, on the contrary, that she was simply an automaton to register the will of others than herself. What do the facts in this case show as to the mental capacity of Eliza Christian for understanding and forming independent judgments in the ordinary affairs of life?

THE EVIDENCE AS TO COMPETENCY OR INCOMPETENCY.

(1) The General Background and Education of Eliza Christian.

Eliza (Holt) Christian was born December 30, 1885, at Makaha, Waianae, Oahu, a country district about thirty miles from the City of Honolulu and about three miles from the nearest country school. She had no schooling during the first eight years of her life. Whatever attempts were made to include her in the training given to the young children of her relatives accomplished little. She was apparently [123] left a great deal to herself as an "odd" child. She had no brothers and sisters.

Her father brought her to Honolulu to live in the early nineties. Her mother died when she was about seven years old. From about 1893 to 1898 (that is from the ages of eight to twelve or thirteen) Eliza was at the Catholic Convent during the school year. During vacations she and her father lived with various relatives in Honolulu with no family home of her own. After five years at the Convent, she was next sent by her father, under the guardianship (as a minor) of her cousin, Annie Holt (Kentwell), to a Catholic Girls' School in San Jose, California, where she remained for about a year. We next see her for a short time in a Priory School for Girls at Honolulu, at the age of about sixteen years. She remained there but a short time, being taken out during her confinement and giving birth to an ille-

gitimate child. That was the end of her schooling; seven years between the ages of eight and sixteen years, in three of the best schools without leaving a record of accomplishment beyond the most elementary character.

Practically from the time when this schooling stopped, about the year 1902, and continuously up to the present time, Eliza Holt (Christian) became the family drudge and charge of Annie Holt Kentwell and of her husband, Lawrence Kentwell. Her father also lived with (or on) the Kentwells, doing nothing to support himself or his daughter, except as the maintenance money due from James Lawrence Holt may have been received [124] and used for that purpose.

Her father had assigned his right to respondent, James Lawrence Holt with power of attorney, reserving less than half to himself. His chief interests, from the evidence, appeared to be gin and beer, fish and poi,—a place to eat and to sleep.

Before the Kentwells left Honolulu in 1906, they had three children, whose care was shared by Eliza. Stopping at several places on the United States mainland, the Kentwells, John Dominis Holt and Eliza (Holt) Christian landed in New Jersey, where Lawrence Kentwell, Annie's husband, attended Columbia Law School. In 1909, they all moved to Oxford, England, where the home was established that still exists. Lawrence Kentwell continued his study of law at Oxford through 1910.

He also continued to manage and control the combined family finances.

(2) The Observations of Associates and Acquaintances of Eliza as to her Mentality.

A great number of local witnesses testified both for the petitioner and the respondent, covering the period from Eliza's infancy to the time she left Hawaii in 1906. The respondent's witnesses testified that Eliza was normal but not very bright, backward, timid, shy; that is to say, she could wash and dress herself, do simple housework and sewing and read simple things. She did not mix much with her elders; spoke when spoken to. The petitioner's witnesses, EXCLUDING FROM CONSIDERATION THE TESTIMONY OF JAMES L. HOLT AND ANNIE KENTWELL, testified that she was not normal, was "ihepa" [125] (meaning feeble minded); that her normal companions were much younger than she; that she was an "easy mark" at play; that she did very little in caring for her own person, except as directed explicity by others; that she did not seem to understand the value of money as a young girl or as an adult, even as to the small purchases that would be natural to children; that she was never allowed to go very much by herself; and that she looked and acted silly and foolish without engaging in the natural conversations of growing children of her age.

Such memory as her teachers had of her was of a child with very little ability to learn, silly and

foolish, and who made very little progress. Both sets of witnesses were vague and exaggerative. There is no evidence of any independent conduct on the part of Eliza Christian up to 1910, showing that she, by and for herself, had ever been called upon to handle money in any substantial sum, manage a bank account, plan or act for herself, except under fairly rigid surveillance by her elders who had charge over her. So long as creature comforts and affection were accorded her, she was the obedient child (even in mature years) of her father and the Kentwells.

The same general character of testimony was produced relating to the years from 1910 to date. Associates and acquaintances during this period indicate no further progress on the part of Eliza to think, act and form judgments in relation to self direction. In 1908 she had another illegitimate child and in 1916 or 1917, still another, the latter to whom is still [126] living. No intelligent information was ever obtainable from Eliza as to the paternity of these children. This evidence, as to the years after 1910, was admitted and is considered solely in connection with the question whether or not the whole life of the petitioner indicates a normal growing mind, or a mind incapable of understanding more than the simplest personal matters, incapable of development to a point of exercising reasonable, intelligent, independent judgment in ordinary business affairs, or in any of the ordinary affairs of life.

(3) The Observations of "Non-Expert" Physicians.

Dr. Wayson of Honolulu, witness for the petitioner, was the family physician from about 1896 to about 1906. He had frequent opportunity for observations. To him Eliza was a "nit-wit" or an imbecile, meaning, thereby, a person having a mentality less than to be expected of a six or seven year old child.

Dr. Masson of the Mayo Clinic, witness for the respondents, attended Eliza as the physician in charge of the hospital, at New York City, where Eliza was confined at the instance of the Kentwells with her second illegitimate child in 1908 to 1909. His recollection of attendance during a few weeks' confinement is simply of getting "yes" or "no" answers, in the main, to the ordinary questions of a physician as to the condition of a patient in the hospital. He did have a memory of Eliza as a "rather diffident foreigner, who did not speak a great deal of English"; (altho the evidence conclusively shows that ENGLISH [127] was the language used by Eliza); of one who did not talk much and whose language was broken. He did not remember anything indicating that she was other than normal.

Dr. Douglas in England testified as a witness for the respondents. He did not set himself up as an expert but simply as a trained observer having practiced medicine for more than forty years. He saw Eliza for a short time on one occasion in 1923, at Oxford, England, in connection with an investiga-

tion to report to the Hawaiian Trust Company, Limited, at Honolulu, whether Eliza understood and was satisfied as to what was involved in appointing Annie Kentwell to have full authority over her property. He admitted getting his history of the case from Annie Kentwell and asking Eliza questions calling for "yes" or "no" answers. Dr. Douglas found nothing which, in his judgment, was not normal.

Over against his testimony is the evidence of another semi-expert, Dr. Morton in England, who was the family physician, attendant upon Eliza in England occasionally from and after 1909 to 1928. Dr. Morton had had some experience in mental diagnosis, and from his infrequent observation over said period, Eliza had a mentality of a child of five or six; which testimony corroborates Dr. Wayson.

(4) The Opinions of Experts.

In addition to such semi-expert testimony, the petitioner offered the testimony of Dr. Good, who appears to be a leader in England as to mental diagnosis. Dr. Good examined Eliza in [128] 1915, 1925, 1926 and 1928 and stated that Eliza's mental condition as shown by all of these examinations indicated her to be a congenital imbecile with a mentality of a child of four or five years of age.

Again, the petitioner produced the testimony of Dr. Waterhouse who examined Eliza in 1926 and 1928 and who corroborates Dr. Good. Both of these experts testified that the condition they found was due to a want of development of mind that must have been present always.

(5) Certain Recorded Acts of and Concerning Eliza, Including Her Testimony in the Hall Case.

Commencing in 1893 Eliza, AS A MINOR, was under guardianship. For one year her father acted. From 1894 to 1900 a third party acted. In 1900 Annie Holt (Kentwell) was appointed. Apparently this guardianship was never officially closed. The court papers are lost. (Ex. G.) Eliza has, continuously since 1902, lived under the care of Annie Kentwell, who exercised the same directing control as if she were in fact the legal guardian. The entire business correspondence, affecting Eliza's affairs during all these years to date, emanated either from Lawrence Kentwell or Annie Kentwell.

On May 27, 1902 (at the age of 16½ years) Eliza appeared as the prosecutrix against a man charged with rape. To what extent if at all she was first examined by the court to discover her competency does not appear from the evidence herein. The transcript of her testimony is the only undisputed picture of [129] her mental processes produced in the case at bar. The record of the direct testimony shows some knowledge of GENERAL localities and directions about town and some ability to follow leading questions, SPASMODICALLY, in connection with the subject matter under investigation. Other than that, there is nowhere a consecutive, independent narrative by the witness. On the contrary the transcript demonstrates a continuous necessity on the part of the examiner to lead her back

to the progressive stages of her story. (Resp. Ex. 4, pp. 1-18.)

On cross examination Eliza stated, in response to leading questions, that she had been in the Convent for the past seven years and had studied the primer and second reader, spelling and first and second parts of arithmetic. Many questions were asked opening the door wide for explanations and Eliza answered: "I don't know", or "I don't remember". She would follow leading questions of a simple nature for awhile, and then her mind would cease to function or go off on a tangent. Then, she didn't know who was the father of her child. Again, she assented to a leading question naming a third party as the father. She "don't know anything about" whether it is right or wrong to have sexual relations with a man before marriage. She "don't know" why she is in court or whether a thirty party was the father of her child. Then, she answered "yes" or "no" to a few leading suestions. Called upon to pick up the story, she didn't answer.

Then followed a short recess and after that a patient attempt to get the witness to talk, with little but monosyllables in answer to leading questions. She replied to a question as to whether it was right or wrong to have sexual relations by [130] saying, briefly: "Wrong". Then followed an adjournment to the next day.

She changed her story materially on this second morning, still answering leading questions by a word or two, mostly "yes" or "no", when the ques-

tions were simply phrased, developing by monosyllables a sordid tale of a simpleminded girl and animal passions of men.

At the conclusion of the examination Eliza was cross-examined as to her ability in simple arithmetic. She didn't answer or shook her head, (indicating she did not know), when asked how many seven apples and five apples would make; or how many fingers one would have with seven on one hand and five on the other; or how many two apples and two apples would be; or what five times four would be. This record gives an insight into Eliza's mental processes before any disputes over her property rights was ever thought of.

Counsel for petitioner, in the case at bar, offered the instructions given to the jury in the Hall case. Upon objection this court refused the offer. This court is still in a quandary as to how this case could have been submitted to the jury at all as a case of rape, (except possibly on the theory that Eliza was too feebleminded to have been capable of consent).

The next record is an agreement of adoption in 1902, executed by Eliza, a minor, together with her father and the adopting parents and concerning Eliza's illegitimate child. What part Eliza took as distinct from her father is problematical. The judge who acted at the time is living in Honolulu and was called by neither party. [131]

Next, we have Eliza's marriage in 1903 consented to by her father. Whether that consent should be

construed as evidence of growing competency, or the result of a desire to pass on a parental responsibility that was becoming a problem, is a question as to which the rest of the evidence tends toward the latter construction.

Martial life was of short duration. The next record (Resp. Ex. 7) is a brief decision and decree wherein Judge Gear, in 1905, refused to annul Eliza's marriage on a petition brought on her behalf on the ground of her incompetency, the judge saying in a one paragraph decision:

> "* * * the plaintiff has not made out such a case as under the authorities is required * * * while it seems to me that it perhaps would have been much better for the plaintiff never to have been married * * * nevertheless the plaintiff has not shown such a case of incompetency as to justify the court in annulling the marriage * * *". (Underscoring ours).

What evidence was before the court or upon what authorities the decision is based is not known to this court. Annulment, then and now, required an affirmative finding that the party was an IDIOT or a LUNATIC. (Sec. 2955 R. L. 1925. Same sec. being Sec. 2218 R. L. 1905 without change since 1903). Many considerations might lead a judge to REFUSE TO INTERFERE with a marriage status without thereby adjudicating competency to handle business affairs. It is a negative decision at the most on the question before this court. In fact the parties did not resume marital relations again. [132]

There are also in evidence a number of deeds, options and assignments, signed prior to 1910 by Eliza before notaries, concerning her property. There is also in evidence the negative testimony of such notaries that they observed nothing wrong. In each of these cases Lawrence Kentwell was involved. In none of them was Eliza an independent actor, a directing influence, or a manager of the funds involved. She signed her name to any documents, apparently prepared or vouched for under the direction of Lawrence Kentwell. They do not help to solve the problem: "Was Eliza in fact COMPETENT to sign deeds?" They may affect the question of ignorance as to Eliza's condition and want of notice to purchasers.

FINDINGS AS TO COMPETENCY.

In Leonard v. Shane, 182 Iowa 1134, 166 N. W. 373, cited by respondents, the rule of evidence applied by the court was: "The fact (of mental incompetence) need not be proved beyond a reasonable doubt, but the preponderance in favor of such finding must be reasonably clear and satisfactory". (166 N. W. at p. 374).

The transaction which is questioned in the case at bar is the purported sale by Eliza Christian of all her right, title and interest in the 14,000 odd acres of land at Waialua, Oahu. Her rights were distinct and separate from the rights of her father, the Kentwells and any other person. Her right was entirely dependent upon whether or not she survived

her father. If she, in fact, had been consulted in connection with the [133] correspondence between James L. Holt and Lawrence Kentwell, she would have had to determine whether in her judgment, as advised by others, her independent right in expectancy was worth $60,000.00 or $30,000.00 or any price; whether her right should be sold at all, or for present cash or for partly cash in hand and partly cash held in escrow subject to payment of the balance when her father died. In some measure, she would have had to judge the present investment value of cash as against her rights in FUTURE. She would also have to have some intelligent understanding of the fact that she was either being offered $30,000.00 cash to herself, for her own separate interest, or that such offer was a joint offer to herself and to her father; and have some understanding of comparison between a life estate with a few years to run and a possible interest in fee.

Respondents offered Exhibits 1-A to 1-D inclusive as typewritten copies of letters turned over to Waialua Company by James L. Holt prior to the transaction of May 2, 1910, these letters purporting to be signed by Eliza. There is nothing in the entire record, either on behalf of petitioner or respondent, which would justify the court finding that the original of Exhibit 1-A was really the letter of Eliza, written by her, with an understanding of what the terms meant to her in fact, as distinguished from legal meaning. Exhibits 1-B to 1-D may well have been copies of letters written by or dictated to or

merely signed by Eliza. No one of these three letters indicates that Eliza, if she was the writer, understood [134] her independent rights in Waialua or had an appreciation of anything more than the fact that her father desired money for the necessities of life.

Upon the weight of the testimony and the credibility of the witnesses, as herein summarized in connection with the question of competency, the court finds:

1. Eliza (Holt) Christian, petitioner, neither was, nor is, an idiot, a lunatic or utterly imbecile.

2. She was and is, however, a person of undeveloped intellect, incapable of forming a reasoned judgment or understanding; incapable of comprehending her own right to an independent status, the extent or nature of property or of her property interests, the value of money, or the ordinary matters of life essential to a reasonable degree of independent living.

3. She had insufficient mental capacity to comprehend the difference between $100.00 and $1,000.00; between $30,000.00 or $60,000.00 for her individual rights; or to comprehend the difference between payment to her individually, for her sole disposition, of any such sum or sums and payment to her circle of relatives and under their control; or whether $30,000.00 or any sum was for her rights as distinct from the rights of others involved in the deal; or the difference between present payment of income and future payment of principal; or to understand

that she had rights distinct and independent of her father or of Annie Kentwell.

4. She could not possibly have comprehended, even with advice worthy of trust, the elements necessary to form an independent judgment or to exercise a reasonable measure of [135] choice or of will relative to the value of cane land, pineapple land, ranch land or any kind of land in any quantity; or of postponed rights therein as opposed to present interests; or even the elementary character of her rights and direct the disposition of what she owned.

5. The court is convinced that Eliza did not have the most elementary capacity to understand and judge her rights and protect herself from undue influence and fraud; and that at no time was she an independent actor with a knowledge of her rights.

6. In short, she was mentally incompetent to execute a conveyance in 1910 or at any other time within the scope of the evidence and the law in this case.

7. Her incompetence had not been adjudicated by a proper protective proceeding and was not such as to be clearly self-evident to an entire stranger dealing with her casually without prior notice of facts to indicate her entire dependency.

8. Eliza's incompetency was known to James L. Holt, to her father, John Dominis Holt, to the Kentwells and to others who were familiar with her dependency upon the Kentwells.

9. James L. Holt, Lawrence Kentwell, his wife, and John Dominis Holt did everything in their

power to represent to the Waialua Company that Eliza was a competent and willing seller, who wanted to join in their attempts to sell out.

THE DEED OF A PERSON MENTALLY INCOMPETENT IS VOIDABLE.

Petitioner claims that a deed from an incompetent is void; respondent, Waialua Company, claims that it is, at the most, [136] voidable in the discretion of a court of equity under eqtitable principles of restoration, if cancellation be found to be equitable at all.

Petitioner cites Dexter v. Hall, 82 U. S. (15 Wall.) 9. This case merely holds that a POWER OF ATTORNEY from a legally incompetent person is void.

Respondent cites Luhrs v. Hancock, 181 U. S. 567. This case merely stands for the principle that a title of a purchaser on a sale under a JUDGMENT of foreclosure CANNOT BE ATTACKED COLLATERALLY on the ground of the alleged insanity of the mortgagor. The case at bar is a direct attack by the alleged incompetent, personally represented.

Referring again to 2 Black on Rescission, etc. (2nd Ed) at page 718, the text writer sums up the law: "But if the contracting party had no knowledge of the other's insanity, and dealt with him in ENTIRE INNOCENCE AND GOOD FAITH, and if, for this reason, the contract cannot be regarded as absolutely void but as voidable at most, there remains the fact that an insane person cannot give that intelli-

gent consent without which a valid contract cannot be formed, and hence, in this case also, the contract may be avoided or set aside on equitable terms". And again on page 719 that author summarizes: "But deeds so made (by mental incompetent) are not universally regarded as absolutely void, and generally speaking, where a business transaction of any kind is to be avoided on the ground of insanity of a party, the court of equity is the proper forum to grant relief * * *". [137]

And again on pages 722-724 the author summarizes: "* * * The rule almost universally prevailing in modern times being that the contracts, as well as the deeds and conveyances, of a person who is actually insane at the time, but not judicially so adjudged and not under guardianship, are voidable for that cause, on equitable principles, but not absolutely void. * * * and if such a deed is merely voidable it will not be set aside except on equitable terms and conditions. * * * a decree will not be withheld merely because it appears that the grantee did not know of the insanity of the grantor and obtained the conveyance without fraud and for an adequate consideration".

In a well reasoned case, cited by respondents, which adopts the "voidable" theory there seems to be no doubt of the incompetent's right of rescission, IF the INNOCENT purchaser, ignorant of the incompetency, is restored to statu quo by return of the purchase price. The court, in determining whether or not there shall be cancellation must

balance all the equities. Coburn v. Raymond, 76 Conn. 484. See also Sparrowhawk v. Erwin, 246 Pac. 541 (Ariz).

The rule in New York is: "The deed of a lunatic is not void, in the sense of being a nullity, but has force and effect UNTIL the option to declare it void is exercised". Blinn v. Schwartz, 177 N. Y. 252.

"If the lunatic and his relatives and friends, and those upon whom rests the moral or legal duty to protect him in his unfortunate mental condition fail to have his mental incapacity judicially determined, so that others may learn of his condition, and the mental condition and appearance of the lunatic [138] is such that he causes even the cautious and prudent individual with whom he deals to believe in good faith that he is a fully competent person, then simple justice demands that innocent third persons be not made to suffer and lose moneys actually paid out by them in good faith in carrying into effect the contracts made by them with such lunatic—. The reason of the rule requires with equal force the restitution of moneys thus expended, though the lunatic did not profit thereby as well as where he did so". Edwards v. Miller, 102 Okl. 189, 228 P. 1105.

Given the facts, as has been found in the case at bar, that the grantor both before and at the time of the conveyance which is challenged and ever since, has been and still is incompetent to the extent of having been incapable of understanding and acting in the ordinary affairs of life, a conveyance made by

such a person will be set aside, either with or without restoration of the purchase money as the equities require. See also, Thompson, Real Property, Volume 3, pages 1008 to 1009; Brewster v. Weston, 126 N. E. (Mass.) 271; Gates v. Carpenter, 43 Iowa 152; Hovey v. Hobson, 53 Me. 451; Jordan v. Kirkpatrick, 25 Ill. 116, 95 N. E. 1079.

Incidentally on this point the court has carefully read cases cited by the respondent in which equitable interference was denied, among them being Dragoo v. Dragoo, 50 Mich. 573; Leonard v. Shane, 182 Iowa, 1134; In re Snyder's Estate, 279 Pa. St. 63; Grove v. Taylor, 143 Md. 184. However, the court finds that each of these cases is wholly inapplicable to the [139] facts in the case at bar. In those cases the court refused relief where detailed and substantiated histories of PRIOR COMPETENCY were opposed practically alone by expert testimony. In the case at bar complete want of history of independent competency and consistent history of guardianship-in-fact, if not in-law, with advantage taken by those relatives who should have protected, is CORROBORATED by the experts and semi-experts.

Section 2463, Revised Laws of Hawaii, 1925, gives equity jurisdiction in cases among others involving suits between tenants in common, suits in accounting and, according to cases cited under this section, suits for cancellation. The instrument challenged is not void on its face. Its insufficiency and relief therefrom depend upon oral proof and equitable principles.

The precise question raised in the case at bar does not appear to have been passed upon by the decisions of our Supreme Court. From the decisions elsewhere as hereinabove summarized, it is clearly apparent that a person who has always been mentally incompetent is entitled to the protection of a court of equity and to have the transaction, affecting his or her property rights, scrutinized. This does not mean that such transactions are void and a nullity. On the contrary, it is clear that such transactions are of force and effect until directly attacked.

When incompetency is shown as a fact in a direct attack upon the transaction, it is the duty of a court of equity to examine into the transaction and to weigh the equities between the incompetent and the person or persons claiming to have [140] succeeded to the incompetent's property. Even if it clearly appears that the latter has been guilty of no fraud in fact, of no overreaching in fact, and if it further clearly appears that the respondent has paid an adequate value to the incompetent, from which the incompetent had benefited, some courts permit avoidance if the STATU QUO can be reached by complete restoration of the purchase price. In some cases where equity has thus been satisfied that the incompetent has in fact been adequately and fairly treated by an entirely INNOCENT purchaser who had in fact given adequate consideration, equity has refused to avoid the deed and has left the incompetent to his remedies, if any, against those who may have handled the consideration. Slight evidence of

overreaching or of inadequacy has always been sufficient to turn the scales in favor of the incompetent.

The final question before this court, then, is whether or not Waialua Company was a bona fide purchaser for adequate consideration to such a degree that equity should refuse relief. The answer to this question will require an analysis of the negotiations and the transactions itself.

WAS WAIALUA COMPANY A BONA FIDE PURCHASER AND FOR AN ADEQUATE CONSIDERATION?

Ever since its incorporation in 1898, Waialua Company had been endeavoring to acquire not only the use and control of the Holt lands at Waialua, but also the ownership of as much as it could get. Prior to 1907, the Company had purchased outright [141] from six of the children of Owen J. Holt, their respective one-twenty-seventh interests. The Company had succeeded in acquiring from these children an estate in fee amounting to two-ninths undivided interest for a combined total price of $46,300.00. To be sure this sum included consideration for other small interests which did not concern the lands in this suit, but these other interests were of a minor character. Moreover, this price relates to the Waialua lands in an unimproved condition.

Under the 1905 lease negotiated by John F. Colburn, Waialua Company took possession and started improvements for the purpose of increasing its business profit. From 1905 to 1910 the Company

had put under cultivation approximately 1600 acres of cane lands, which were producing bi-annual cane crops averaging in excess of six tons per acre, or about three tons per acre per year. In addition the Company had actually subleased about 2500 acres of the Waialua lands for pineapple purposes, calling for a combined rental to the Company, net above taxes, of $22,000.00 per year as of 1910.

An analysis of all the evidence clearly shows that the fair market value of all of these Waialua lands in controversy in fee unincumbered was in excess of $400,000.00 under conditions prevailing in 1910. A one-third interest in fee in 1910, free from incumbrances, had a market value in excess of $130,000.00.

In 1910, the only incumbrance on the land was the 1905 lease. This lease had an expectancy, so far as concerned each one-third interest involved in the James R. Holt and John Dominis Holt lives, of eight years, figured at a mortality expectancy as to the life tenants of eight years, minus or plus [142] such years as the life tenants should actually live. Beyond such life estate the Company had at the most a right to test out the interest that could be claimed to flow from the fact that Eliza Christian and James Lawrence Holt were respectively assenting parties to the lease in 1905, without present consideration, and should they actually survive their respective parents.

Figured on the eight year mortality expectancy of the life tenants, the Company was obligated un-

der the lease to pay $6,000.00 per year rental as to two-thirds interest or a total of $48,000.00 in eight years on a leasehold, having in 1910 a rental VALUE as to two-thirds of at least $22,000.00 per annum, net above taxes, or a gross rental value for eight years of $176,000.00. In other words the Company had in 1910 under its lease an expectant saving to itself in rental values in excess of $120,000.00. This was the Company's position in 1910 when it began to hasten proceedings to buy, due to the appearance of a stranger to the title coming into the field as a prospective buyer.

Moreover, for a long period of time James L. Holt and John F. Colburn, his Trustee, had been endeavoring to sell their interests to Waialua Company. First, these sellers had proceeded on the theory that they owned a two-thirds interest. This had been decided against them prior to 1905. Both they and the Waialua Company knew that they owned two life estates, each in one-third, and a contingent remainder in the James R. Holt one-third, should James L. Holt survive his father. They both also knew that Eliza Christian owned a contingent remainder in the [143] John Dominis Holt one-third, should she survive her father. In 1910, John Dominis Holt was in his 71st year and Eliza Christian was 24 years old and apparently in good physical health.

Prior to April, 1909, James L. Holt, attorney-in-fact for John Dominis Holt, was in correspondence with LAWRENCE KENTWELL, husband of Annie Kentwell, with whom John Dominis Holt and Eliza were living. (Ex. D-1). In March, 1909, John

F. Colburn was offering to Waialua Company, the James R. Holt interest for $60,000.00, (including the life interest and contingent remainder), and the John Dominis Holt interest for an additional $60,000.00 to be held in escrow at 5% per annum, ($3,000.00 per annum), during the life of John Dominis Holt. (Ex. D-3). In September, 1909, James L. Holt wrote to W. R. Castle, who was acting for Waialua Company, endeavoring to get that Company to finance the purchase of Eliza's interest for $50,000.00; that is to say, $10,000.00 down and the balance on the death of Eliza's father, and contemplating CONTINUING THE PAYMENT TO JOHN DOMINIS Holt at the rate of $100.00 per month during the balance of his life instead of $150.00 per month. (Ex. D-2). By this letter, Mr. Castle was informed that LAWRENCE KENTWELL had approved such a method of buying Eliza's share. James L. Holt wrote: "—I believe now is OUR opportunity to secure this one-third interest from my cousin (meaning Eliza) at a very reasonable figure—".

By February 17, 1910, James L. Holt was writing LAWRENCE KENTWELL to the effect that Waialua Company refused to negotiate further unless the Kentwells, John Dominis Holt and [144] Eliza would sell for $30,000.00. In this letter James L. Holt informed Kentwell: "—this offer I make you now is final and if the sale goes through it means that upon the payment to YOU FOLKS the sum of $30,000.00 YOU ARE OUT OF IT HOLUS

BOLUS in other words YOU will have to provide for uncle John as far as his weekly stipend is concerned. You will bear in mind that in the trust deed and agreement I have with uncle John it is provided that should Eliza survive her father she shall receive one-half the total that I can get for the one-third". (This appears to be interpolated by Holt as self justification for cutting in half his original offer of $60,000.00, also for saying nothing about the profit which he, Holt, expected to make on the deal, altho Holt had never acquired any right to share Eliza's contingency). The letter continued: "—Now it is an open question as you know whether she will survive him or not if she does YOU may be able to get more for her share than this amount I offer, if she should happen to die before uncle John YOU would be shut out of it entirely now you know 'a bird in the hand is worth a great many in the bushes'. The Waialua people have intimated strongly that should this attempt on their part to buy fail they will resort to a suit in partition for the sale of the land at public auction—". (Ex. D-5. Underscoring ours). (See Tr. page 1328, Mr. Goodale as a witness for Waialua denies any such contemplated action; but this letter together with the rest of the D. series of Exhibits were in the hands of Waialua Company before May 2, 1910 and their contents unrepudiated).

LAWRENCE KENTWELL answered this letter under date of March [145] 8, 1910, at Oxford and discusses the terms, saying: "—then SOME must

be paid over to Eliza. With regard to our releasing you from paying to Uncle John the $150.00 a month which we are now getting from Colburn, Annie said she would do so upon paying her $5,000.00—so that the whole thing will amount to $35,000.00 cash—". (Ex. D-6). In this letter from Kentwell to Holt, Kentwell indicates that he is under the impression that Waialua is dealing with Holt on the basis of a gross price of $75,000.00 cash. Waialua Company knew of this letter. The real terms to Holt were never discussed with the parties in England.

In none of this correspondence was the interest of Eliza Christian kept definitely separate as to price from the interests of the other parties in England, nor was its relative value ever honestly discussed with relation to the deal in Honolulu.

On March 3, 1910, Mr. Colburn at Honolulu wrote to Waialua Company stating: "—Mr. L. L. McCandless (of Honolulu) I am informed has made a definite offer to the Kentwells without any strings and if your Company fails to act promptly your opportunity to buy the lands will be nil—". He then urges a definite program and speed to get Waialua Company's attorney, who was then in Boston, Mass. to proceed forthwith to England, to procure an outright conveyance from the parties in England for $30,000.00 and to pay to Colburn the balance after deducting expenses "of the purchase price agreed upon as $120,000.00". (Ex. D-7).

Also under date of March 30, 1910, at Oxford, LAWRENCE KENTWELL wrote to James L.

Holt at Honolulu: "—there is some one else in the field and has offered Liza a better [146] proposition, and Annie and Uncle John are not required to release the $150.00 a month which she now gets from Colburn.—His name is McCandless.—Be sure and get the matter fixed as soon as you can as a delay will not be beneficial to either of us.—". (Ex. D-8. Underscoring ours).

Waialua Company cabled their attorney in Boston on April 8, 1910: "—Terms of agreement well known Link (meaning McCandless)—go as soon as possible". (Ex. D-10). Another cable was sent by Waialua to their attorney on April 11, 1910, advising that an agent for McCandless had left Honolulu bound for England and advising the Waialua attorney "to leave as soon as possible". (Ex. D-11).

An April 12, 1910, Colburn, Trustee, definitely offered to Waialua Company in writing to sell the James R. Holt life interest and the James L. Holt contingency together in one-third of the Waialua lands for $60,000.00 and also to sell the John Dominis Holt life interest and Eliza's contingency for an additional $60,000.00, less what it would cost to acquire Eliza's interest. (Ex. D-12). On the same date, April 12, 1910, James L. Holt at Honolulu cabled LAWRENCE KENTWELL at Oxford, England, purporting to accept LAWRENCE KENTWELL'S offer to convey the interests of the Kentwells, John Dominis Holt and Eliza Christian for $35,000.00. (Ex. D-14). On the same date, April

12, 1910, Waialua Company cabled their attorney at Boston: "—Waialua depends upon you. Have every reason to believe Link (meaning McCandless) will keep them supplied with money provided they can get (to) America where (they) expect to meet (agent for McCandless)—". (Ex. D-13). [147]

On April 13, 1910, the Company's attorney in Boston was further advised by cable that KENTWELL had accepted Holt's offer and that the attorney's credit was increased to $40,000.00. (Ex. D-15). And on April 16th, the Company's attorney cabled back advising insuring. (Ex. D-20). On this latter date Waialua Company cabled its attorney: "Eliza and John D. accept $30,000.00 must be inclusive of prospective interest. Annie Kentwell wants $5,000.00 her interest. Make less if possible. Must not exceed $35,000.00. Price to Waialua must be kept secret". (Ex. D-21. Underscoring ours).

On April 19, 1910, Waialua again cabled its attorney that KENTWELL had advised Holt that he, KENTWELL, "will agree to abide by you, though Link (McCandless) offers a better proposition". (Ex. D-22).

By April 26, 1910, the attorney for Waialua Company had arrived in England and on that date he cabled Waialua Company: "Demand payment in cash. Are objecting insurance. We do not consider advisable without (insurance). Agent for (McCandless) will not arrive until Monday". (Ex. D-25), to which cable the Company at once answered

by cable: "A delay is dangerous. We consider it advisable close immediately before arrival (agent for McCandless), excluding insurance.—McCandless has been notified our rights must be upheld". (Ex. D-27. Underscoring ours).

With the knoweldge of the Company and under the advice of its attorney in Honolulu, James L. Holt, by letter dated April 28, 1910, warned Mr. McCandless to refrain from interfering with any of the parties in England, Holt claiming an accepted contract of purchase and sale. (Ex. D-26).

[148]

All the foregoing correspondence was known to the representatives of the Waialua Company at Honolulu practically as it occurred. So far as the parties in England were concerned all of the negotiations were with LAWRENCE KENTWELL and depended for their validity upon the authority of LAWRENCE KENTWELL. Both he and James L. Holt at Honolulu must have known of Eliza's incompetency in fact, but disclosed no more of the true condition of Eliza than the correspondence and cables would have disclosed to a reasonable person.

What the situation would now be if Waialua Company had been content to deal with James L. Holt at arms length, only, after he, Holt, had acquired the rights of Eliza is not the question before this court. In fact the Company actively took over the negotiations of James L. Holt and through the attorney for the Company went forward and closed the transaction in England, using the situation Holt

had been able to create as a blood relative and attorney-in-fact for John Dominis Holt and, thereafter, using James L. Holt merely as a "dummy" grantee. The Company's representatives in Honolulu had notice that parties in England reposed confidence in James Lawrence Holt by reason of his blood relationship and his status as attorney-in-fact for John Dominis Holt. They knew that James L. Holt was securing a secret profit to himself and Colburn by reason of being able to induce LAWRENCE KENTWELL to get the parties in England to join him in selling the life estate and contingent remainder for $35,000.00, (quoted at Honolulu unknown to Kentwell and the others in England for $60,000.00). To be sure Holt in Honolulu had acquired an interest in the life [149] estate; but this was not greater than the interest quoted for Annie Kentwell at $5,000.00 and for which James Lawrence Holt was getting a proportionate part of $25,000.00 more, less expenses, (unknown to Kentwell).

If in fact Eliza had been a competent adult the custom of business men as generally understood might justify bargains of this character so far as the Company is concerned. A court of equity does not correct mere imprudence among adults competent to act for themselves. Granted that the attorney for the Company at England did not know the background as did the parties in Honolulu, still, do the actions of the representatives of the Company at Honolulu recommend themselves to a court of

equity faced with the problem of adjudicating the rights of an incompetent on the one hand and of the purchaser on the other?

Assuming that Waialua Company, including in that phrase all the representatives in Honolulu, were actually ignorant of facts indicating the feeble mindedness of Eliza Christian, and also assuming that the negotiations in England between the Company's agent and LAWRENCE KENTWELL were such as not to indicate Eliza's true condition, still that assumption of ignorance is not equivalent to entire bona fides when Waialua Company took over and managed for itself the final closing of this deal engineered by Lawrence Kentwell and James L. Holt. But, this factor may not be considered sufficient, alone, to over-balance the scales in favor of the incompetent if the price in fact was adequate. Hence the final question is: Was the price for Eliza's interest clearly adequate? [150]

ADEQUACY OF PRICE.

Without considering events subsequent to 1910, the market value of a fee simple unincumbered one-third interest in these Waialua lands in 1910 was clearly in excess of $130,000.00. This fact is established either by analysis of the evidence on the "ten-times-the-annual rental" theory of the respondents or upon analysis of the fee simple value of the other witnesses for both parties. The only incumbrance was the lease of the life tenant which would terminate upon his death. The first point of inquiry is

what was a one-third interest worth in 1910 if it were vested and the enjoyment thereof were merely postponed to the death of the life tenant?

The evidence shows that the life tenant had an expectancy of eight years. $1,000.00 postponed eight years at 6% would be presently worth $627.00; or $130,000.00 so postponed would be presently worth $81,510.00.

But the contingent interest in question might never become vested in Eliza. It depended upon Eliza surviving her father. Such possibility of survivorship could be protected by insurance on the life of the contingent remainderman, if he or she were willing to be insured and could pass an examination for insurance as to health and mental competency. (The attorney in England advised insurance. The representatives in Honolulu refused to wait). Taking into consideration the costs of such insurance, then $1,000.00 postponed for eight years and less the cost of insurance would be worth $552.14 presently; or $130,000.00 eight years hence protected by insurance would represent present cash in the sum of $71,778.20. [151]

These are facts, illustrated by the evidence in this case, which would have been material to a decision of a court of equity if called upon in 1910 to pass upon the propriety of authorizing a sale of an incompetent's contingency as of that date.

Again the evidence shows that the James R. Holt one-third life estate, together with James Lawrence Holt's contingency, were valued throughout the

1909-1910 negotiations at $60,000.00. Consider this in connection with life expectancy of eight years under the facts known in 1910. Rental was due on this life interest at $3,000.00 per annum which spread over eight year's expectancy would amount to $24,000.00. This sum had a present value in 1910 of approximately $18,000.00, which is arrived at by taking the value of $3,000.00 eight years hence plus $3,000.00 presently, dividing the same in behalf and multiplying by eight. This would place James Lawrence Holt's contingency at a figure between $40,000.00 and $42,000.00. His contingency was, no better or no worse than Eliza's under the facts known in 1910.

But, the Waialua Company maintains, that it paid $37,500.00 for Eliza's interest. In fact, it paid $2,500.00 to Albert Christian, as to which Eliza had no part and further as to which the correspondence showed the parties in England were willing to come to Honolulu to straighten out her affairs so as to make such payment unnecessary. But Waialua Company did not want the parties in England to come to Honolulu where the real facts would be known.

Also Waialua Company paid Annie Kentwell $5,000.00 for an [152] interest in the life estate that apparently was every bit as good as the interest of James Lawrence Holt in the same life estate and for which he was getting a proportionate part of $25,000.00 bonus, less expenses.

Also the $30,000.00, ostensibly for Eliza's share, was so described in the correspondence between Holt

and Kentwell, and known to the Company, as to be confused as to whether it was for Eliza personally or for "you folks", including Eliza and her father and even the Kentwells. The most that can be said is, that $30,000.00 was paid to the circle of relatives with whom Eliza was living and purported to be for Eliza's interest. The evidence does show that Eliza continued to live with the same circle of relatives, dependent upon them for support and actually supported by them either out of their own funds or out of this $30,000.00.

The respondent Waialua Company maintains that the market value of this contingency was nothing but a gamble, anyway. "People were not buying such gambles at a strictly mathematical market value" is the contention. The evidence shows, that Mr. McCandless, hearing that Eliza's interest, alone, might be bought for $30,000.00 immediately dispatched, at his own expense, a personal agent to England to see what could be done. And Waialua Company was informed that McCandless had made a better offer to Eliza, for her sole benefit, of more than this $30,000.00. Faced with this imperative fact Waialua Company, even though it, as a co-tenant with a peculiar knowledge of the value, and even though it knew of the secret profit to be made by James Lawrence Holt, took over the negotiations with Lawrence Kentwell [153] and now wants this court to find that it did pay adequate consideration and the fair market value. This Company did everything in its power to prevent the question of values coming out in the open at the time. A finding that

the question of this value is a "gamble" does not amount to an assurance that it was "adequate". Nor is a "gambler" entitled to protection in equity in preference to an "incompetent".

This court has used the expression that Waialua Company was a co-tenant. In some situations the conduct of a co-tenant is subject to scrutiny. It is very definitely settled in the law that a co-tenant cannot gain title by adverse possession against a co-tenant who does not know that he has an interest in the land. 7 R.C.L. page 849, Note 9. Also, to some extent, co-tenants are in relation of trust and confidence different from strangers. See illustration in 7 R.C.L. pages 857 to 861. For instance, one co-tenant cannot gain an advantage over another co-tenant by buying out adverse claims of others but must share such advantage upon reasonable contribution pro rata. In the case at bar, not only was James Lawrence Holt a co-tenant but was a blood relative of Eliza, attorney-in-fact for her father and supposed to know and report the situation in Honolulu. The Waialua Company was also a co-tenant in possession and knew of the betrayal of confidence which was going on between James Lawrence Holt and Lawrence Kentwell affecting Eliza. However, the matter of co-tenancy may be immaterial to this case. While such a situation among competent adults might not give jurisdiction for interference with the present title, yet this court is faced with the question whether respondent is in [154] such an equitable position as to require equity to withhold its natural protection to an incompetent.

The best that can be said is that the price paid was very much of a "bargain". UNDER THE CIRCUMSTANCES IN EVIDENCE THIS COURT CANNOT SAY THAT THE PRICE PAID BY WAIALUA WAS ADEQUATE. THE PETITIONER HAS OFFERED TO RETURN THE PURCHASE PRICE WITH INTEREST AND THE SITUATION IS SUCH THAT THIS CAN BE DONE.

The respondent, Waialua Company, calls the court's attention to another rule summarized from 2 Black on Rescission, etc., Section 258 where it is stated that the better rule seems to be that a deed to a SUBSEQUENT GRANTEE, who is innocent, for value, without notice will not be set aside, but a remedy will be given against the original grantee who had notice. The trouble with this rule is its application to the case at bar.

This court has found that it is not clearly shown that Waialua Company had actual notice of the incompetency of Eliza. In other words the court has proceeded on the assumption that Waialua Company was ignorant of her real mental status. But this fact does not justify the conclusion that the Company was a "subsequent grantee" or an "innocent purchaser". It is treated as innocent of knowledge of incompetency. That is the extent of its innocence.

To be sure the deed from the parties in England ran to James Lawrence Holt and the latter at Honolulu immediately conveyed to persons acting for the

Company. Waialua Company's money financed the whole transaction. Waialua Company's attorney attended to all the details. The fiction of James [155] Lawrence Holt as grantee was clearly indulged in to prevent disclosure of the real purchase price at Honolulu and to preserve to the Company the benefit of the negotiations which had been created through the confidence existing between Kentwell and Holt. This court is not now concerned with what might have been the situation had James L. Holt purchased his cousin's interest directly and then as owner had sold to Waialua. The fact is that Waialua Company, in its haste to close the purchase, took direct charge of the transaction; and, while attempting to preserve the form of a secondary position, it in substance became the purchaser in fact. It does not qualify as a "subsequent grantee".

On pages 24 to 27 of the reply memorandum of law, filed April 10, 1929, counsel for Waialua Company set out a strong summary for the Company. But, the underlying weakness of the whole chain of circumstances recited therein is the constant fact, clearly shown in the incidents themselves or by the clear weight of the testimony, that Eliza Christian was at no time an independent actor and manager of the ordinary affairs of her life. It clearly appears in the record that she was always under the constant DIRECTION and WILL of the Kentwells, who, assisted by the weakness of the father and the necessities of the cousin in Honolulu, were seeking to exchange Eliza's property for cash that would be

under their control. And these same persons who were in control of the conduct and decisions of Eliza are some of the same persons whom counsel for respondent hold up to scorn as witnesses. They were no more faithful or reliable as counselors, directors and guardians-in-fact than [156] they now appear as witnesses.

Again it is argued by the respondent that James L. Holt could have brought a suit for specific performance again Eliza. This argument is based upon the theory that the exchange of letters and cables between Holt and Kentwell creating a contract for the enforcement of which equity would lend affirmative aid. Without analysing this theory exhaustively the court might suggest several legal hurdles which Holt as a petitioner in equity would have to surmount: (1) Proof of the competency of Eliza; (2) Proof of the authority of Lawrence Kentwell to bind Eliza; (3) and showing of "clean hands" by a petitioner in equity. The less said about the possibility of such a suit for specific performance the better it will be.

Again it is argued that Waialua Company is entitled to hold possession against Eliza by reason of her signature as an assenting party to the 1905 lease. This position is entirely inconsistent with the real claim of ownership continuously and consistently made by Waialua Company which compelled petitioner to bring this suit. The Company had abandoned its status as lessee, so far as the "John D. Holt-Eliza one-third" is concerned, since May 2,

1910, under a claim of ownership. When demand was made for restitution and rents on behalf of petitioner subsequent to 1922, the Company maintained its position as owner.

Moreover, this court has found under the facts that Eliza has never been competent to act for herself. Again, in 1905 Eliza had no estate in possession subject to lease. Life [157] tenant lessors could not have bound her title, when and if her contingency should vest. The Company has never taken the frank position that it engaged in a gamble by attempting to purchase what it knew it could not purchase and intended all along to rely on its lease or rather its claim for a right to a lease. Claims of bona fide purchase and claims of survival of rights to enforce a lease accruing when Eliza's contingency vested in 1922, are too inconsistent for further consideration in this case. If rights survive to the Company as against Holt and the Kentwells, the Company is left to its remedies.

CONCLUSION.

From the findings heretofore made this court concludes, after weighing all the credible evidence and applying the law as heretofore analyzed:

1. That Eliza R. P. Christian, petitioner herein, has never been competent mentally to execute a conveyance of property;

2. That she was not competent mentally to execute the conveyance of May 2, 1910;

3. That, since Eliza was incompetent during the entire period from and before 1910 to date,

without a legal guardian until just prior to the filing of this proceeding, she could not be affected by the equitable doctrine of laches;

4. That the evidence does not clearly show that the respondent, Waialua Company, knew of such mental incompetency;

5. That Lawrence Kentwell and James Lawrence Holt did know the facts which would be notice of this mental incompetency; [158]

6. That the negotiations for the transaction in question were handled in England under the direction and control of Lawrence Kentwell;

7. That James Lawrence Holt with the assistance of John F. Colburn, his trustee, in Honolulu imposed upon his position as a blood relative of petitioner and attorney-in-fact for John Dominis Holt to enable him to induce a sale which was to afford him and Colburn a secret profit;

8. That the representatives of Waialua Company in Honolulu knew the facts concerning the position of James Lawrence Holt and John F. Colburn in the negotiations;

9. That Waialua Company with such knowledge took over the control and completion of such negotiations;

10. That the deed of an incompetent, being voidable only and good until directly attacked, can be cancelled in a court of equity;

11. That the petitioner as an incompetent is entitled to relief in this court unless it clearly

appears that the respondent Waialua Company is in a more substantial equitable position than petitioner;

12. That Waialua Company is not in the "subsequent grantee" class;

13. That the price paid by Waialua Company was clearly a bargain, and not adequate;

14. That Waialua Company did pay $30,000.00 in cash on May 2, 1910, to those who then had and continued to have charge of petitioner and the responsibility for maintenance of petitioner and who continued to maintain petitioner; [159]

15. That the persons who would have knowledge of the uses made of said moneys and the benefit, if any, derived by petitioner, are the persons who are substantially discredited in this court as witnesses;

16. That it would be inequitable to require respondent Waialua Company to show from such witnesses what actually became of the money and its benefits;

17. That the most that can be said for respondent Waialua Company is that, under the unqualified offer of petitioner, said respondent Waialua Company, (including in that phrase innocent stockholders who have dealt with it), should have restored to it said $30,000.00 with simple interest at the reasonable rate of 6% per annum from May 2, 1910, until the date of restoration, as a condition precedent to final cancellation.

By stipulation of the parties it was agreed at the hearing that the question of accounting for the reasonable rental value of an undivided one-third in said property in possession of said respondent Waialua Company since April 10, 1922, should await the determination of the major issue of the right of cancellation and avoidance of the deed of May 2, 1910, so far as petitioner is concerned. Sufficient evidence was introduced, however, to show that substantial rentals would be due in the event of cancellation. Also, sufficient evidence was introduced to show that the value of the interest in fee had substantially increased since 1910.

This is not a suit for partition. As a result of this decision petitioner would become a tenant in common with [160] Waialua Company. Petitioner did not assume that status prior to April 10, 1922. Improvements made by Waialua Company prior to that date were no more than it was entitled to make as the rightful owner of other interests, including the John Dominis Holt life estate; and until 1922 the Company was entitled to exclusive possession. Such improvements were also made to enhance the business of Waialua Company in connection with its rightful use of the premises.

It has been held that a tenant in common is not entitled to reimbursement from its co-tenant for improvements made solely to increase the business of the occupying tenant. 7 R. C. L. page 840, Note 19.

In accordance with the foregoing decision a master will be appointed, with such powers and duties

as may be ordered after due opportunity to the parties to be heard, to determine the reasonable rental value of a one-third undivided interest in fee in said lands commencing April 10, 1922 and thereafter to the date of his report; and upon such report, or other determination of such account, a decree will be entered entitling the petitioner to cancellation and avoidance as to her of the deed of May 2, 1910 and ordering a restoration to her by said Waialua Company of an undivided one-third interest in said lands upon condition that she reimburse the respondent Waialua Company by repayment to it of the sum of $30,000.00 with simple interest at 6% per annum from May 2, 1910, first by credit against rentals found to be due and if such rentals be insufficient then to pay the balance in cash; if said rentals are more than sufficient for such reimbursement to said respondent [161] then such decree shall include a money judgment to petitioner and against respondent Waialua Company for such excess. All matters relative to costs will be determined at the time of presentation of said final decree.

Dated, Honolulu, Hawaii, May 11, A. D. 1929.

[Seal] ALBERT M. CRISTY,
Second Judge, Circuit Court, First Circuit,
Territory of Hawaii. [162]

[Title of Court and Cause.]

Filed at 10 o'clock a. m. July 12, 1929. Sibyl Davis, Clerk.

MOTION TO DISMISS.

Now comes the WAIALUA AGRICULTURAL COMPANY, LIMITED, respondent in the above entitled cause, by its attorneys, ROBERTSON & CASTLE, and moves this Honorable Court that the petitioner's Bill of Complaint in said cause be dismissed upon the following grounds and for the following reasons:

1. That the petitioner has failed to produce evidence to sustain the material allegations in said bill so as to be entitled to any relief in equity.

2. That it appears from the evidence that there has been a failure to join necessary parties in said cause because of such nonjoinder. [163]

3. That it appears from the evidence that the petitioner has been guilty of laches beyond the period provided by the statute of limitations for law actions of like nature and further that it appears from the evidence that the movant and it predecessors in title have been in open, exclusive and adverse possession under a claim of right to the lands described in said bill for a period of more than ten years without interruption against the trustee of the estate of R. W. Holt.

4. That the petitioner has failed to offer to do equity.

This motion is based upon all the records and evidence in the above entitled cause.

DATED, Honolulu, T. H., July 12, 1929.

ROBERTSON & CASTLE,
Attorneys for Respondent, Waialua Agricultural Company, Ltd. [164]

[Title of Court and Cause.]

Filed at 10:35 o'clock a. m. Aug. 1, 1929. Sibyl Davis, Clerk. [165]

APPEARANCE OF ANNE HOLT KENTWELL.

COMES NOW, Anne Holt Kentwell, by her attorney, Barry S. Ulrich, and enters this her appearance in the above-entitled cause and submits to the jurisdiction of the court herein.

Dated at Honolulu, T. H. this 1st day of August, 1919.

ANNE HOLT KENTWELL.
By BARRY S. ULRICH,
Her Attorney. [166]

[Title of Court and Cause.]

SUPPLEMENTAL DECISION RE ACCOUNTING.

Filed at 9:00 o'clock a. m. Aug. 9, 1929. D. K. Sherwood, Clerk. [167]

On May 11, 1929, this Court filed its decision on the merits of petitioner's bill for cancellation of the

deed signed by her on May 2, 1910, finding in that decision that petitioner was entitled to cancellation upon reimbursement to the respondent, Waialua Agricultural Company, Limited, in the sum of $30,000.00 with simple interest at 6% per annum from May 2, 1910. In that decision the Court stated that it was prepared to appoint a master for the purpose of giving further relief incidental to the bill in the nature of an accounting for rents from respondent, Waialua Company, by reason of its ouster through exclusive possession under claim of title. This accounting was to ascertain the reasonable rental value for use and occupation of petitioner's undivided interest in the lands in controversy, from April [168] 10, 1922, the date when petitioner's interest ves d, to the date of final decree.

Upon further proceedings being had in regard to said accounting, it was agreed that the Court would hear the evidence relating to the reasonable rental value of petitioner's one-third interest in the land. Such hearings were had. The value of improvements, if any, were not considered; that being left to adjustment between the parties, or for consideration in any partition that may be had in the future.

This accounting divides itself into two major subdivisions. The so-called Holt lands so far as they have rental value, are concededly available for two major agricultural purposes: (1) lands available for sugar cultivation which were exclusively so occupied by respondent, Waialua Company, in connection with other lands used for its sugar plantation;

(2) lands available for pineapples cultivation which, from April 10, 1922 to January 1, 1923, were subject to numerous leases from Waialua Company, as lessor, to numerous tenants; and from January 1, 1923, under lease executed January 10, 1923, these lands have been leased (together with other lands) to the Hawaiian Pineapple Company, Limited, under a paid-up lease (Exhibit Ac-B1). This paid-up lease is for a 17½ year term commencing January 1, 1923, and has approximately eleven years yet to run.

The respondent, Waialua Company, has from the outset reserved its objections to any accounting. These objections have been already overruled in the record and will not be referred to any further in this decision. In other words it will be assumed in this decision, that the Court [169] has correctly required an accounting to be had. Moreover all evidence relative to rents received, or rental values, represents those values net above taxes. Hence no evidence was necessary relative to deductions for taxes.

PINEAPPLE RENTALS.

There is no dispute that Waialua Company received from numerous tenants, prior to January 10, 1923, rentals net above taxes, one-third of which (representing petitioner's interest in the Holt lands) is equal to $12,333.00.

Waialua Company thought it owned in fee simple, 25/27ths undivided interest in approximately

6,428.45 acres of Holt lands available for pineapple cultivation. It did control the other 2/27ths under leases from the other two Holt heirs. By the decision in this case it appears that 9/27ths of this claimed interest belonged to petitioner, leaving Waialua Company still the owner in fee of 16/27ths undivided interest in this area, and lessee of 2/27ths. In addition to the Holt lands, Waialua Company owned, or controlled through leasehold interests, approximately 5,674 acres more of pineapple lands. In other words, petitioner's interest in terms of acres would be equivalent to 2158.82 acres. Waialua owned or controlled in its own right the balance of the pineapple area, or 9991.18 acres.

As has been stated, the entire pineapple area had been, prior to 1922, leased out to many tenants. The major number of these leases were due to expire. The questions of rental values, leases and tenants for the future were of primary importance in the year 1922. Waialua Company thought it owned or controlled in its own right, the whole area of [170] upwards of 12,000 acres.

After a series of negotiations, Waialua Company and the Hawaiian Pineapple Company, executed an Option Agreement dated October 14, 1922. By this agreement (Exhibit Ac-A1) Waialua Company gave the Pineapple Company an option to lease said 12,000 acres, more or less, of pineapple lands according to definite terms of adjusted rentals for the period of lease, depending upon the actual number of acres finally to be determined, at a rental value

of $15 per acre per annum. This valuation was a substantial increase over former lease rentals. In consideration for this option the Pineapple Company paid Waialua Company $60,000.00 cash and gave Waialua Company the option to BUY a one-third interest in the Pineapple Company at an expressed valuation per share of stock (computed from then book values) which would make up the one-third interest in the Pineapple Company represented by the option. There is no question of fraud but, on the contrary, every evidence of good faith in fixing the rental valuation for the whole contemplated term at the agreed sum of $15 per acre per year. Nor is there any doubt but what the parties to this option agreement contemplated that, if the Pineapple Company took up its option for the lease, the present value of the rental distributed over the period of the lease should be computed at 5% discount rate, to arrive at a paid-up valuation which the Waialua Company could use in credit toward payment pro tanto for one-third interest in the Pineapple Company. The right of either company to take up its respective option was [171] not, however, made dependent upon the exercise of option by the other party.

Waialua Company exercised its right to purchase stock representing one-third value of the Pineapple Company. Immediately on October 14, 1922, Waialua Company purchased 23,000 shares of Pineapple Company stock under the option, paying

$1,214,000.00 in cash. Petitioner disclaims any interest in this purchase.

On November 28, 1922, in contemplation of a 58% stock dividend, Waialua Company elected to purchase 40,114 shares, (the balance of stock under its option), and on December 1, 1922, gave its promissory note to the Pineapple Company for $2,118,019.00 at 5% interest, in payment for such shares. This note was received and accepted by the Pineapple Company and the stock was issued to Waialua Company. On January 4, 1923, Hawaiian Pineapple Company elected to take up the lease of the pineapple lands under the option of October 14, 1922. On January 10, 1923, the lease was executed for the paid-up consideration computed on the actual acreage described therein (12,150 acres). The annual rental (net above taxes) was discounted at 5% for the term of 17½ years, making the present value (1923) for a paid-up lease $2,109,179.25, which amount was credited on the note of Waialua Company of December 1st., and the balance of said note, together with interest from December 1, 1922, to January 10, 1923, was paid to the Pineapple Company by Waialua Company in cash. Waialua Company then bought on the open market sufficient number of additional shares of stock to give it an actual one-third interest in the Pine- [172] apple Company.

Petitioner has elected to ratify this lease and demands an accounting from Waialua Company for her pro-rata share of the consideration for the lease.

Petitioner claims that the substance of the transaction of giving a paid-up lease from Waialua Company to the Pineapple Company involved the receipt by the Waialua Company of SHARES OF STOCK in the Pineapple Company; that is to say, that the Pineapple Company did not pay for this lease in cash, but really paid in shares of stock computed on agreed valuations of stock versus valuations of rental. Hence petitioner demands a computation of the number of shares of stock representing the rental value of the land; an allocation of a proper number of these shares to petitioner's interest; a further computation of the increase in this number through stock dividends; and finally a computation of cash dividends received on such allocated number of shares.

On the other hand the respondent, Waialua Company, contends that the transaction was handled in good faith on the basis of cash values and that the use of the paid-up rent valuation for the liquidation of its existing obligation on the stock purchased was in the nature of a personal investment. That is to say, the Waialua Company maintains that, if an accounting is due petitioner at all (which it denies), it would at the most be required to compute and pay petitioner's proportion of the cash rentals received. This would be based upon the proportion of 2,358.82 acres (representing petitioner's interest in Pineapple lands) to the total area leased, to-wit: 12,150 [173] acres. This proportion would represent (decimal) .17768 of the consideration named in the

lease, or $374,760.36. It must be remembered that this total represents rent at $15 per acre per year on 2,158.82 acres over a term of 17½ years discounted at 5% to equal the present value, as of January 10, 1923, of this paid-up rent.

Taking into consideration the entire history of the negotiations between Waialua Company and the Pineapple Company as evidenced by the series of Exhibits Numbered Ac-A1 to Ac-A29, this Court is of the opinion that the two companies were engaged in a mutually personal transaction. The Pineapple Company wanted an assured and substantial acreage for the production of its product over a substantial term of years. It also wanted the added strength which would be given by obtaining Waialua Company as a substantial, interested stockholder. Waialua Company wanted a fair rental return to be assured on areas of land suitable for pineapple cultivation which it thought it owned or controlled and was attracted also by the opportunity to increase its financial status by becoming a substantial stockholder in the well-established business of the Pineapple Company through cash and rental investments. The lease was so drawn as to make it possible for the Waialua Company to perform independent of any fluctuation of acreage by reason of the interruption from a paramount title holder as to any of the acreage involved in the total leased. In other words the lease was not dependent upon actual ownership of petitioner's interest in the Holt lands. To be sure there is nothing in the record to indicate

that Waialua Company, in 1922 and 1923, [174] had any doubt as to its title to 25/27ths of the whole area, but, the lease was not dependent for its performance upon the legality of that claim. The consideration negotiated between the parties was not dependent upon sole ownership of any particular acreage. The rental value of $15 per acre per annum, adopted in figuring the consideration for the lease, was arrived at as a fair valuation for the rental of that land for pineapple cultivation, regardless of the character of title and interests in the title. It is the only valuation of pineapple land in the record and must be assumed to be a fair and bona fide rental valuation per acre.

Under the facts in evidence this Court finds as a fact that the fair rental value of land suitable for pineapple cultivation in the Holt area, was and is $15 per acre per year. The Court further finds that the stock transaction between Waialua Company and the Pineapple Company was an investment transaction personal to the Waialua Company acting in its own behalf and not as agent or trustee in fact for any other person; that the paid-up consideration named in the lease from Waialua Company to the Pineapple Company (Exhibit Ac-B1) represented the fair paid-up rental value for the lands included within the lease as of January 10, 1923 discounted at 5%; that Waialua Company received this paid-up rental on January 10, 1923; and that the proportion of such rental so received which would represent the petitioner's interest in the lands

leased is and was as of January 10, 1923 the sum of $374,760.36, received by Waialua Company. The Court further finds that the annual [175] rental, if not anticipated by this method of computing the whole period, would have been, (at $15 per acre on 12,150 acres), $182,250.00 per annum for the whole; or $32,382.30 per annum for the petitioner's undivided interest in the pineapple lands so leased to the Hawaiian Pineapple Company by the Waialua Company. The Pineapple Company is in possession under the lease. Petitioner has elected in this proceeding to ratify and take under the lease its proportion of rents received by Waialua Company.

SUGAR RENTALS.

There is no dispute that the respondents exclusively occupied and used 1623 acres of cane lands during the entire period covered by the accounting. This represented the entire area of Holt lands suitable for such use. The question in dispute is as to what rental per acre the Court should adopt as the fair rental value, (such values being, also, NET ABOVE TAXES).

Petitioner's witness, Mr. Gibb, placed the fair rental value average over the whole Holt area at $15 per acre per annum. Respondents contend that the leases of Pioneer Company lands in Maui are the most similar and show a rental value of approximately $7 per acre. While the Pioneer acreage shows crops produced in excess of the crops

produced on the Holt area the exhibits also show the existence of factors making cultivation of the Pioneer area a much more difficult factor and hence more expensive than on the Holt area.

On the other hand the most favorable leases on Oahu introduced by the petitioner affected lands having a much lower average elevation than the Holt areas, as well as [176] having greater productivity.

Respondents show that, at a 5% basis for rental, the production records on the Holt area would average approximately $12.50 per acre. There are also in evidence leases to Waialua Company of lands adjoining the Holt area ranging from $14 to $20 an acre, the higher rentals being on lands having an average mean elevation lower than the average Holt lands. Taking all the factors into consideration including the advantage of having all the Holt lands together, the relative productivity and the rents paid by respondent for nearby leases, $14 per acre seems to be a fair average rental value for the area used by the respondent, Waialua Company.

There being 1623 acres of Holt lands used for sugar purposes and the petitioner having a one-third interest, this would represent an interest equivalent to 541 acres which would yield at $14 per acre a fair average annual rental of $7,574.00 per annum, net above taxes for lands suitable for sugar cultivation.

THE LAW.

In giving full relief in cases involving cancellation of instruments, a Court of equity may settle the accounting between the parties relative to the rent and income and adjust these accounts equitably between the parties. See—Bozarth vs. Banister, 136 S. W. 902 (Ky.); Campbell vs. Spears, 94 N. W. 1126 (Ia.). If this had been a case in which there had been no apparent alienation of Petitioner's interest by petitioner herself and respondent, Waialua Company, had taken exclusive possession under [177] claims arising from others than petitioner, there would clearly have been a legal ouster, as a result of which petitioner would have been entitled to recover not only her share of rents received from a third party, but also for the value of the use and occupation by the ousting co-tenant. See the cases collected in the notes in 27 A. L. R. 184-273; 39 A. L. R. 408-410; Zapp vs. Miller 109 N. Y. 51; Hannah vs. Carver 121 Ind. 278, 279; Adkins vs. Adkins 85 S. E. 490, 491.

It was also conceded in argument by the attorneys for respondent, Waialua Company, that the Statute of Anne, giving a co-tenant out of possession an action for share of rents, is applicable as part of the common law of Hawaii. See—Peterson vs. Kaanaana, 10 Haw. 384, 387; Haw. Com. etc. Co. vs. Waikapu, etc. Co., 9 Haw. 75, 80; Helemano Land Co. vs. Forster, 20 Haw. 252

There are certain findings in the decision on the merits heretofore filed which must always be kept

in mind. The petitioner was found to have been continuously incompetent to execute a conveyance of her interest on May 2, 1910, or to ratify it at any time thereafter. The Court concluded in that decision that the deed in question was voidable on direct attack in equity. Until that deed is cancelled and set aside by this proceeding, the strictly legal rights of the parties would not be affected. When the deed is cancelled and set aside by order of this Court, Petitioner's legal estate of inheritance becomes no longer encumbered by the purported conveyance of 1910.

If there had been no attempt to deal with petitioner's estate, it would have vested on April 10, 1922. In accord- [178] ance with the findings of fact in this decision, it appears that Waialua Company by its exclusive possession since 1922, has received either from third parties or from its own use, the equivalent of very substantial rents. Its right to retain such rents or benefit by such rental value is founded solely upon the deed which this Court has found the petitioner entitled to have cancelled. But the petitioner has at all times been incompetent under the findings of this Court. It would obviously be inequitable to permit the respondent, Waialua Company, to retain the rents and profits flowing from the interest of the petitioner under the cancelled deed. It would also be inequitable to penalize petitioner to the extent of losing the rental value of her interest since April 10, 1922, for delay in asserting her rights. She

was incompetent to act for herself. Until a proper guardian was appointed there was no one competent to act in her behalf either to repudiate the prior deed or to demand present income.

On the other hands, the respondent, Waialua Company, acting in reliance upon its supposed rights under the deed was apparently in rightful possession. It was certainly not acting as agent in fact for the petitioner. Moreover, even if there had been no deed from petitioner to respondent a legal relationship of tenancy in common would not be construed as a trust relationship in the face of open, hostile adverse claim by Waialua Company. Hodgson vs. Federal Oil etc., 274 Y. S. 15; Kennedy vs. De Trafford, 1897 A. C. 180; Kalamaku vs. Wharton, 16 Haw. 228-223. At law the rents and [179] profits appropriated by a tenant in common in possession are not trust funds. Daniel vs. Daniel, 106 Wash. 659, 181 Pac. 215 at page 222. A tenant in common is not a common law bailiff. Wheeler vs. Horne, Willes 208, 125 English Reprint 1135.

The liability under the Statute of Anne is for debt. British Mutual Investment Company vs. Smart, L. R. 10 Ch. Ap. Cas. 567 (1875); Blood vs. Blood, 110 Mass. 545; Bird vs. Bird, 14 Fla. 424, 21 Am. Rep. 296; Bates vs. Hamilton, 144 Mo. 1, 64 A. S. R. 407; Hudson vs. Coe, 79 Me. 83, 1 A. S. R. 288; Henderson vs. Eason, 17 Q. B. 701; Scott vs. Guernsey, 60 Barb. (N. Y.) 163, 180.

From the foregoing cases it is clear that one who is in fact and law a tenant in common and who is in

open, hostile and exclusive possession is not a trustee of the ousted co-tenant but is regarded as a debtor of the ousted co-tenant to the extent of the excess rentals received and also to the extent of the rental value of the ousted co-tenant's interest which was used by the ousting co-tenant.

Applying this legal principle to the equitable situation at bar it is impossible to see by what theory Waialua Company could be construed to be a trustee for a party whose interest it thought it had purchased. A finding in this proceeding that Waialua Company dealt with an incompetent and has no right to retain the fruits of such a dealing cannot be used to create a trustee relationship that did not exist in fact. All that the equities demand is that Waialua Company turn over to petitioner through her proper guardian in this proceeding, the reasonable rental value of petitioner's interest which petitioner [180] would have been entitled to receive but for the inequitable deed. See, 3 Black on Rescission (2d Ed.) Sec. 634.

Moreover, in the findings of fact herein, this Court has determined that the transactions between Waialua Company and the Hawaiian Pineapple Company were in the nature of a personal investment by Waialua Company so far as the stock transaction was concerned. This conclusion is strengthened by the fact that the transactions took place in 1922 and 1923, more than five years before Waialua Company was informed by the demand of petitioner's guardian that petitioner's former deed was repudi-

ated on the ground of incompetency. Further the facts show that Waialua Company invested by purchase and sale in the stock of the Pineapple Company before the Pineapple Company finally bound itself to take the lease in question.

It has been held that, where a purchase has been made and a legal obligation to pay has been created, the use of funds due another to make payment thereafter does not of itself create a resulting trust. Botsford vs. Burr, 2 John Ch. 405; French vs. Shaplor, 83 Ind. 265, 43 Am. Dec. 67; Tilford vs. Torrey, 53 Ala. 120. Neither by analogy to the legal situation which would have obtained between existing tenants in common under the foregoing authorities, nor by the analysis of the situation existing in fact at the time Waialua Company was negotiating with the Pineapple Company for the lease of 1923, can this Court discover any equitable principle under which petitioner could be given the right to be a sharing participant in the personal investment ability of the officers and directors of Waialua [181] Company. Petitioner is entitled in equity to credit and payment for the reasonable rental value of her interests, enjoyment of which she has been inequitably deprived. So much of that rental value as Waialua Company has received from third parties should be computed in its cash value and credited to petitioner's account.

A co-tenant at law has an election to ratify a lease by a fellow co-tenant and claim a proportionate share of the benefits, or to repudiate the lease and

assert rights against the lessee. Helemano vs. Forster, 20 Haw. 252 at page 254; 17 A. & E. Encyc. 674; Starks vs. Sickes, 8 Gray 609 (Mass.), 69 Am. Dec. 270; McNeely vs. So. Penn. Oil Co. 52 S. E. 480 (W. Va.); Enterprise Oil Co. vs. National Transit Co. 172 Pa. State 421, 52 A. S. R. 746.

The petitioner has elected in this proceeding to ratify the lease of 1923 between Waialua Company and the Pineapple Company. This ratification by the petitioner cannot have the force and effect to impose at this time a trustee relationship that did not in fact exist at the time of the execution of the lease. The only effect of such ratification would be to confirm the lease for its term so far as petitioner is concerned and to entitle the petitioner on the other hand to use the consideration upon which the lease was figured for the purpose of computing the proportionate rental value of her interest which the lessee proportionately gave for the right to use the land and for which Waialua Company was compensated in excess of its own interest. These companies figured this value bona fide on a cash basis. This cash basis represented fair rental values. The fact that the values so agreed upon were [182] used by Waialua Company for a personal investment program does not change a debt pro tanto into a trust.

Confusion is introduced into this computation by the fact that Waialua Company accepted in 1923 the then present value as of that date for all the rentals to become due under the full term discounted

at 5%, so that Waialua Company could obtain immediate credit for such paid-up value on its investment program. This paid-up rental value as of 1923 was arrived at by discounting the annual rentals during the full term at 5%. Hence while the consideration named in the lease is the fair cash value as of that date, it is not necessarily conclusive on the equities of the case, as to the sum which today would represent by fixed proportion, what petitioner has been deprived of in fair rental value on the basis of the lease.

Respondent, Waialua Company, has called the attention of the Court to Section 3585 R. L. 1925, on the subject of interest, maintaining that this Section is controlling upon this Court in determining what is equitably due to the petitioner. This Section provides in part for a statutory rate of interest "* * * for money due on settlement of accounts, from the day on which balance is ascertained and for money received to the use of another from the date of a demand made". There is no doubt that this Section applies in actions at law. Waialua Agricultural Company vs. O. R. & L. 19 Haw. 446. But this proceeding is neither an action at law to settle admitted accounts and the striking of a balance, nor is it strictly an action or a substitute for an action for money had and received. The object of this [183] proceeding is to put an adjudicated incompetent and a party who has inequitably dealt with such incompetent in as near an equitable status quo as can be done upon final decree. The

incompetent's deed is to be cancelled. It has been determined in the former decision herein, that such cancellation shall entail the reimbursement to Waialua Company of the $30,000.00 it paid on May 2, 1910, with interest thereon at 6%, as an equitable condition to such cancellation. On the other hand respondent has used the incompetent's property which (1) as to the sugar lands has a definite, computable, annual rental value from the date petitioner's interest would have vested; (2) as to the pineapple lands, respondent received prior to January 1, 1923 a definite sum representing the rental value of petitioner's interest (se Ex. Ac-C); and (3) respondent obtained the advance payment as of January 10, 1923, of a large sum of cash which can be apportioned as of that time as representing the THEN rental value of petitioner's interest.

Computing these values as of January 10, 1923, we have the following cash equivalents representing what the incompetent would have been entitled to if she had had proper representation:

(1) 9/12ths of one year's rental on Sugar Lands (See pg. 10 herein)	$ 5,680.50
(2) Proportionate rentals from miscellaneous pineapple leases, (1/3 of Ex. Ac-C) (pg. 3)	12,333.00
(3) Proportionate share of paid-up cash rental under the lease (pg. 7)	374,760.36
Total of the above as of January 10, 1923	$392,773.86

[184]

Forward		$392,773.86
To be credited against the above:		
	$30,000.00	
Interest at 6 % on above from May 2, 1910 to January 10, 1923. (12 yrs. 8 mos. 8 days)	$22,840.00	
Total deduction by way of credit		52,840.00
NET value as of January 10, 1923		$339,933.86

The statute on interest heretofore referred to, primarily refers to a situation where competent parties have left their accounts in abeyance or where the statute is obviously based on the assumption of competent parties impliedly leaving one in control of monies had and received until demand is made for payment. See an analogous statute construed in Armijo et al. vs. Neher. 72 Pac. 12, 13 (N. Mex). This Court is unable to see how it fits a situation where a Court of equity is attempting to arrive at an equitable adjustment demanded by the case at bar. The respondent has received value really belonging to an incompetent in the eyes of equity. While it should not be penalized by excessive sums, yet it should not be permitted on the other hand, to anticipate the use of such sum without cost, simply because the incompetent has had no proper representation heretofore.

Respondent has objected to disclosing what profits it may have made in anticipating the use of rights which are herein found to have belonged equitably to petitioner. This Court has sustained

such objection on the grounds that respondent was neither the agent nor trustee of petitioner and further, that the real question is the reasonable rental value of petitioner's interest. But in sustaining this objection this Court is not in the position of permitting this refusal [185] to disclose profits to operate to the extent of blinding the Court to the fact that the use of money has value or to the further fact that a cash substitute for use and occupation in each of the years from 1922 to date as well as paid-up rentals for the unexpired term of the pineapple lease has to be arrived at in fairness to the petitioner.

Respondent anticipated the revenue in the case of the pineapple area. The proportionate amount of that anticipated revenue is easily computed as of 1923. To bring that figure to its fair equivalent of the rents which petitioner has been deprived of the use of, a reasonable interest rate is the simplest method of computation; not that interest is due as a matter of right, but that interest on sums in hand, obtained by both hostile use and by anticipating revenue, is a proper and equitable means of arriving at the value of petitioner's interest as used during these years as well as the value of the use which petitioner has agreed to during the balance of the years of the pineapple lease. The record shows that first mortgage rates in Hawaii vary from 7% to 8%; that the companies used a 5% rate for discount purposes; that a 6% rate is often used in connection with mortality tables; that Waialua Company actu-

ally profited on the pineapple investment greatly in excess of any of these rates. A 6% rate seems to this Court an equitable rate to aid in arriving at the equitable compensation due herein.

Also from the record herein, it appears to be customary to figure and pay rentals on some form of annual or semiannual basis. Hence the adoption of annual stops on sugar rentals appears equitable. [186]

Respondent's attorneys introduced evidence of what a realtor would be entitled to charge for negotiating a lease. No such expense, however, was incurred or paid by Waialua Company. Nor did it act as, or ever admit that it was, the agent in fact of petitioner. It acted on its own behalf, using in part what now appears to have ben equitable the petitioner's lands.

Evidence was, also, given as to the fee paid to the attorneys for Waialua Company for drawing the lease. It is obvious from the record that the major service of attorneys in this connection involved conforming a usual lease to the intricate terms of respondent's personal investment program and the protection of both parties necessary by reason of anticipating rentals in present payment to assist the investment. No segregation of this expense was attempted in the evidence. Hence no deduction is made for any arbitrary proportion thereof.

CONCLUSION.

Hence it is the conclusion of the Court based upon the foregoing discussion that in addition to the can-

cellation of the deed of May 2, 1910; respondent shall account with and pay to petitioner, the NET SUM heretofore set forth as of January 10, 1923, to-wit: $339,933.86, plus 6% interest from that date to the date of the decree; and that respondent further acount and pay to the petitioner additional rentals for sugar lands at the rate of $7,574.00 per annum from January 10, 1923, with interest at 6% per annum, with annual stops, to the date of the decree. It is further [187] decided that under the election of petitioner to ratify the lease with the Hawaiian Pineapple Company, that the decree shall provide that petitioner is in all respects bound not to interfere with the use of the lands described in the lease to the Hawaiian Pineapple Company according to the terms of said lease.

That a decree issue in accordance with the decisions herein.

Dated at Honolulu, this 9 day of August, 1929.

[Seal] ALBERT M. CRISTY

Second Judge, First Circuit Court, Territory of Hawaii.

In the Circuit Court of the First Judicial Circuit Territory of Hawaii.

E-2915.

Bill for Cancellation, Accounting and Incidental Relief.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN von HOLT, her Guardian,
Petitioner,

vs.

WAIALUA AGRICULTURAL COMPANY, LTD., a Hawaiian corporation, and JAMES L. HOLT,
Respondents.

DECREE.

Filed at 10:00 o'clock A. M., Oct. 16, 1929, D. K. Sherwood, Clerk. [189]

Pursuant to and confirming the Decision of this Court heretofore made and entered herein on, to-wit, May 11, 1929, and pursuant to and confirming the Supplemental Decision of said Court made and entered on, to-wit, August 9, 1929.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That that certain deed dated May 2, 1910, by and between John Dominis Holt, Eliza R. P. Christian, Annie Holt Kentwell and Lawrence K. Kentwell, therein named as Grantors, and James L. Holt, therein named as Grantee, said deed being

described and referred to in the Petition and Amended Petition on file herein, a copy of which deed being annexed to said Amended Petition and made a part thereof, and marked Exhibit "B", be and it is hereby declared and adjudged cancelled, annulled and void and of no effect as to Eliza R. P. Christian named as Grantor [190] therein, being the same Eliza R. P. Christian, Petitioner herein.

2. That, as against all parties personally appearing herein and submitting to the jurisdiction of this Court herein, to-wit, Waialua Agricultural Company, Ltd., James L. Holt, and Annie Holt Kentwell, the said Eliza R. P. Christian is and has been since April 10, 1922, the owner in fee simple of an undivided one-third (1/3) interest in and to the following described property:

(a) A portion of the Ahupuaa of Paalaa being a portion of Apana 34, L. C. A. 7713, Royal Patent 4475, containing an area of 12018.81 acres more or less (said parcel of land being more particularly described in Exhibit I hereto annexed and made a part hereof);

(b) The lands described in Royal Patent 973 to Robinson et al, containing an area of 1902 acres;

(c) The lands described in Royal Patent 431 to Kanohanui, containing an area of 100 acres;

(d) The lands described in Royal Patent 235 to Jerome and Louis Johnson, and Topliff, containing an area of 36 acres;

(e) The lands described in Royal Patent 238 to J. F. Anderson and F. Davis containing an area of 25.8 acres;

(f) All kuleanas or grants lying within the above described land.

3. That Petitioner herein, as tenant in common of said land with Waialua Agricultural Company, Ltd., since April 10, 1922, do have and recover from said Respondent Waialua Agricultural Company, Ltd., (1) as past and future rentals for Petitioner's interest in the pineapple lands described in that certain lease (dated January 10, 1923) by and between Waialua Agricultural Company, Ltd., and [191] Hawaiian Pineapple Company, Ltd. (being Exhibit Ac-B1, in this case), said lease expiring July 1, 1940, and (2) as and for rentals upon all other lands hereinabove described as to the date of this decree, the total sum of $540,906.07; payment of the foregoing sum together with any other sums included in this decree, to be made to the duly appointed and acting guardian of the Petitioner herein;

4. That, better to effectuate this decree, the Respondent, Waialua Agricultural Co., Ltd., do deliver up to the Clerk of this Court, for cancellation as to Petitioner herein, the original of that certain deed of May 2, 1910, hereinabove referred to, and for endorsement thereon by said Clerk,

"The above and foregoing deed of May 2, 1910, is hereby cancelled, annulled and void as to Eliza R. P. Christian named as Grantor

therein, by reason of the incompetency of said Eliza R. P. Christian, By Order of the Court under Decree in the Circuit Court of the First Judicial Circuit Territory of Hawaii, in Equity 2915, said Decree being dated ———.

———————————

Clerk".

And, further, that Respondent, Waialua Agricultural Company, Ltd., by appropriate indenture do release and forever quit-claim unto the said Eliza R. P. Christian, Petitioner herein, all of the right, title and interest in an undivided one-third (1/3) interest in fee in the said lands, referred to in paragraphs 2—a, b, c, d, e and f, hereinabove, purported to have been conveyed and granted by the Petitioner herein by virtue of said deed of May 2, 1910; [192]

5. That Petitioner herein, having accepted, ratified and adopted that certain lease by and between Waialua Agricultural Company, Ltd., and Hawaiian Pineapple Company, Ltd., dated January 10, 1923, as above referred to in paragraph 3, hereof, the rights of said Hawaiian Pineapple Company, Ltd., under and by virtue of said lease are in all respects confirmed as to the Petitioner's interest in said lands;

6. That this decree is granted without prejudice to such rights, if any, as said Respondent, Waialua Agricultural Company, Ltd., may have against any persons other than said Eliza R. P. Christian; and also without prejudice to an accounting in the event

of partition by or between Petitioner and said Waialua Agricultural Company, Ltd., for or on account of permanent improvements, if any, which may have been made by said Respondent upon the lands covered by this decree, the question of such improvements, if any, being expressly left open herein.

7. That petitioner do further have and recover of the Respondent, Waialua Agricultural Company, Ltd., the sum of $2,256.53, taxed as costs herein.

Dated at Honolulu, T. H., this 16th day of October, 1929.

By the Court:

[Seal] DOROTHY M. FEDER
Clerk.

Approved:

ALBERT M. CRISTY
Presiding Judge. [193]

EXHIBIT I.

DESCRIPTION OF PORTION OF APANA 34 R. P. 4475 L. C. A. 7713

LOT NO. 1: Beginning at a pipe on the east side of the Government road, and being the north west corner of Grant 607 to J. S. Emerson, the co-ordinates of said pipe referred to the "Maile" Triangulation Survey Station being north 18397.35 feet and west 4913.52 feet. Thence running by true azimuths as follows:

1.	201	Degrees	00′ 00″	1,589.2	Feet along Government road;
2.	264	"	27′ 00″	595.85	" along stone wall;
3.	275	"	42′ 00″	356.40	" do.
4.	266	"	45′ 00″	407.24	" do.
5.	210	"	15′ 00″	382.04	" crossing the Halemano stream to its east bank;
6.	255	"	30′ 00″	146.5	" along stone wall on the south side of L. C. A. 2856 Apana 1 to Kea;
7.	235	"	15′ 00″	260.7	" along stone wall on the south side of L. C. A. 2856 Apana 1 to Kea;
8.	151	"	45′ 00″	312.2	"
9.	210	"	45′ 00″	385.4	" along stone wall and the boundary of Kawailoa;
10.	214	"	45′ 00″	427.0	" along the same;
11.	240	"	45′ 00″	521.4	" along the boundary of Kawailoa;
12.	225	"	40′ 00″	484.7	" along the boundary of Kawailoa to a stone marked "A";
13.	269	"	45′ 00″	483.8	" along the boundary of Kawailoa;
14.	220	"	15′ 00″	170.3	" along the same;
15.	220	"	45′ 00″	156.0	" along the boundary of Kawailoa to the center of Opaeula stream, the co-ordinates of said point referred to Maile Triangulation Survey Station being North 22,242.2 feet and West 649.36 feet;

16. Thence running along a south-easterly direction along the center of the Opaeula Stream in all its windings to a bolt in large rock, the direct azimuth and distance being 283 degrees 06′ 30″ 16,939.9 feet, the co-ordinates of said bolt referred to the "Maile"

Triangulation Survey Station being north 18,400.4 feet and east 15,849.1 feet;

17. Thence running along a southeasterly direction along the center of the Opaeula Stream in all its windings to a point which is by direct azimuth and distance 283 degrees 11′ 28″ 20,087.8 feet; [194]

18. 341 Degrees 17′ 38″ 1,688.0 Feet along the land of Kawailoa to U. S. A. Triangulation Survey Station "Peahinaia", the co-ordinates of said Survey Station referred to Maile being North 12,217.6 feet and East 35,948.3 feet;

19. 341 " 17′ 38″ 6,450.0 Feet along the West side of the remainder of Paalaa-Uka called Ili of Helemano to the North bank of the Helemano stream;

20. Thence running along the south side of Paalaa-Uka called Ili of Helemano, in a southeasterly direction along the north bank of the Helemano stream to a point known as "Kaape Fishing Place", the direct azimuth being 281 degrees 34′ 00″ 4,304.0 feet;

21. 11 Degrees 00′ 00″ 900.0 Feet along the West side of Paalaa-Uka;

22. 50 " 00′ 00″ 2,700.0 Feet along the West side of Paalaa-Uka to a point, and from which point the Helemano Triangulation Station marked by a 1-14″ Galvanized pipe is by true azimuth and distance 115 deg. 30′ 560 feet, and the co-ordinates of said Triangulation Station referred to Government Survey Triangulation Station "Maile" being North 2866.9 feet, and East 39,488.2 feet;

23. Thence running along the top of a ridge, being the dividing line betwen the Paalaa and the Wahiawa watersheds to a Forest Reservation Monument marked by a galvanized pipe, the direct azimuth and distance being 68 degrees 31′ 40″ 4252.2 feet; the co-ordinates of said Monument referred to the Triagulation Station "Maile" being North 1,069.3 feet and West, 33,036.4 feet;

24. Thence running along the top of said dividing ridge to the south bank of the Poamoho Stream, the direct azimuth and distance, being 76 degrees 10′ 47″ 1658.4 feet;

25. Thence running along in a westerly direction along the south bank of the Poamoho Stream in all its windings, and being the boundary of Grant 973 to Robinson and Lawrence to a point near the intake of the Poamoho ditch, the direct azimuth and distance being 130 degrees 52′ 20″ 3,068.9 feet; [195]

26. Thence running along in a south westerly direction in all its windings along the south bank of the Poamoho stream and the boundary of Grant 973 to Robinson and Lawrence to the northeast corner of Land Court Application No. 262, the direct azimuth and distance being 74 degrees 13′ 02″ 11,614.11 feet;

27. Thence running westerly following the South bank of the Poamoho Stream in all its windings and the boundary of Land Court Application No. 262 to a point on the Kaheeka boundary 151 degrees 30′ 30″ 500.0 feet from an iron pipe and concrete monument on the south side of the Poamoho Gulch,

which is in turn 270 degrees 38′ 14,130 feet from the Maile Triangulation Station, the direct azimuth and distance being 96 degrees 9′ 7,079 feet;

28.	151	Degrees 30′ 30″	10,305.0	Feet along the Kaheeka boundary to a bend marked by an iron pipe and concrete monument from which monument, the Maile Triangulation Station is by true azimuth and distance 43 degrees 1′ 30″ 13,014 feet;
29.	123	" 41′ 00″	8,572.6	Feet along Kaheeka boundary to a pipe in concrete;
30.	141	" 45′ 00″	1,504.0	Feet along the Kaheeka boundary to the northeast corner of Grant 607 to J. S. Emerson, marked by a concrete monument;
31.	113	" 11′ 00″	3,720.0	Feet along Grant 607 to J. S. Emerson to an iron pipe and concrete monument;
32.	122	" 43′ 00″	2,744.5	Feet along Grant 607 to J. S. Emerson to the point of beginning and containing a gross area of 12,020.47 acres, and a net area of 12,002.53 acres after deducting the following privately owned lands;

R. P. 907	L. C. A. 2735	Apana 2 to Pakanaka,	6.38 acres
R. P. 2841	L. C. A. 3868	Apana 1 to Pila	6.86 "
R. P. 888	L. C. A. 8349	Apana 1 to Koha,	1.62 "
R. P. 1490	L. C. A. 4318	Apana 1 to Kalapaku	3.08 "
		TOTAL	17.94 acres

And further deducting from said 12,002.53 acres an undivided twenty-five twenty-sevenths interest in an area of five (5) acres sold by warranty deed of the Waialua Agricultural Company, Limited to the

Territory of Hawaii dated July 19, 1926, Recorded Book 837, Pages 168, 169, said total of five acres being bounded as follows:

Beginning at an iron pipe at the east corner of this piece and on the South side of road reservation, the coordinates of said point of beginning referred to Government Survey Trig. Station "Maili" being 1978.8 feet North and 19475.3 feet East, as shown on Government Survey Registered Map No. 2056, and running by true azimuths: [196]

1. 20° 10′ 300.0 feet to an iron pipe;
2. 110° 10′ 726.0 feet to an iron pipe;
3. 200° 10′ 300.0 feet to an iron pipe;
4. 290° 10′ 726.0 feet along road reservation to the point of beginning.

Area 5-00/100 acres.

Known as the Helemano School Lot.

LOT 2. Beginning at a point of the west side of the Government road marked by a concrete monument, and being the northeast corner of Grant 236 Apama 2 to Davis the co-ordinates of said concrete monument referred to Maile Triangulation Survey Station being 18,424.1 feet north and 4,955.16 feet west, and the azimuth and distance of the Station 1 of Lot 1 from said concrete monument being 302 degrees 43 minutes 49.5 feet; thence running by true azimuths:

1. 146 Degrees 40′ 1183.2 Feet along the north side of Grant 1630 to Kawaioloa;
2. 249 " 29′ 1294.0 Feet along the land of Kawailoa;
3. 21 " 17′ 1547.6 Feet along the west side of Government road to the point of beginning;

Area 17.13 acres more or less.

LOT 3. Beginning at the southeast corner of this piece and station 5 of Lot 1 the co-ordinates of said point referred to the "Maile" Triangulation Survey Station being 19,926.1 feet north and 2,987.74 feet west, thence running by true azimuths:

1.	195	Degrees	00′	136.0 Feet along the west bank of the Helemano stream;
2.	105	"	00′	264.7 Feet along the south side of Apana 1 of L. C. A. 2735 to Pakanaka;
3.	16	"	00′	122.8 Feet along the same;
4.	79	"	30′	87.0 Feet along the same;
5.	353	"	00′	85.2 Feet along the same;
6.	266	"	45′	330.0 Feet along Lot 1 and line of old stone wall to point of beginning, area 1.23 acres, more or less.

LOT 4. Beginning at the southeast corner of this piece at a point on the boundary of Lot 1 said point being the southwest corner of Apana 1 of LCA 2735 to Pakanaka, the true azimuth and distance of said point from Station 4 of Lot 1 being 95 degrees 42 minutes 149.8 [197] feet and the coordinates of said Station 4 of Lot 1 referred to the "Maile" Triangulation Survey Station being 19,903.0 feet north and 3,394.3 feet west, thence running by true azimuths:

1.	208	Degrees	30′	177.6 Feet along Apana 1 of L. C. A. 2735 to Pakanaka;
2.	132	"	15′	66.0 Feet along the southerly bank of the Helemano Stream;
3.	22	"	41′	212.3 Feet along the east side of Apana 4 of L. C. A. 2856 to Kea;
4.	275	"	42′	46.2 Feet along Lot 1 and stone wall to point of beginning, area 0.24 acres, more or less.

LOT 5. Beginning at a southerly corner of this piece, by true azimuth and distance from Station 3 of Lot 1 190 degrees 27 Minutes 249.3 feet and the co-ordinates of said station of Lot 1 referred to "Maile" Triangulation Survey Station being 19,938.6 feet north and 3,750.95 feet west, thence running by true azimuths:

1.	121	Degrees	19′	57.15	Feet;
2.	210	"	00′	92.40	"
3.	296	"	30′	83.80	"
4.	45	"	00′	102.30	" along the west side of Apana 10 of L. C. A. 7342 to Kuokoa to point of beginning, area 0.15 acres more or less.

LOT 6. Beginning at a southeasterly corner of this piece on the southeasterly boundary of Apana 1 of L. C. A. 2859-B to Kaluhia, by true azimuth and distance from Station 3 of Lot 1 192 degrees 22 minutes 553 feet and the co-ordinates of said Station 3 of Lot 1 referred to the "Maile" Triangulation Survey Station being 19,938.6 feet north and 3,750.95 feet west, thence running by true azimuths as follows:

1.	224	Degrees	30′	59.4	Feet along the easterly side of L. C. A 2859-B to Kaluhia;
2.	304	Degrees	53′	65.50	Feet;
3.	32	"	30′	33.70	"
4.	106	"	55′	80.80	" to the point of beginning, area 0.07 acres more or less.

LOT 7. Beginning at the south corner of this piece, at a point which is by true azimuth and distance from Station 3 of Lot 1, 192 degrees 29′

572 feet, the co-ordinates of said Station 3 of Lot 1 referred to the "Maile" Triangulation Survey Station being 19,938.6 feet north and 3,750.95 feet west, thence running by true azimuths: [198]

1.	150	Degrees	15′	105.6	Feet;
2.	255	"	00′	74.6	"
3.	344	"	02′	77.65	"
4.	48	"	30′	54.8	" to the joint of beginning, area 0.13 acres, more or less.

LOT 8. Beginning at the westerly corner of this piece on the east boundary of L. C. A. 2879 Apana 2 to Kuaiwa and being by true azimuth and distance from the northeast corner of said L. C. A. 2879 Apana 2 to Kuaiwa 36 deg. 30′ 133.4 feet and from Station 3 of Lot 1, 178 degrees 10′ 828 feet the co-ordinates of said Station 3 of Lot 1 referred to the "Maile" Triangulation Survey Station being 19,938.6 feet north and 3,750.95 feet west, thence running by true azimuths.

1.	328	Degrees	00′	153.8	Feet;
2.	235	"	15′	75.2	"
3.	144	"	45′	176.13	"
4.	36	"	30′	70.°	" along the east side of L. C. A. 2879 Apana 2 to Kuaiwa to the point of beginning, area 0.27 acres more or less.

LOT 9. Begining at the easterly corner of this piece and being by true azimuth and distance from the north easterly corner of L. C. A. 2859-B Apana 1 to Kaluhia 45 degrees 00′ 33 feet and from Station 3 of Lot 1, 202 degrees 10′ 752 feet,

the co-ordinates of said Station 3 of Lot 1 referred to the "Maile" Triangulation Survey Station being 19,938.6 feet north and 3,750.95 feet west, thence running by true azimuths:

1. 45 Degrees 00′ 74.6 Feet along the west side of LCA 2813 to Kauloaiwi;
2. 145 " 00′ 124.7 Feet;
3. 213 " 00′ 59.4 "
4. 317 " 10′ 135.2 " to the point of beginning, area 0.19 acres, more or less.

LOT 10. Beginning at the southwest corner of this piece, same being the southeast corner of Apana 2 of L. C. A. 2920 to Hika, the true azimuth and distance of said initial point from Station 3 of Lot 1 being 164 degrees 45′ 663.0 feet, the co-ordinates of said Station 3 referred to "Maile" Triangulation Survey Station being 19,938.6 feet north and 3,750.95 feet west, thence runing by true azimuths as follows: [199]

1. 162 Degrees 08′ 87.1 Feet along the west side of L. C. A. 2920 Apana 2 to Hika;
2. 247 " 00′ 37.0 " along same;
3. 261 " 00′ 29.0 " along the west side of L. C. A. 2879 Apana 2 to Kuaiwa;
4. 348 " 45′ 82.5 " along same;
5. 68 " 00′ 56.1 " along the same to point of beginning, area 0.12 acres, more or less.

LOT 11. Beginning at the southeasterly corner of this piece and the northeast corner of L. C. A. 2879 Apana 1 to Kuaiwa the true azimuth and distance from Station 3, of Lot 1, being 177 degrees 45′ 392 feet, co-ordinates of said Station 3

referred to "Maile" Triangulation Survey Station being 19,938.6 feet north and 3,750.95 feet west, thence running by true azimuths:

1.	92 Degrees	08′	66.0 Feet	along the north side of L. C. A. 2879 Apana 1 to Kuaiwa;
2.	148 "	00′	51.5 Feet	along the east side of L. C. A. 2887 Apana 2 to Leleahina;
3.	248 "	30′	132.0 Feet	along the south side of L. C. A. 2879 Apana 2 to Kuaiwa;
4.	17 "	22′	99.0 Feet	along the west side of L. C. A. 2813 to Kauloaiwi to the point of beginning, area, 0.15 acres, more or less.

LOT 12. Beginning at the southwest corner of this piece on the east side of the Government Road and being Station 2 of Lot 1, the co-ordinates of said Station 2 referred to "Maile" Triangulation Survey Station being 19,881.0 feet north and 4,344.0 feet west; thence running by true azimuths:

1.	264 Degrees	27′	271.9 Feet	along stone wall;
2.	200 "	00′	180.2 Feet	along the west side of L. C. A. 7342 Apana 11 to Kuokoa;
3.	102 "	04′	243.0 Feet	along the south side of L. C. A.'s 2859 Apana 2 to Kaluhiā and 2920 Apana 1 to Hika;
4.	21 "	00′	264.0 Feet	along the east side of the Government Road to the point of beginning, area 1.23 acres, more or less.

[200]

TOTAL AREA.

Lot 1, 12,002.53 acres less 25/27 of 5 acres for Helemano School Lot	= 11,997.90	Acres
Lot 2	17.13	"
Lot 3	1.23	"
Lot 4	0.24	"
Lot 5	0.15	"
Lot 6	0.07	"
Lot 7	0.13	"
Lot 8	0.27	"
Lot 9	0.19	"
Lot 10	0.12	"
Lot 11	0.15	"
Lot 12	1.23	"
	12,018.81	"

[201]

In the Supreme Court of the Territory of Hawaii.
October Term, 1930.

No. 1920.

Appeal from Circuit Judge, First Circuit.
Hon. A. M. Christy, Presiding.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her Guardian,

Petitioner,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian Corporation, and JAMES L. HOLT,

Respondents.

OPINION OF THE SUPREME COURT.

Filed April 18, 1931 at 11:40 o'clock A. M. J. A. Thompson, Clerk, Supreme Court. [202]

Argued February 2, 3, 4, 1931.
Decided April 18, 1931.

PERRY, C. J., BANKS AND PARSONS, JJ.

Deeds—validity—mental incompetency.

The deed of a person who is mentally incompetent to execute it but whose incompetency has not been judicially ascertained and is otherwise unknown to the beneficial grantee is not void solely because of the incompetency of the grantor but merely voidable.

Same—cancellation—restoration to status quo.

In a suit to have such a deed canceled it will be set aside regardless of the adequacy of the consideration and the good faith of the beneficial grantee in dealing with the incompetent if such grantee can be restored to his status quo ante and no injustice will be done him by the cancellation of the deed. [203]

Same—same—same—increase in value of land.

In a suit to cancel the deed of a grantor, who is mentally incompetent to execute it, conveying a contingent interest in land, the restoration of the beneficial grantee to his status quo is not prevented by the increased value of the interest conveyed, which increase is the result of natural causes; nor is the fact that such grantee has, during his occupancy of the land, after receiving the deed, placed permanent improvements thereon an impediment to his restoration to his status quo if upon cancellation of the deed he and his grantor become tenants in common of the land. In such circumstances he can by a suit for partition secure full restoration of or compensation for such improvements.

Insane Persons—laches—statute of limitations.

Laches is not imputable to a person whose mind is so enfeebled as to incapacitate him from executing a valid deed to an interest in land, nor is such person barred by our statute of limitations if in a suit for the cancellation of the deed more than six years from its execution have elapsed.

Contingent Remainders—demisability.

A contingent remainder in land is demisable.

Insane Persons—deeds—cancellation—merger of prior lease.

When in a suit for the cancellation of a deed on the ground of the mental incompetency of the grantor the deed is canceled and it appears that prior to the deed the grantor had joined in a lease of the land to the bene- [204] ficial grantee, the term of which had not expired at the time of the trial, the lease is not merged in nor extinguished by the deed.

Pleading—issues.

When in a suit to cancel a deed to an interest in land the deed is set aside because of the mental incompetency of the grantor and it appears that prior to the deed the grantor had joined as a consenting party in a lease to the respondent, the term of which had not expired at the time of the trial, and the issue of whether the lease was invalid as to her because of her mental incompetency was not within the issues presented by the pleadings, a decree for rents against the respondent who claimed the right of possession under the lease is erroneous.

Landlord and Tenant—rents—assignment.

An instrument in writing which is valid as an assignment of the rents derivable from land should, although for statutory reasons it might be void as a conveyance of an interest in the land itself, be given effect as an assignment of

rents when giving it such effect is necessary to the accomplishment of the purpose the assignor intended to accomplish. [205]

OPINION OF THE COURT BY BANKS, J.

This is a suit in equity brought by Eliza R. P. Christian, an alleged mental incompetent, by her duly appointed guardian, for the cancellation of a deed of conveyance of a contingent interest in land situated on the Island of Oahu, and for other incidental relief. The circuit judge before whom the case was tried entered a decree canceling the deed so far as it related to the petitioner and as incidental relief decreed that the Waialua Agricultural Company, one of the respondents, pay to the guardian of the petitioner the sum of $540,906.07. The Waialua Agricultural Company brings the case here on appeal from the decree.

The deed in question was executed by the petitioner at Oxford, England, on May 2, 1910, the grantee being James L. Holt, a respondent in the instant case. At that time the petitioner, by virtue of the will of her grandfather, R. W. Holt, long deceased, and by virtue of her being the only surviving child and prospective heir of John Dominis Holt, who was then living, and who under the will of R. W. Holt was given a life estate, was the owner of an estate in remainder in an undivided one-third interest in the lands described in the deed. This interest passed by successive conveyances from grantor to grantee until on July 20, 1921, it came finally to rest in the Waialua Agricultural Com-

pany, where it remained unchallenged until May 8, 1928, when the present suit was brought.

On April 10, 1922, John Dominis Holt, the life tenant, died leaving surviving him as his sole heir at law his daughter, Eliza R. P. Christian. Upon the happening of this event Eliza's contingent estate in remainder ripened into a vested estate in fee simple. The deed executed by her on May 2, 1910, purported [206] to convey to James L. Holt, the grantee, not only the interest which she at that time had but also purported to convey every interest which she might thereafter acquire under the will of R. W. Holt. If this deed was valid and binding on her it divested her of all interest in the property, whether present or prospective, and vested it in her grantee and by subsequent conveyances it became the property of the Waialua Agricultural Company.

The question therefore that lies at the very threshold of the case is whether Eliza Christian, at the time she executed the deed of May 2, 1910, had sufficient mental capacity to make a valid and binding conveyance of her interest in the lands described in the deed. This is a question of fact, upon which much conflicting evidence was taken. The circuit judge made the following findings regarding the petitioner's mental competency: "Upon the weight of the testimony and the credibility of the witnesses, as herein summarized in connection with the question of competency, the court finds: I. Eliza (Holt) Christian, petitioner, neither was, nor is, an idiot,

a lunatic or UTTERLY imbecile. 2. She was and is, however, a person of undeveloped intellect, incapable of forming a reasoned judgment or understanding, incapable of comprehending her own right to an independent status, the extent or nature of property or of her property interests, the value of money, or the ordinary matters of life essential to a reasonable degree of independent living. 3. She had insufficient mental capacity to comprehend the difference between $100.00 and $1,000.00; between $30,000.00 or $60,000.00 for her individual rights; or to comprehend the difference between payment to her individually, for her sole disposition, of any such sum or sums and payment to her circle of relatives and under their control; or whether $30,000.00 or any sum [207] was for her rights as distinct from the rights of others involved in the deal; or the difference between present payment of income and future payment of principal; or to understand that she had rights distinct and independent of her father or of Annie Kentwell. 4. She could not possibly have comprehended, even with advice worthy of trust, the elements necessary to form an independent judgment or to exercise a reasonable measure of choice or of will relative to the value of cane land, pineapple land, ranch land or any kind of land in any quantity; or of postponed rights therein as opposed to present interests; or even the elementary character of her rights and direct the disposition of what she owned. 5. The court is convinced that Eliza did not have the most ele-

mentary capacity to understand and judge her rights and protect herself from undue influence and fraud; and that at no time was she an independent actor with a knowledge of her rights. 6. In short, she was mentally incompetent to execute a conveyance in 1910 or at any other time within the scope of the evidence and the law in this case."

It has long been the rule in this court that "in equity cases, on appeal, while the findings of the circuit judge are given weight and under certain circumstances, especially on pure issues of fact, would be allowed to control, the supreme court nevertheless is authorized and has always exercised its right and duty to weigh the evidence and to make its own findings." Godfrey v. Kidwell, 15 Haw. 526 (1904). See also Cha Fook v. Lau Piu, 10 Haw. 308 (1896).

In compliance with the duty imposed upon us by law we have carefully read the entire transcript of the evidence, consisting of some three thousand typewritten pages, bearing upon the petitioner's mental condition, with the view of determining [208] whether she was incapable of making a valid conveyance of her interest in the lands in question. We have weighed this evidence to the best of our ability and from it have reached the conclusion presently to be stated.

Of course a deed to land executed by a person who is sui juris is presumed to be valid and will not be upset because of the mental incompetency of the grantor unless the incompetency was of so

marked a degree as to be the equivalent of a lack of capacity to make a binding contract. The highest degree of intelligence is not necessary to bind the grantor, nor is the lowest degree essential to the avoidance of the deed. Between these extremes lies the fate of the deed. In Black on Rescission and Cancellation, § 262, the following rule is given: "No particular degree of mental capacity is essential to enable one to execute a valid deed or contract, and no arbitrary standard is or could be established. No very high measure of intelligence or acumen is required, and on the other hand, a person may be mentally incompetent for business and legal purposes although he is not absolutely an idiot nor totally devoid of reason. The test generaly agreed upon is this: A deed or contract cannot be set aside on the ground of insanity if the person had sufficient mental capacity to understand in a reasonable manner the nature of the particular transaction in which he was engaged and its consequences and effects upon his rights and interests. It is sometimes said that a person has capacity to make a deed if he has sufficient mind to be capable of transacting ordinary business affairs, or of pursuing his own ordinary business in his usual manner. But this is too loose. The proper inquiry is whether he was capable of understanding and appreciating the nature and effect of the one particular act or transaction which [209] is challenged. 'It is evident that it requires less capacity to do a simple act, or make a contract involving no com-

plications, than it does to make understandingly an agreement involving complications and imposing various obligations. One may have but little business capacity, and a weak intellect or impaired faculties, and yet be capable of making a binding contract. All that the law requires to make the contract effectual is that a man should so have possession of his reason as to know the character of the act he is about to perform and be capable of carrying that act into effect.'" In Mann v. Keene Guaranty Savings Bank, 86 Fed. 51, 53, the circuit court of appeals for the eighth circuit, in discussing the capacity of a grantor to execute a deed, announced the following rule: "The question is not whether her mental powers were impaired. It is not whether or not she had ordinary capacity to do business. It is whether she had any—the smallest—capacity to understand what she was doing and to decide intelligently whether or not she would do it." The respondent characterizes this as "a classic statement of the law upon the subject in the federal courts."

With this test in mind we will review the evidence with such fullness of detail as seems necessary to an adequate understanding of this phase of the case. In doing this we will consider the evidence which reflects Eliza Christian's mental condition at different periods of her life.

Eliza Christian (at that time Eliza Holt) was born December 30, 1885, at Makaha, which is a rural section of the Island of Oahu. In the early nineties

(perhaps 1893) she was brought to Honolulu. In 1894, when she was about eight years of age, she was placed, as a pupil and boarder, in school at the Catholic convent in Honolulu. She remained in this institution [210] until July 1, 1899. After leaving the convent school and after a year's interval in Honolulu she went in 1900, with her cousin, Annie Holt, to San Jose, California, where she attended a Catholic girls' school at Notre Dame convent. In the summer of 1901 she returned to Honolulu and for a time attended school at St. Andrew's Priory. She left this school before completing the term. Thereafter she remained in Honolulu until 1906 when she went with her father and her cousin, Annie Kentwell, nee Holt, and the latter's husband, Lawrence Kentwell, to the mainland of the United States. In 1909 she went, again with her father and the Kentwells, to Oxford, England, where she was living in 1910, when the deed in question was executed. Since the execution of the deed she has continued to live in England, residing, except for about four years in London, with the Kentwells at Oxford.

The evidence relating to Eliza's mental state during the first period of her life, that is, during the time she was living at Makaha, is rather scant. Several of the witnesses who saw her from the time of her birth up to the time she came to Honolulu with her father, and who had observed her as a child playing with other children, testified that she was no different from her associates and seemed to

be entirely normal. Typical of this testimony is that of Keawekane, his wife, Kaluna Keawekane, Solomon Keaupule, and two or three other Hawaiians who worked on the Holt ranch. Keawekane testified that he had opportunity to observe Eliza from the time she was a very little girl until she grew up to be a big girl and that there was no sign that she was "ihepa," "lolo" or "pupule," and that there was nothing unusual about her to attract his attention; that she was like other people. His testimony was corroborated by his wife, Kaluna Keawekane, and the other witnesses just referred to. The testimony of Mrs. Helen [211] Cushingham, however, gives a very different picture of Eliza's mentality during this period. Mrs. Cushingham went to Makaha in 1886, about a year after Eliza's birth. During the time that Eliza and her father were there she lived within a very short distance of them and frequently saw Eliza up to the time she finally came with her father to Honolulu. There was no school in the neighborhood and Mrs. Cushingham not only taught her own children but also undertook to teach Eliza, who was about two or three years older than Mrs. Cushingham's eldest child. "I tried to teach her the alphabet and numbers and I found that she was a hopeless case;" that she was never able to learn her alphabet nor to learn anything about numbers and was not able to carry on a sensible or rational conversation. There is also testimony of other witnesses who knew Eliza during her early childhood which corroborates that given

by Mrs. Cushingham. For instance, Mrs. Abbie Fablan testified that she remembered Eliza at Makaha when she was five or six years old. She saw her there on several vacations and that she was "simple." "If you call her and say 'hello' to her she won't talk to you; can't get anything from her." She was "simple like, ihepa. * * * When you talk to her she doesn't say anything and grinning like that. * * * Q. By 'ihepa' what do you mean? A. Simple-minded." Mrs. Marie Aylett testified that she first knew Eliza in 1886 as a babe in arms and that from the first time she knew her she did not have that normal appearance like other normal children. "She was always funny, very silly. * * * She was a feeble-minded child,—not normal." Speaking of the time when Eliza was between three and four years of age the witness testified that she tried to teach her "just a few objects, such as 'chair,' 'table,' and I would make a statement for them to repeat. The others would do it [212] but she can't. She would laugh and go out and spin around." She never played with toys or dolls or marbles.

During the second period of Eliza's life, which includes her pupilage at the Catholic school in Honolulu, her contacts were much more numerous and frequent than during the first period, consequently the evidence portraying her mental condition is more voluminous. Many of the witnesses who testified concerning Eliza, her habits, her personality and her progress during this period were women

who as young girls attended the school during the time she was there, or a portion of the time she was there, and who knew her more or less intimately and observed her more or less closely. There is some conflict in the testimony of these witnesses. In a general way, however, some of it tends to show that Eliza in her companionship with other pupils and her behavior in school was not unlike her associates. The testimony of Mrs. Minnie Paloney illustrates the tendency of this testimony. This witness attended the school for about a year and a half, during which time Eliza was also a pupil. She remembered that during the play period Eliza engaged in the same games and in the same way as the other girls. She was very polite and never quarrelsome. She had drawing lessons and sewing lessons and did her work like the other girls. The witness had seen her read, knew she dressed herself and generally took care of herself. Her table manners were always good. Basing her opinion on the acts which Eliza did in her presence and her conversations with her the witness said that she was just like the other girls. She played with them and talked with them and would do everything the other girls would do. She knew little or nothing about Eliza's progress in school or her proficiency in her studies. Mrs. Fisher, who was a schoolmate of Eliza's [213] during the period we are now considering, testified more in detail and more positively as to her mentality. According to her recollection she was entirely normal—in her studies, her habits

and her associations with other pupils. She took communion, attended confession, memorized the catechism and recited her lessons. She also wrote in the witness's autograph album. Mrs. Fisher testified that she and Eliza were in the same class, beginning with the primer, were promoted together, ending finally in the third class. Mrs. Beatrice Ross testified that she and Eliza were at school together for about five years. Her testimony is not so specific as Mrs. Fisher's but tends to show that she was normal girl. There were several other witnesses who testified to the same effect.

In sharp contrast with this testimony is the testimony of the Catholic Sisters who were connected with the school during Eliza's attendance. Sister Anne Joseph testified that she remembered Eliza Holt at school very well. She was there about six years. She could not make any progress in her studies. The witness was with the Sister who was teaching Eliza but she could not learn. She was taught reading but she could not be promoted. She was not an idiot and she was not insane. "She acted like a little girl, a little child, a girl playing with little ones in the school. She was very polite; had a kind heart * * * would say 'good morning, Sister,' * * * 'good afternoon, Sister,' * * * and 'thank you.' * * * She sat there. She could not recite by heart, she could not memorize words like that." The witness never saw her take communion. Sister Mary Augusta testified: "I saw the father bring her" (Eliza) "in school. I asked her if she

wanted me to talk to her, because she was kind of silly. * * * Only to see her you could tell there was something the matter." [214] This witness further testified that Eliza was like a little child in school. She never learned anything. She was in school four or five years but never learned anything. She could repeat words after the teacher but the witness thought she could never remember. The witness also thought she "never wrote." When asked if at the time Eliza left the school she had progressed any the witness said: "No, no, just the same. She never learned anything." Sister Teresa testified that she was a pupil in the school when Eliza was there and that she and Eliza were playmates; that they were together in school about two years. When asked to describe her the witness said: "She really couldn't learn, she was not able to learn. She was easily influenced and she had a very kind heart and you could easily influence her. She often spoke about her cousin Annie. I think she was of that spirit that had a mind that could not be really developed,—a kind of small child. * * * She must have been may be about eleven or twelve." She was then asked the question: "And you would describe her as having the mind of a small child?" and her answer was: "Yes, not able to be developed." Sister Leocadia testified that while Eliza was at the school she had an operation on both eyes and that she (the witness) nursed her after the operation. She said Eliza talked with her "a little, but not very sensibly; like a little child." Sister

Margaret testified that she knew Eliza but was never her teacher; that she remembered that she was not like a normal girl as to her mind but she was put in a class with bigger girls "because we couldn't leave her with the small children all the time." Sister Regoert testified that while she had nothing to do with Eliza she knew her well and that she had a childish mind. "If you tell her to do a thing and she would not. She cannot judge for herself what was right and [215] what was wrong, but she was never unpleasant or difficult to manage." The witness did not remember what she had to do with Eliza but remembered that she had something to do with her and that her eyes were crooked. She remembered that she was a "small child when she was big."

The third period of Eliza's life comprises the time (about a year) when she was a matriculant at a Catholic girls' school at Notre Dame convent in San Jose, California. There is not much evidence concerning her during this period. Mrs. Rose Wight (nee Cunha) testified that she was a pupil at Notre Dame during the time that Eliza was there. She knew her quite well and too *f*requent walks with her in the garden. The witness thought Eliza was then about fourteen years of age and that she was not in the first grade but in a sort of infants' class before the first grade. When asked what she had observed regarding her ability to read, the witness said: "On many occasions—probably it will need a little explanation. I was rather fond of the

children and it was our custom to take walks during recreation time. We had school hours so long we had to walk in the garden, and very often I would ask Eliza to walk with me, and on many occasions she would read me her lessons. When she had a successful day she seemed very happy of accomplishment." She did "very simple reading of four and five words, but she felt she was accomplishing something and was anxious to let me see." When asked to describe the kind of girl Eliza was with reference to mentality, the witness replied: "Of course I don't really think I am capable of judging but from a lay-person's viewpoint I would say she had the mind of a child of six." Speaking of the kind of conversations they had, the witness said: "Conversations that would suit a child of six. She seemed to be a little child [216] and I liked to go out and talk with her about things that would interest her, things about the garden and about animals, things that would make an interesting story."

After returning to Honolulu from Notre Dame Eliza Christian entered St. Andrew's Priory as a pupil. During her pupilage there it was discovered that she was pregnant and she was obliged to leave the school before the completion of the term. Mrs. J. J. Smiddy, who was at St. Andrew's Priory during a portion of the time that Eliza was there, testified that she knew her and had occasion to observe her among other girls. When asked what impression Eliza made on her she said: "Well, she was a girl that gave me the impression of being

below the normal,—feeble-minded." When the witness spoke to her "she didn't respond at all, just hung her head, or just act foolish, you know." When asked if she remembered what class Eliza was in she said: "No I can't tell you. I know she was not in any particular class because she never would attend classes very well. She was not a very bright child and I don't think she was ever made to study there, or she could not." The witness remembered that she played a lot with the younger children, children about "seven,—five, six or seven;" could not remember just how old she was—thought perhaps "eight, nine or ten." Mrs. Daisy Sanders testified that she knew Eliza at St. Andrew's Priory and that she was about fourteen or fifteen years old at that time—that she thought she (Eliza) was in the "baby class." When asked what Eliza's condition was as she remembered it, the witness said: "Well, most people would—the new name for it now is 'feeble-minded,' but we used to call her feeble and stupid, the girls in school used to. * * * She didn't want to mingle with the girls, and if you asked her anything she didn't know [217] what to answer you, whether to say 'yes' or 'no;' kind of timid. * * * Sometimes she would answer and sometimes she wouldn't as if she didn't know." Sister Lydia Margaret, whose deposition was taken in Glendale, Ohio, testified that she had formerly lived at St. Andrew's Priory in Honolulu, having substituted as a teacher; that while she was there she knew a girl then attending the priory named Eliza

Holt but that she never had occasion to teach her. She did, however, have occasion to observe her during the period she was at the priory. She had no recollection what class or grade she was in; did not know whether she was ever promoted. When asked if she remembered whether Eliza carried on a rational or sensible conversation with her or with anyone else in her presence, the witness said: "No, she didn't. She was kind of feeble-minded. * * * She was very childlike all the time, different from the other girls. * * * She was mentally deficient." Miss A. Z. Hadley testified that she had been teaching at Lahaina and came to Honolulu to spend the Christmas holidays and had to remain, on account of the plague, until the Easter holidays; that during this time the priory was practically her home and that she was there for about four months and saw Eliza Holt—that she was sure she would have noticed it if she had not been normal.

Eliza left St. Andrew's Priory probably in the early part of 1902—certainly before April, because in that month she gave birth to an illegitimate child. From the time she left the priory until she departed in 1906 with her father and her cousin, Annie Kentwell, and the latter's husband, Lawrence Kentwell, for the mainland of the United States, she lived with relatives and friends in various sections of Honolulu. This constitutes the fifth period of her life. During this period [218] many things of importance to Eliza transpired and the state of her mental capacity with reference to them and other-

wise is revealed by the testimony of many witnesses.

As we have just seen, her child was born in April of 1902. On May 27 and 28, 1902, she testified as the complaining witness in a rape case. On June 12, 1902, she appeared in court with her father, John D. Holt, and Mr. and Mrs. George Sea, and signed an agreement for the adoption of her child by the Seas. On January *we,* 1903, she was married at the Catholic Cathedral to Albert Christian, with whom she lived for a short time, probably six months, and from whom she was never divorced. In the latter part of 1903 proceedings were brought in the circuit court at Honolulu to annul her marriage. On January 24, 1904, her child, which had been adopted by the Seas, died. On March 4, 1905, Judge Gear handed down his decision denying the petition of Annie Kentwell for the annulment of Eliza's marriage. On March 17, 1905, Eliza consented, over her own signature, to a lease that had been executed by other parties in interest of the Holt lands at Waialua to the Waialua Agricultural Company for a period of twenty-five years from April 1, 1905. On August 31, 1906, she executed a written instrument assigning to Annie Kentwell all her (Eliza's) income and profits from the Holt estate, including rents under the Waialua lease just referred to, during the life of Eliza, in consideration of Annie Kentwell's agreement to support her during that time. On the same day Eliza leased to Annie Kentwell certain interests in land at Makaha.

Mrs. John H. Wilson, the wife of John H. Wilson,

who was, at the time her testimony was given, mayor of the City and County of Honolulu, gave this picture of Eliza when she was in [219] an advanced state of pregnancy: "When she was pregnant, one Sunday I was going with my mother to church, and just out here, at the old Opera House we had before, past that was the old Gibson home, and she was sitting out with a couple of boys playing marbles. Of course she couldn't stoop and sat flat on the ground, and I said, 'Eliza, what are you doing here?' and then the boys started to run with the marbles and she started to cry, just like a child, and I called to them and they brought them back when I called, and I said, 'How many marbles have you here' and she said, 'I don't know.' * * * They didn't give back all the marbles, but they ran, and that is all she got." In answer to the question, "Was her condition of pregnancy noticeable at that time?" Mrs. Wilson said, "Oh, yes." This witness also testified that she knew Eliza when she was four or five years old—saw her frequently when she and her father would come to Honolulu and that she also saw her often after she and her father moved to Honolulu, and after her marriage to Albert Christian she saw them once in a while, passing them on the street. She remembers seeing Eliza at the court house during the proceeding to annul her marriage and she also remembers seeing her when she lived with the Kentwells at Waikiki just before their departure for the mainland. The impression she got of her during all the time she knew her was that she was feeble-binded—what the

Hawaiians call "ihepa." She never at any time heard Eliza carry on a sensible or rational conversation.

Mrs. Hilda Chillingworth, testifying in regard to Eliza's pregnancy and her actions at that time, said: "Of course, we didn't realize what the trouble was. We used to make fun of her a great deal, never realizing, of course, that she was going to have a baby, but she would play around with us just the [220] same and went around as though there were nothing the matter with her. * * * I don't think she realized what was going to happen." Mrs. Chillingworth also testified that her earliest recollection of her was when she (Eliza) was about twelve or fourteen years of age. They lived on adjoining premises and while never intimate were friendly and played together a great deal. When asked to state what kind of girl she was and her condition, the witness said: "It is very hard to state, except our impression of her at the times was that she was just simple,—simple-minded." She imagined the Hawaiian word would be "lolo." "In playing games we would always take advantage of her. In playing hide we would make her seek and let her keep on looking, and we would play marbles with her and we used to take them away from her." When asked if Eliza would know how many marbles she would have at any time, the witness said: "I don't imagine so. It seems to me we would give her a few or whatever we had and she would be satisfied—I don't recollect."

Mrs. John Lopes knew Eliza when she was ten or eleven and again when she was seventeen or eighteen years old, and when asked if she remembered anything about her just before her baby was born, said: "Yes. * * * I do. I called to see Mrs. Holt and old lady Holt, and the girl in her condition I saw climbing over the—jumping from the chiffonier to the bed, and the day I was there I said, 'Don't do that in the condition you are in' and she only laughed at me and jumped up on the chiffonier and I said 'In the condition you are in you are not supposed to do that' and she only laughed at me."

Mrs. Marie Sea, one of the adoptive parents of Eliza's child, testified that Eliza had come to her house on Piikoi street about six weeks after her baby was born and that she thereafter [221] lived with her for six or seven months. Speaking of the time when the baby was adopted the witness said that she and Mr. Sea, and Mr. Holt and Eliza went before the court and the judge told Eliza "that she was giving her baby to me; that it wasn't hers any more;" that Eliza did not read over the paper which she finally signed. The witness had never at any time heard her read anything and had never seen her reading anything; also had never seen Eliza write anything aside from her name. When asked whether she took care of the child Mrs. Sea said: "She could not care for the child unless someone told her what to do. She did not know when to feed it, when the child needed feeding; how

to change it. I looked after that." When asked about Eliza as to her dress the witness said: "Well, if you had let her alone, she would not care to change or clean herself. She was very helpless. * * * Sometimes she would have her clothes inside out and the buttons inside. She would wear them that way unless I noticed it. * * * She was an imbecile to my way of thinking,—lolo."

At the trial of the rape case already referred to, Eliza was brought forward as the prosecuting witness. At that time she was about seventeen years of age. Her answers to the questions propounded to her give a clear picture of her mentality. Most of the questions were leading and were answered "yes" or "no." She seemed to have a fairly good knowledge of the streets in the neighborhood where she lived and the location of buildings. When questions were asked her which could not be answered "yes" or "no," her replies were often quite confused and sometimes unintelligible. She seemed unable to tell with any sort of definiteness just what the accused did to her. From her replies to many leading questions, in which the answer was [222] palpably suggested, an inference of sexual intercourse might be drawn, but nothing more. When asked why she did it or let him do it she replied, "I don't know." On cross-examination on simple matters her answers often were "I don't *no*" or "I don't remember." At first she did not know whether it was right or wrong to have sexual relations with a man before marriage. Later she said

it was wrong. She did not know why she was in court or who was the father of her child. In her testimony she accused two different men. After adjournment of court to the next day she was again called to the witness stand and materially changed her story. At the conclusion of her examination she was cross-examined as to her ability in simple arithmetic. When asked how many seven apples and five apples would make, or how many fingers she would have with seven on one hand and five on the other, or how many two apples and two apples would be, or what five times four would be, she did not answer but shook her head, indicating that she did not know.

Eliza's testimony is comprised within seventy-nine typewritten pages. It would be a wearisome and useless task to review it in detail. Suffice it to say it clearly reflects a very rudimentary and undeveloped mind.

Many witnesses other than those already referred to testified to their acquaintance with and their observations of Eliza during and prior to this period. While there is not entire unanimity of opinion among these witnesses concerning her mentality during the period we are now considering, a great majority of them regarded her as either "simple-minded," "ihepa," "lolo," or "pupule." The opinions of these witnesses were predicated upon her acts and behavior at various times which are inconsistent with a normal mind, such acts and [222] behavior being inability to carry on a "sensible"

or "rational" conversation; associating with "small children;" inability to do simple domestic work like "cooking," "making beds" and "sewing;" inability to take proper care of herself in matters of "dress" and "personal cleanliness" without direction; inability to "read" or "write" except to sign her own name; inability to "count" except to a limited degree; inability to "recite the alphabet" beyond the first few letters; often "grinning" and "running away" when spoken to, and yielding to the calls of nature in broad daylight on public streets in the presence of others.

"Ihepa," "lolo" and "pupule" are Hawaiian words in common use in this Territory and are descriptive of a person having a diseased or insane mind or of one having an undeveloped mind or of one who is in a condition of imbecility or idiocy. They all, however, indicate a state of mental incompetency arising from one cause or another.

Among the witnesses who considered Eliza normal during this period are Mrs. Ellen K. Lorenzen, a probation officer, Mrs. Eliza Yates McKenzie and Lorrin Andrews, an attorney at law.

Mrs. Lorenzen testified that as a probation officer she had worked with feeble-minded children and had observed how they acted. She first knew Eliza in about the year 1903 and saw her from time to time thereafter around Honolulu. She had come in contact with her in the home of her sister, Mrs. John Holt. When asked her opinion of her during the time she knew her, the witness said: "She al-

ways impressed me as being a very timid child." And when asked whether in her opinion Eliza was either "feeble-minded," "ihepa," "loló" or "pupule," Mrs. Lorenzen [224] said: "She" (referring to Eliza) "seemed to understand my sister, and when she would talk to her she would answer, and she was neat and clean." On cross-examination the witness was asked if she had not stated to Mr. Hite (one of the attorneys representing the petitioner), in the presence of John Holt, that she had always considered Eliza to be "lolo." Her answer to this question was: "No, I don't remember that." Holt, who testified in rebuttal, stated that he remembered a conversation during which Mr. Hite and Mrs. Lorenzen were present and that Mrs. Lorenzen said: "You, Johnny, know as well as I do that Eliza Holt was lolo. They called her ihepa and feeble-minded. Don't you think so?"

Mrs. Eliza Yates McKenzie, seventy-two years of age, who testified from her sick bed, stated that she used to visit, for three or four weeks at a time, in the Kentwell home at Waikiki, while Eliza was staying there; that she considered her perfectly sane, "there was nothing wrong with the girl. She was nurse girl, the woman that cleaned the house; that sewed the clothes, and I never saw anything out of the way with her. * * * I used to sit on the veranda and talk with her nearly all morning, sometimes, and she seemed to me perfectly rational." The witness did not know whether Eliza could read —that she was kept too busy to have an opportunity

to read, but she could "sing Hawaiian lore, Hawaiian songs * * * 'Like No A Like.' * * * She had a sweet voice." She stated that Eliza used to cook and serve the meals; take care of the children when the Kentwells went out; go swimming from the Cassidy pier. She did not know that she had given birth to a child; did not know anything about her marriage to Albert Christian. The witness remembered Mrs. Kentwell's having whipped or beaten her because she (Eliza) [225] refused to marry George Kentwell.

Dr. James R. Judd, who was called by the petitioner in rebuttal, testified that he had for many years been the physician and attendant upon Mrs. Eliza Yates McKenzie. When asked for his opinion as to her mental state, Dr. Judd said: "She is 72 years old and has had a great deal of illness, and at the present time she is confined in bed, and has been in bed for several months with a broken hip. It is common with old people. She has a good memory for past events at times, a very active memory. Of recent events her memory is not as good. That is a matter which is common with old people. I have never made any special observations as to her memory. I am not a mental expert. I could not give any scientific summary of her mental condition unless things were checked up. For instance, she might repeat a thing accurately and the next time subsequently alter it in some way, but considering her age and her illnesses I should say that she has a fairly good memory, at times confused, uncertain, and unreliable."

Lorrin Andrews, who is a member of the bar of this court, having been at one time attorney general of the Territory and who for the past few years has resided in Los Angeles, testified that during his residence in Honolulu he knew all of the members of the Holt family, including Eliza, whom he knew as a girl; that he was a frequent visitor at the Holt home and saw her on a number of occasions; that after she had given birth to an illegitimate child and had charged a white man named Hall with having raped her and when Hall was about to be tried on the charge of rape, Lawrence Kentwell called on him and told him, that his brother, George Kentwell, was about to be mixed up in the matter, and that as a result of this conference he [226] interviewed Eliza. Speaking of this interview the witness said: "* * * When I told her I was representing George Kentwell, she talked very freely and she said to me that she had testified before the grand jury, I believe under the advice of Annie Kentwell. She said Annie Kentwell, as I remember it, was a daughter of Owen Holt and, I guess, her cousin,—yes, the daughter of Owen Holt, and her cousin." In answer to the question as to what she said to him during this interview the witness stated that Eliza said in substance that "at the instance or advice of Annie Kentwell she had said that Hall was the only man who had ever been intimate with her and was the father of her child; that she had fixed the alleged rape at an unfinished house that Hall was building; that she had got

mixed up in her dates; that it turned out that the house had been finished more than a year before her child was born and she was very much worried over it as to what would happen to her when she got in court and they confronted her with these witnesses. She asked me what she should say, and I told her, 'I am not your lawyer; I am not going to give you any advice. The only think I can say is, if you come into court you had better tell the truth. That is the safest way to do.' And she went on—portions of the conversation I remember—she went on whether they would put her in jail * * * for having lied, and she began, bringing up different things that she wanted advice on, and Annie Kentwell said, 'Well, Eliza, play lolo, play lolo; that is all you have got to do,' and when that came I thought it was about time for me to retire from the scene, and I retired. * * * I don't remember ever having talked with Eliza Holt after that date." In answer to a question as to how the girl impressed him the witness said: "There is no question. She was perfectly rational, if that [227] is the test;" that he noticed no impediment in her speech but that she spoke very slowly; that so far as speech was concerned she was "normal for her class and age." The witness also testified that he heard Eliza testify in the Hall case and that she was entirely different; that by the comparison he would make, she was at the trial either "very much frightened or acting."

As we have already seen, Eliza went in 1906, with her father and the Kentwells, to the mainland of the United States, remaining there until 1909 when they removed to Oxford, England. This constitutes the sixth period of Eliza's life. At the beginning of this period she lived with her father and the Kentwells, first at Cambridge, Massachusetts, for a few months, and then at Elizabeth, New Jersey. On June 13, 1907, Eliza appeared before Edward L. Mack, commissioner of deeds of New Jersey, and acknowledged that she had signed, sealed and delivered her written confirmation of a lease made by John D. Holt, Jr., and others on January 1, 1901, to Annie Holt Kentwell. On June 14, 1907, she appeared before E. L. Bernard, notary public, New York County, and acknowledged the execution of an option to May K. Brown for the purchase of her contingent interest in lands at Makaha. On October 26, 1907, she again appeared before Edward L. Mack, notary public of New Jersey, and acknowledged the execution of a quitclaim deed to certain lands situate at Kaaawa, Makua, in the County of Oahu, and Territory of Hawaii, to L. L. McCandless. On January 1, 1909, she gave birth to another illegitimate child in the city of New York.

Elizabeth Martz, a resident of Elizabeth, New Jersey, for about thirty years, testified that she knew Eliza between "1906 or 1907, or 1908" and that she lived next door to her for "about three or four years or more;" that during that period they [228] had talked to each other "about once a

week,—maybe more;" that Eliza was "a short and dark lady, appeared to be a Jap. * * * She looked just like a Jap, that is all I can say." Their conversations were "just general things;" she was "all right. She seemed to be—she was sane. She was rational." The witness saw no indication of temper on her part, "she was all right in every way;" she (Eliza) was about twenty years old, "I suppose," at that time. She "guessed" Mrs. Kentwell was also a "Jap,"—all the members of the family living there appeared to be Japanese. When asked if she was on intimate terms with this Japanese family next door—whether she called on them and visited with them a great deal, the witness said: "Well, no, just occasionally, that we had milk for sale, and when they were short they would come in and get the milk and so, and then out they would go." When asked if she and the members of this family called on each other particularly, she said: "No, just as a neighbor, we just spoke as neighbors would do, you know—a few words and that." She never visited the home, or had meals with them or anything like that. She knew nothing about Eliza's habits about the house. She knew nothing about her ability to take care of her self. She never saw her write anything; she never saw her read anything. She never saw her handle money. She never had occasion to see whether she could add or subtract. Eliza never had any money. She did not know that Eliza had an illegitimate child while she was living there. When asked if during the time she lived

next to her she ever noticed that Eliza was pregnant she said: "Well, you see, we were busy, and I hadn't much chance to gaze around, and as I say, we were out with the milk wagon, we would come in in the afternoon, and then we were too busy—we didn't visit with no neighbors or [229] anything. I didn't notice anything, no." She did not see a great deal of Eliza—"just occasionally—just as I say, maybe probably once a week and maybe more, and she would come in maybe once or so to get milk."

Edward L. Mack testified that on June 13, 1907, "someone who was introduced to me as Eliza R. P. Christian" appeared before him and personally executed the confirmation of the lease to Annie Kentwell just referred to and that he took her acknowledgment in regular form as commissioner of deeds; that he explained to her the contents and purpose of the instrument and asked her if she executed it freely and voluntarily and that she answered in the affirmative. When asked if he could recall anything with respect to Eliza's appearance and conduct at the time he said: "I have not a very clear mental picture of her, except that as I recollect it she was a woman of approximately my own age and rather small and not attractive. There was nothing in her appearance or manner that impressed her upon me very strongly." The witness could not remember anything that she did or said that would lead him to suspect that she was not of sound mind. The witness was also shown a certified copy of the deed from John D. Holt and others to

L. L. McCandless, dated October 26, 1907, and said that the original of this instrument was executed in his presence as a duly authorized notary public for Union County, New Jersey, and that John D. Holt and Eliza Holt Christian signed it in his presence; that he explained to Eliza the contents and purpose of the instrument and asked her if she executed it "for the uses and purposes therein expressed, freely and voluntarily and without any constraint, compulsion or fear on the part of or from her said husband," and that she answered in the affirmative. When asked if he had [230] any other conversation with Mrs. Christian and Mr. Holt on that occasion he said: "My recollection is that following the execution of that instrument I asked them if their former home was in Hawaii. We talked for two or three minutes about the Island." When asked if Eliza's acts or conversations were those of a rational or irrational mind, he said: "All I can say is that there was nothing in her appearance or in anything she did or said which led me to suspect that she was not of sound mind." From the two meetings he had with Eliza he said: "I think she was normal. I would rather answer that by saying that I do not remember anything she did that would lead me to think she was not normal. * * * In other words, I am trying to convey now that there was no reason for me to scrutinize Mrs. Christian with the idea of seeing whether she was sane or not. She did not give the slightest evidence of not being perfectly all right."

He was testifying to facts which occurred twenty-one years before, when he was twenty-six years old. It was the first time he had ever been called upon to take an acknowledgment to a deed covering land lying outside of the United States and for that reason alone he could explain why he could remember, when he was taking so many acknowledgments. He had never seen Mrs. Christian before the 13th day of June, 1907, and the 26th day of October, 1907, nor had he ever seen her since. In taking her first acknowledgment he did what he usually did, that is, asked her questions in the usual form and got an indication of affirmance and that her part in the conversation was to indicate her affirmance. Speaking of the conversation regarding Hawaii, that occurred on the taking of the second acknowledgment, he said: "My recollection is that the conversation was almost entirely between Mr. Holt and myself." [231]

Everett L. Bernard testified that he was an attorney living at New Rochelle, Westchester County, New York, and that he had been a notary public authorized to take acknowledgments in the city, county and State of New York and that he was such notary public on June 14, 1907. He was shown a certified copy of an option of Eliza R. P. Christian to May K. Brown, purporting to be dated the 14th day of June, 1907, and was asked whether the original of that instrument was executed in his presence, to which he replied: "I believe it was, yes, to the best of my knowledge;" it was signed by Eliza

R. P. Christian on the date of the acknowledgment in New York County. "After she signed it, I asked her if she acknowledged it, and I followed the wording of the acknowledgment which was a little bit unusual—whether she acknowledged it freely and voluntarily for the uses and purposes therein set forth" and "she said 'yes' or replied in the affirmative. I think she said 'yes;'" that no one prompted her to give that answer. The witness was also shown a certified copy of a deed by Annie H. Kentwell and husband, et al, to May K. Brown, purporting to be dated June 14, 1907, and was asked whether or not the original of that instrument was executed in his presence to which he replied: "Yes, * * * by Annie Holt Kentwell and L. K. Kentwell, and Eliza R. P. Christian * * * in New York County" on the date of the acknowledgment; that he asked Mrs. Christian if she acknowledged the execution of this instrument and "my memory is she said 'yes'" and when asked if anyone prompted her in making her signature he said "no." The witness had seen Mrs. Kentwell and Eliza on one other occasion prior to the signing of the deeds. When asked to state what conversation was had between any of the persons present upon the occasion of his first meeting with [232] Mrs. Christian the witness said: "I do not remember the exact conversation, other than a discussion of the transaction. * * * I recall I addressed a remark to the group inquiring of them the reason for the reservation of a parcel which was reserved in the option,

and one of the three replied that it had a patch of some fruit or vegetable they desired to retain; and the other two nodded an assent to that; it was unanimous. That is the only particular conversation I recall." Speaking of the time when the acknowledgments were taken, the witness said: "My memory groups the two women in my mind. Neither of them stands out distinctly from the other. They were both alike and at the time I had been told, I think, that they were related. * * * The demeanor of both was ladylike and pleasant and normal in every way." When asked particularly about the appearance or conduct of Mrs. Christian on the date of his first meeting with her, the witness said: "I am not positive that my meeting on June 14th was not my only meeting with her. If I met her at the first time I was at Mr. Cook's office, there was nothing at the meeting which would distinguish it in my memory from the second meeting, so that I will have to answer that question as though the June 14th meeting were the only meeting I had present in my mind. * * * Her appearance was usual and ladylike, attractive and not in any respect different from that of her companion. * * * She was dressed as usual and her deportment was usual." When asked if there was anything in the acts or conversation or conduct of Mrs. Christian which indicated her soundness or unsoundness of mind, the witness said: "I had no thought about the matter; it never occurred to me."

Eliza's child, which was born in New York on January [233] 1, 1909, was delivered on the platform

of an elevated railroad and Eliza was hurried to the Manhattan maternity hospital where she was attended by Dr. Masson for about three weeks. Dr. Masson, who for some years has been a surgeon at the Mayo clinic at Rochester, Minnesota, testified that he was the resident physician at the Manhattan maternity hospital when Eliza was brought there. He remembers when she was brought to the hospital and that she was placed in a private room and that he saw her at least once a day and sometimes oftener while she remained in the hospital. During these visits he talked to her but always on the subject of her condition. When asked if she spoke like an intelligent person, he said: "I always got what I considered satisfactory answers to questions asked her and looked upon her as a rather diffident foreigner who did not speak a great deal of English. * * * I am quite sure I remember that she spoke with the accent of a foreigner." "She was a very obedient patient and gave no trouble to the hospital authorities, as I observed her." When asked if he observed anything irrational as to demeanor, he said: "No. Nothing was noticed by any of the hospital staff. * * * I considered her quite normal." When asked if she ever did anything in his presence that indicated that she was mentally deficient he said, "no." When asked if her demeanor impressed him as being the demeanor or acts of a mentally incompetent person, he said, "no." He also said he considered her normal mentally.

The witness was shown certain documents which he identified as the records and charts of the hospital kept by him or under his direction and supervision, and from these records and charts reaffirmed his opinion as to Eliza's mental condition. [234] On cross-examination he testified that the greater part of his training and experience had been in surgery and gynecology, except for a period of about three years, when he was engaged in a private capacity in the general practice of his profession. He never made an examination of Eliza as to the degree of her mentality. He never used any tests recognized by alienists to determine the degree of her mentality. He was unfamiliar with these tests. He made no observations as to whether she could add two and two or whether she would be able to subtract or read or write or memorize or could appreciate the value of money or of property. He made no observations as to her standards of morality.

In 1909 Eliza Christian went, again with her father and Annie and Lawrence Kentwell, to England, where she has ever since resided. This constitutes the latest period of her life. During this period she has lived (except for perhaps four years when she lived in London) at the home of the Kentwells in Oxford. There is little or no evidence concerning her while she was living in London. There is, however, a great deal of evidence concerning her during her residence with the Kentwells at Oxford. This evidence covers a term of

more than twenty-five years and was given in the form of depositions, nearly all of which were taken at Oxford by a commissioner, the witnesses being examined and cross-examined orally by counsel for the respective parties. It is so voluminous that it would extend this opinion beyond reasonable or necessary length to review it in detail. We shall, however, set it out sufficiently to give an adequate understanding of its general tendencies and its probative effect.

It was during the period we are now considering that [235] Eliza signed the deed to James L. Holt, which is the subject of the present suit, this deed, as we have already seen, being dated May 2, 1910. On May 21, 1912, she also signed a deed which purported to convey to John M. Dowsett certain lands at Makaha. On January 11, 1923, she signed a power of attorney to Henry Smith, of Honolulu, and on March 16 of the same year signed another power of attorney to Henry Smith. Two letters were received in evidence by the circuit judge and are a part of the record, the originals of which the Waialua company claims were written by Eliza during the period of her life now under consideration. During this period she gave birth to another illegitimate child, which is still living.

Catherine Hambridge testified that her occupation was that of housekeeper; that she had followed that occupation for at least twenty-five years; that she was in Mrs. Kentwell's service at Oxford on

July 8, 1911, and lived in the Kentwell house for about eight months and since that time had visited the Kentwells continually and that during her acquaintance with the Kentwell family she had come in frequent contact with Eliza and knew her well; that Eliza was not able to take care of herself in the ordinary way—had to be told things that should have been told a child; had to be told more often than not to have a bath and when to change her clothes and linen; that she wrote and read very badly, frequently went into fits of temper if anybody offended her and if she was much upset she would go upstairs and shut herself in a room and not come down to meals. This happened fairly frequently—not very often. The witness believed that Eliza was fond of the Kentwell children, but "very often got exceedingly angry and I have known her to give the little boy a knock." The cause [236] of these fits of anger with the children was "because she wanted them to do something which they objected to." The witness never knew Eliza to carry on a rational conversation with anyone. "She could not reason out anything with you. * * * She would go out and you did not know when she was coming back. One day she went out, I believe it was fair time, and she came back drenched. She went out several times and when she came home she was very wet and went straight to her room. She would not see Mrs. Kentwell at all." She always had to be told to change her bed clothes. The witness was present and was housekeeper at the time Eliza's

father died. She showed "no actual grief that I noticed. There were no tears shed when her father died. That I do know. We had a nurse and she did not help nurse him at all." She "never went near." She "did go out alone sometimes. She went to the pictures but she was always told what time to come back." She would always come back "fairly right." All the time the witness had known Eliza her condition had been the same—"more like a child than anything else. * * * She rarely carried on a conversation. She did not seem to have the power to." When asked as to her susceptibility to influence or capability of resisting it, the witness said: "If she liked a person very much she might do anything. I never quarreled with her but the servants quarreled with her. I treated her as a child from the time I went there. I saw that she was not really all there and I tried to be tactful with her so that I never quarreled with her and she would fairly do the things I asked her. * * * You might get her to do things by coaxing her. * * * I use to say: 'Do so and so, there's a good girl,' whereas if I ordered her she might have refused." When asked if she noticed [237] any other trait the witness said: "Of course I did notice. I think I was sitting at table one day she played the piano and there was no time or anything in it. She said: 'When I was at school I took several first prizes.' It meant that the woman was not equal to doing what a child of six ought to have done. That was very like a child's doing." When asked if she could recall anything else indicating Eliza's mental condition, the witness said:

"The whole thing of course was childish. I treated her as such and spoke to her as such. If I racked my brain I might find a lot of odd things which showed how simple she was. She always wanted to be very much alone. If anyone came in she never wanted to come down; she always wanted to go upstairs to her room. * * * Some times she would cut paper and make some paper flowers but then she would sit upstairs doing nothing. She could not read much."

Lily Jamieson testified that she had worked with with Mrs. Kentwell for four or five years, beginning sometime in 1909; that after this term of service expired she went away and later returned and remained until a month or two before her testimony was taken; that Eliza was living with the Kentwells all the time the witness was there. When asked if she noticed any indication of temper on her part she said: "Yes, she got into a temper, she came into my room between five and six in the morning and thumped me on the head and quite dazed me. I had to call Mrs. Kentwell to my assistance." This "happened only recently." The cause of Eliza's striking her was that "the kitchen door was locked, and she seems to think it was through me it was locked. She thought I was the cause of it being locked and so she thought she would have her revenge on me." When asked about Eliza's cleanliness she said: "Well, [238] she would never change her things nor never wash, not when she was told." When asked what she would do with her spare

time the witness said: "She generally used to go into her own room. She would sit up there; she would read or cut things out of the newspapers." In explanation of what she meant by "reading" the witness said: "She would look at papers then, but she cannot read sentences properly. * * * I have heard her try. She has done that with me." She would cut out "pictures and advertisements, chiefly advertisements. * * * Just anyhow she would cut them. * * * Just keep them, collect them together, keep them." When asked about her conduct towards the tradesmen that came to the house, the witness said: "She was very fond of going to the door and talking with them, and giving silly, trifling things to them" like "flowers, pencils or anything like that she would give." If a little money was given to her "she would often give it away * * * to people in the street or if not, she would spend it on silly things. Things that were of no value at all, childish." She could not handle money "because she could not give correct change and she could not count money. * * * That I know from my own experience." When asked if she had ever seen Eliza try to write the witness said: "No, she cannot write at all. She cannot make her letters nor spell properly. You would have to tell her how to spell, she cannot spell. * * * I have seen that. She has always had to ask someone to spell words for her. * * * Once when I was with her" (on the street) "she turned round and swore at me simply because I wanted her to come home. She wanted to stay

out and she turned round in the street and swore at me. * * * She has gone off and stayed out quite late at night, and Mrs. Kentwell or someone [239] has had to go and search for her. * * * She has often come to our house and has acted very silly. Dances about very silly you know in the house. * * * I have always had to bring her home. She could never go home by herself." During all the time she witness knew Eliza "she has never improved, has never got any better. She has always got into these terrible tempers."

Mrs. Frederica Jamieson, the mother of Lily Jamieson, who saw Eliza at her (the witness's) home on four or five different occasions, testified to several instances of peculiar conduct on her part.

Ethel Margaret Richardson, a trained nurse, testified that she had known Eliza "one way and another" for about twenty-two years; that she was a frequent visitor and guest at the Kentwell home and Mrs. Kentwell and Eliza had been frequent guests at her home. When asked what she knew of Eliza's ability to read, she said: "Well, I should say not. Nothing over little tiny words, because I showed her myself a letter when I mislaid my spectacles and asked her if she could read it. It was perfectly legible, but all she made out was 'clock;' nothing else; she said she could not read the rest." Speaking of her ability to take care of herself the witness said: "I should think she would be like a stray sheep if she was let loose. * * * One

does not like to be too personal, but I should not say she was by any means a very cleanly person. Certainly she did not look much brushed up. * * * I am quite sure she could not" make plans and arrangements for herself. Speaking of her character of speech the witness said: "She talks extremely indistinctly, and it is very difficult for me to make out what she is saying until the sentence comes to an end. She talks as if she had a sort of impediment in her mouth. * * * She does not seem to have any interest in anything except in what you might call immediate creature comforts. She [240] will talk about meal time being near at hand; she will talk about the pictures, but I don't think she could tell you what the pictures are about. * * * From my observation she would just hang about, gaze out of the window probably and twist her apron between her thumbs. * * * She is certainly very moody. She has a way of going into a sulk for no apparent reason and she stares in an uncanny way, and she looks very loury, very loury, as if she was nursing a grievance." When asked if she had ever been any different from the condition described, the witness said, "no." On cross-examination the witness said she was a great friend of Mrs. Kentwell's.

Mrs. Eliza Joliffe, who was residing in London but who had formerly lived in Oxford, testified that she was a frequent visitor at the Kentwell home and "saw quite a fair amount" of Eliza; she used to come "to my children's parties. She never

came to the grown-up parties." When asked whether during the time she had known Eliza she had ever known her to carry on a really sensible, rational conversation with anybody the witness said: "Good gracious, no! I should think it was quite impossible. She would just say 'Yes' and 'No,' or 'it is a nice day,' or 'How are you,' beyond that, unless you asked her questions, she would not volunteer any statement at all." When asked whether she had ever known Eliza to participate in any conversation, or what part she took in conversations she said: "Well, vulgarly speaking, a back seat, always, I should say. She would sit and look and perhaps smile. I really do not remember any occasion when she would volunteer any statement."

Mary Clapton, a servant in the Kentwell home, had known Eliza during the five years she had worked there. When [241] asked about her ability to take care of herself in the house the witness said: "She cannot take care of herself and she wears clothes from one week-end to another unless you have the clothes in your hands and put them on her. Even to her bath, you have to tell her to have a bath once a week otherwise she would not do it. * * * She can read a little but she cannot understand what she is reading. * * * I have seen her try, but she cannot make out the words. * * * I have only seen her write her own name, that is all she can write." When asked what Eliza did with her spare time the witness said: 'She generally

gets hold of a newspaper and cuts out rubbish * * * cats and dogs and pictures like that. * * * She cuts them out all crooked. * * * She generally puts them in a drawer in the kitchen. * * * She has never used the telephone. * * * She has several times been up in her room and would not come down and has remained there all day long. I have been up and asked her to come down to her meals, and she has slammed the door in my face. * * * When it has been a bitter cold day she has been in her room with the window wide open. I have been up and asked her to shut it and she has slammed the door in my face, shivering with cold. * * * She cannot cook." The witness also recited instances of temper on Eliza's part. When asked about her treatment of her clothes the witness said: "I have seen her" tear them up—"good clothes they were. She has torn them up in front of me."

Arthur Lambert, a plasterer, testified that about 1913 Eliza often came to his house and stayed all day and while she was there she did nothing but sit and lie about; that her talk was "silly kind of talk. I cannot tell you exactly what she said, but childish talk." One time she stayed at the [242] witness's house a fortnight but never slept in the house but would go away at night and return in the morning. "I told my wife to see Mrs. Kentwell and tell her we could not put up with her any longer. She went to see Mrs. Kentwell and Mr. Kentwell came and fetched her away." The witness said: "During the time she was staying at our

house she was very dirty in her ways;" when she would come back in the morning she would be "as though she had been walking about all night by the appearance of her;" her clothes were "very dirty." When asked: "And at the end of the fortnight had she a change of clothes?" the witness said: "Not to my knowledge." The witness's residence was in Oxford and about "a mile and a half" from the Kentwell home.

Mrs. Mollie Alatau Wilder testified that she had known Eliza since 1920, while she was living at Oxford with her son who was attending the university, and since then had seen her from time to time. When asked to state what she had observed in the conduct or appearance of Eliza indicative of her mental condition the witness said: "There is no question in my mind that Eliza Holt Christian had the mind of a child. I spoke of that to Mrs. Kentwell at the time." When asked if she had ever endeavored to converse or speak with her and what had been the result of such atetmpt, the witness said: "Yes. I have. * * * I would consider that her answers were very simple. I could not carry on any conversation with Eliza. I tried to." She had seen her at the Kentwell home in Oxford off and on for about three years. When asked if she had ever heard her carry on a rational conversation with anybody the witness said: "I never have. I have never heard her answer more than a word or two, at any rate, if any questions were [243] put to her. She did not seem to be able to converse. * * * I looked upon her simply

as a child sitting there. * * * I simply felt that Eliza when I was there was a child in the place. She was just there and that is all. You did not pay any attention to her, she was just there." The witness never saw Eliza endeavor to read or write.

Dr. Thomas Saxty Good, a medical practitioner and medical superintendent of the Oxford and County Mental Hospital, testified that he was qualified in 1893 and had been thirty-three years at Littlemore, during twenty years of which time he had been superintendent. He also testified that he was Master of Arts at the University of Oxford, a member of the Royal College of Surgeons and licentiate of the Royal College of Physicians. He further testified: "I have done my work necessarily at the mental hospital. During the war I was consulting neurologist to the 3rd Southern General Hospital. Then for 4 years I had a neurological hospital, first in the army, in which I still hold the rank of Lieutenant-Colonel; then for 2 years under the ministry of pensions. I am on the staff of the Radcliffe infirmary as neurologist and I also lecture on my special subject to the faculty of medicine. * * * The title of my lecture is 'Neurological methods', in addition to that I am expert and referee for the feeble-minded for the city of Oxford and also for Oxford county." He had on four different occasions examined Eliza Holt Christian as to her mental condition. The first time was in 1915, the second on May 31, 1925, the third on November 30 or December 1, 1926, and the last time on Octo-

ber 25, 1928, a few days before his testimony was given. When asked his opinion as to her mental condition he said: "One of what, under [244] English law, is a feeble-minded person. * * * I put her at about equivalent to a person of 4 or 5. It is difficult to be absolutely exact, but she has the mentality of a child of about 4 or 5." The witness then explained the system he used in reaching his conclusion. Speaking in detail of the result of his examinations the witness said: "She cannot compare simple objects. Might I give an instance? For instance, you ask, 'I want you to tell me the difference between an apple and a banana.' She told correctly an apple was round and a banana long. You give one mark for that. I said, 'Give another difference.' She said bananas grew on very high trees and apples grew on very low trees. The next question I asked her was, 'What is the difference between wood and glass?' She did not attempt to answer; she was completely confused. She could not give any difference between those, nor could she between paper and cloth. Therefore one said that her powers of comparison were very much below the normal. Then there is the definition which is used to see whether people know things in terms of use and in terms superior to use. You ask, 'What is a chair?' She said, 'to sit on,' but when you pressed her she could give no further definition of a chair or further comparisons with other objects. On asking her, "What is a horse?' she simply gave

a description of a horse in a carriage, but she could not tell you what good or use the horse was in that carriage. I gave her quite a simple addition sum and she could not, as far as I could ascertain, do any addition at all. A question I did ask her was a simple subtraction in terms of money; she did not seem to know how many shillings there were in a £, and she could not even tell me if I took three away how many were left. I tested her for her power of reading; that test does [245] test because there are certain words jumbled up which have to be put together to make a sentence, and she could not read some of the words at all. She could read some of the small, little words, but a word of perhaps two syllables very often one had to spell it out and then she did not seem to know it. Then again, her vocabulary, which is a well known test in which you say, 'Now I am going to give you three minutes, I want you to say as many words as you can,' a word like dog, cat, piano. She produced about twenty words simply the names of nouns which is very much below what is considered even normal. It has been known for a normal child to produce something up to two hundred in that time." The witness also spoke precisely of other tests to which he had subjected Eliza, all of which in his opinion disclosed a puerile condition of mind.

Dr. Amyas Theodore Waterhouse, a practicing physician, who had also had a wide experience in the examination of mental defectives, testified that he had examined Eliza on two occasions, first in

1926, and again in October 1928. Regarding her mental state he said: "I came to the conclusion she was a feeble-minded person and that her mental age was approximately six years." The witness then explained the method used by him in making examinations. When asked whether he considered the condition in which he found Eliza to be of recent occurrence or a continuing one he said: "I should say it has been a continuing condition. * * * I should say it has most likely been life-long."

Dr. Edward Morton, also a practicing physician, testified that he had practiced in England since 1885. When asked about his experience in the treatment of persons mentally [246] defective he said: "I took a special course out in Edinburgh at the Morning Side Asylum. I repeatedly acted as locum tenens at the Warneford Mental Hospital in Oxford. I was medical superintendent at a special school for mentally deficient children at Wolverhampton. * * * For the past ten or twelve years I was co-opted as a member on the statutory committee for the city of Oxford for the treatment of mental deficients and I am chairman of the Voluntary Association for Mental Welfare." During his experience several cases involving mental defectives had come under his observation. He first became acquainted with Eliza and Mrs. Kentwell about 1909. He met them as a medical attendant. He was medical attendant for the family for about sixteen or seventeen years. He treated Eliza professionally and in a general way observed her men-

tal condition. He had seen her quite recently, at Mrs. Kentwell's house in Woodstock Road. When asked his opinion as to her mental condition he said: "Well, she is obviously of feeble intellect and I should put her about the level of a child of about five or six." When asked whether in his opinion this condition had continued since he had known her the witness said: "Well, she appeared to me much the same as she was when I first knew her. * * * I should say it is a continuing condition."

There were other witnesses who gave very much the same description of Eliza's mentality during this period as did those whose testimony we have mentioned. Still other witnesses, however, described her mentality quite differently.

For instance, Dr. Charles James Douglas, a practicing physician and a licentiate of the Royal College of Physicians in Ireland and also of the Royal College of Surgeons in Ireland and a member of the British Medical Society, testified [247] that he had practiced his profession for forty-eight or forty-nine years and from time to time had advised upon cases of mental abnormality,—both feeble-mindedness and insanity; that on February 17, and again on February 19, 1923, he went to 159 Woodstock Road, Oxford (which was the Kentwell residence); that on the first visit Mrs. Kentwell was not in and he went again the second time, when he saw Mrs. Kentwell and explained to her the object of his visit. He then saw Eliza Holt Christian,

with whom he had a conversation. "At first I asked a few questions to gain her confidence, to make her at ease with me; reference to suffering from an attack of influenza. Then I asked questions in relation, and she did not show any resentment or disinclination to answer questions, and I asked her if she understood what the reason of my coming was. I wanted to find out if she thoroughly understood the position with regard to signing a document to enable Mrs. Kentwell to receive her money; she said 'yes.' She thoroughly understood that and had every confidence in Mrs. Kentwell, and even if she were advised to the contrary she would take Mrs. Kentwell's advice in preference to anybody else's, that she had absolute confidence in her affection and love for her and good will towards her. * * * That was the first part. I can't remember, it would be about eight or ten minutes. I asked her other questions which I can't remember now to satisfy myself as to her general outlook on life, that it was fairly normal. I got no answer that did not satisfy me. As to the particular questions I can't remember." When asked whether she took a part in the conversation the witness said: "Well, she was in, in that the conversation would be more or less a question and an answer, but she was not—I could not tell you really what [248] she would enlarge upon, but she certainly showed no hesitation in giving me an answer to any question that I asked. * * * It" (his question) "was appreciated and understood and answered." She gave "an in-

telligent answer." Mrs. Kentwell invited the witness to stay for a cup of tea and he accepted. Speaking of the conversation during the tea the witness said: "We had a general conversation, and during that time I observed as keenly as I could the attitude of Mrs. Christian and was confirmed in my previous impression that her attitude was quite normal. * * * She took a certain part, not a prominent part in the conversation, and I don't remember what the conversation was about. I think they told me something about their life abroad and talked about local events as far as I can remember. She struck me as a neurotic, a bad neurotic, and was suffering from the effects of an attack of influenza at the time." Eliza "told me she was married, had lived with Mrs. Kentwell for the last seventeen years. * * * She was married at seventeen years of age, lived with her husband for one year, who was very cruel and she separated. He is still alive; she went to live in New Jersey with Mrs. Kentwell; came to England in 1909. When a child she suffered from lapse of memory but now her memory is quite good." When asked whether she told him all this the witness said: "That I gathered during our conversation, although here I mention that while gathering this information from Mrs. Holt Christian I was struck by her minute attention to details and by her evident affection for Mrs. Kentwell and her children. * * * This is the sum total of my recollection, I incorporated immediately thereafter." (By incorporating it, the witness evi-

dently meant that he had incorporated the above conversation in a [249] letter which he had written to Mr. Garnett a few days after he saw Eliza, which letter is attached to his deposition as an exhibit.)

Henry Holmes, Esq., who has been a member of the bar of this court since 1892, testified that he first met Eliza Christian in the year of 1912 in Oxford, England, where she was residing with Mr. and Mrs. Kentwell; that "I went there to announce to Mrs. Christian that Mr. J. M. Dowsett, the assignee of an option that she have given in 1907, I think, which was to May K. Brown, the wife of Arthur Brown,—that Mr. Dowsett was prepared to exercise that option, which had been transferred to him by Captain Matson." The witness was shown a copy of the option and identified it. When asked if he knew the signature of Eliza R. P. Christian the witness said: "Well, I saw her sign her name to the conveyance by her to Mr. Dowsett, at the consulate in London, at the time that she carried out the provisions of that option by conveying the interest that she had in Makaha to Mr. Dowsett." When asked whom he saw when he called at the Kentwell home in Oxford, the witness said: "The door was opened to me by Mrs. Christian. I told her where I had come from and what my name was, and she invited me into the house. I went with her into a sittingroom and there I saw her father, Mr. John D. Holt, whom I had known in Honolulu. * * * I told them what the object of my visit was. * * * I said that I had come to ask Mrs. Christian

to carry out her agreement or option to transfer her share of Makaha to Mr. Dowsett. John D. Holt said, 'Kentwell is acting for us and you have got to tell Mr. Kentwell what it is you want.' * * * I stayed about ten minutes or quarter of an hour with [250] them, and we talked about Honolulu. I asked them how they liked living in Oxford and both of them answered. I remember John D. said 'I find it very cold,' but he thought the country was very beautiful, and she said that 'I think he doesn't like it because he misses his poi. * * * She" (Eliza) "said, 'Well, I think he doesn't like it very well because he misses his poi,' and the old man said, 'Yes, that's it; I would like to get back to Honolulu to have some more poi.' She said, when I asked her the same question, if she liked it, that she liked the cold; went out for one or two walks every day, usually with her father, and she liked what she called 'the life,' I mean the quiet, very decent life there is there in the university city of Oxford. * * * The conversation was fairly general and what was to be expected between a person arriving from Honolulu and these two Hawaiians." When asked if the conversation was with both John D. Holt and Mrs. Christian the witness said: "Yes, they were both there. One would talk and then the other." Speaking of her appearance at that time Mr. Holmes said: "She seemed to be in very good health, judging by the color of her skin; of course it's a cold country and if you get out much you will have pink cheeks. She seemed to be in good

health, I would say." The witness saw Eliza again at the Kentwell home within a week. Speaking of who were present at the second meeting the witness said: "Mr. and Mrs. Kentwell were there, and Mrs. Kentwell's children, and Mr. John D. Holt and Mrs. Christian. * * * My wife was with me. * * * We were invited to stay to tea, and tea was served in the garden, I might put it, at the back. Mrs. Kentwell said to Eliza, 'Will you sit with us?'—'us' meaning with Mr. and Mrs. Kentwell, my wife and myself. She says, 'No, I'll sit with the children.' [251] They had a table a short ways from the old folks' table, and she said, 'I'll sit with the children.' * * * There was a little general conversation. My wife would ask her" (Eliza) "a question, or I would, and usually get an answer." When asked if anything was said at that time with relation to the proposed sale to Mr. Dowsett the witness said: "Well, I had mentioned to Mr. Kentwell, of course, the purpose of my visit. He seemed to understand the case very well, because of the experience that he had had in the case of Waialua when Mr. Withington went across. It was not a novelty to him, or it was not unexpected that Mr. Dowsett or someone representing him might appear on the scene in connection with the option that Mrs. Christian had given. * * * Mr. Kentwell said, 'If I could escape the obligation to carry out that option * * * I wouldn't carry it out.'" When asked when he next saw Mrs. Christian the witness said: "Oh, I saw them more than once, on that visit to Oxford. They

came to the hotel to dinner the night after the tea we had had,—Mr. and Mrs. Kentwell and Mrs. Christian; John D. didn't want to go. We had them to one of the hotels in Oxford to dinner; they stopped quite late, about ten o'clock." There were present "Mr. and Mrs. Kentwell and Mrs. Christian and my wife and myself. * * * I suppose the dinner would take place about seven o'clock, half past six or seven, and they certainly were there until about ten. * * * We talked about all sorts of things,—with this exception, Mr. Kentwell said, 'You better acquire John D. Holt's, what you call, contingent interest, or buy his interest.'" When asked if there was any conversation with Eliza that evening the witness said: "She was a girl that would speak if she was spoken to. She is not a forward girl; shy, retiring, but never hesitated to answer any question which was [252] put to her, but never would start a conversation. * * * My wife talked to her." When asked when he next saw her the witness said: "My recollection is that—we were living at the hotel; my recollection is that we met them at lunch next day, at the hotel." There was a "general conversation there." When asked who joined in the conversation the witness said: "Well, Mrs. Kentwell talks very easily and rather fond of it, more so than her husband, but Mr. Kentwell talks, too, freely. Eliza would talk when she was spoken to but I don't think otherwise." The witness said: "I saw them next at the American consulate, in London." There were present

"Mr. and Mrs. Kentwell, Mr. John D. Holt, and Mrs. Christian and I were there." The name of the consul was "either Westacott or Westmacott, I am not sure which." When asked to state what took place at the consulate while Eliza was there the witness said: "I arrived at the consulate before they did. When they came in the consul, or vice-consul, said, 'Oh, you Honolulu people are here again,'—evidently referring to the fact that he had met them while the Waialua transfer was made. * * * He asked what the business was, and Mr. Kentwell said that they wanted him to take the acknowledgments to three deeds, I think he said just three deeds. * * * The first deed that was * * * produced was the conveyance by Eliza Christian to Mr. Dowsett of her share or interest in Makaha, according to the terms of the option." The witness was shown a document dated May 21, 1912, bearing the signature of Eliza R. P. H. Christian and identified it as the deed of which he was speaking. "The consul took the paper in his hand and looked over it and he said to her" (Eliza) "'You understand that this is a transfer by you of some property in Honolulu?' and she said 'Yes;' then he asked her if she acknowl- [253] edged that as her free act and deed,—the usual form. She said she did. Oh, I ought to mention that she signed the document there before him and he witnessed her signature, then took the acknowledgment afterward. * * * I was present all the time." When asked if there was any conversation or anything

like that on the occasion when the deed was signed the witness said: "No, there was very little said at the consulate." When asked whether any money was paid at that time the witness said: "I had a certificate of deposit for what was the equivalent in England of $7,500, and I tendered that to Mrs. Christian, and her father said, 'Oh, give it to Kentwell,' and I asked her if that was all right, and she said 'Yes,' and I handed it to Mr. Kentwell." When asked if he saw her again after the execution of the deed the witness said: "Yes, we went to a moving picture show. In 1912 moving picture shows in England were not common, but this was more than usual because it was colored pictures of the Durbar in India. * * * Mr. and Mrs. Kentwell, John D., Eliza, my wife, and myself" went together. When asked if he remembered having any talk with Eliza the witness said: "No, I don't remember anything. Eliza—I was trying to explain to her something about the movies, that is, what the Durbar was; apparently the meaning of the word was not commonly understood." This was the last time the witness ever saw Eliza. When asked if on any of the occasions mentioned by him there was anything to indicate anything unusual about her the witness said: "No, I saw nothing and heard nothing that would possibly raise that question in the mind of anybody who had a mind of his own."

Mekia Kealakai, bandmaster of the Hawaiian Band, and his wife Millie Kealakai, visited the Kentwells in Oxford in [254] 1919 remaining in

their home for about two weeks. While they were there he saw Eliza daily and the way he looked at it "she is the servant of the family," doing washing, cooking, cleaning and everything; being helped by Annie Kentwell and her children. He had been frequently in the kitchen while Eliza cooked. When the meals were served all the family, including Eliza, ate together. From his observance of her he found her to be normal.

The testimony of Mrs. Kealakai was in substance the same as that of her husband.

Copies of four letters were received in evidence, the originals of which the Waialua company claims were composed and written by Eliza. Two of these letters were dated December 7, 1908, the third was dated January 29, 1910, and the fourth March 11, 1910. They were apparently addressed to James L. Holt and received by him in Honolulu sometime in April, 1910. The originals of these letetrs were taken by James L. Holt to the office of Castle & Withington and were handed to Mr. W. A. Greenwell, who was a member of the firm of Castle & Withington. Greenwell had copies made, compared the copies with the originals and handed the originals back to James L. Holt. These originals were lost and therefore were not produced. If the contention of the Waialua company regarding the authorship of these letters can from the evidence be sustained they furnish very strong proof that Eliza was mentally capable of binding herself by

the deed which in the instant case is sought to be set aside. We will consider this question later.

It is argued by the Waialua company that the probative force of the evidence which tends to show that Eliza Christian's mentality at the time the deed in question was signed by her was normal is so much more conclusive than the evidence tending [255] to show the contrary that we should decide the question of the validity of the deed in the affirmative.

In this connection particular stress is laid upon what is termed "documentary evidence." This evidence includes the following instruments that were signed by Eliza long before she signed the deed in question: Lease to the Waialua company of March 17, 1905; assignment of rents to Annie Kentwell dated August 31, 1906; lease of August 31, 1906, to Annie Kentwell of Eliza's contingent interest in lands at Makaha; confirmation on June 13, 1907, of a lease by John D. Holt, Jr., to Annie Kentwell; deed dated October 26, 1907, to L. L. McCandless of property at Makaha; option of June 14, 1907, to May K. Brown; on the same day joining in a conveyance by Annie Kentwell and Lawrence Kentwell to May K. Brown of their interest in lands at Makaha. It also includes the following instruments signed by Eliza subsequent to the deed now in question: Deed of May 21, 1912, to J. M. Dowsett; power of attorney to Henry Smith dated January 11, 1923; a similar instrument dated March 16, 1923. None of these instruments, of

course, bears any internal evidence of Eliza's mentality. She did not prepare them nor was she, so far as the evidence shows, a participant in the negotiations to which they related. Their value as evidence of her mentality, therefore, depends on the testimony of those who were present when she signed them. Regarding the instruments which she signed in 1905 and 1906, so far as we are informed from the evidence, the only person present when she affixed her signature was the notary who took her acknowledgments and he is no longer living. As to those that were executed in 1907 there is the testimony of the officers who took the acknowledgments, and as to the one that was executed in 1912 there is [256] the testimony of Henry Holmes. The American consul who took her acknowledgment to this last deed is no longer living. Mack and Bernard, one a notary in New Jersey and the other a notary in New York, while performing a purely ministerial duty, each saw Eliza briefly on two occasions many years before he gave his testimony. Henry Holmes saw her on four occasions while arranging in behalf of his client for her signature to the deed. The testimony of these witnesses is in agreement that she gave no indication in their presence of any mental deficiency. It would not be fair to say, however, that this testimony, based as it was on casual observation, although entirely honest in motive, outweighs that of many contradicting witnesses whose opportunities for observing

Eliza were much more frequent and whose acquaintance with her was much more intimate.

Regarding the powers of attorney executed by Eliza to Henry Smith, which are included in the "documentary evidence" which the Waialua company claims is cogent proof of her mental competency, it appears from the certificate of J. Rose, a notary, that they were executed in the presence of and acknowledged before him at County Hall, Oxford. It appears, also, that the one dated March 16, 1923 (the last one), in addition to being acknowledged before J. Rose, was also witnessed by P. Bates and H. W. Hansford. None of these persons, however, were called as witnesses and we have no means of knowing what their impression of her mental condition was at that time. Like the instruments signed by her, to which we have already referred, these powers of attorney in and of themselves provide no evidence of the degree of her intelligence. [257]

We have already mentioned four letters which the Waialua company claims were written by Eliza to James L. Holt. If she was in fact the author of these letetrs they would afford very strong evidence of her mental competency. While by no means models of English composition or even of grammatical construction, they indicate a reasonably sound mind—certainly a mind of sufficient maturity to execute a valid deed. There is no evidence, however, from which even an inference can be drawn that these letters were the products of Eliza's

brain or her hand. The evidence discloses that they were taken to the office of Castle & Withington by James L. Holt. They were then copied by a stenographer, under the direction of W. A. Greenwell, and the copies, after comparison with the originals, were placed on a file where they remained until they were produced at the trial. The originals were returned to Holt and were apparently lost or destroyed. Whether the originals were autographed or typewritten does not appear. Whether the signature was autographed or typewritten does not appear. Whether the letters were composed by Eliza or someone else does not appear. It is contended by the Waialua company that even so, the letters themselves, by their very construction, indicate that Eliza was their author. If her mind was in the rudimentary state indicated by many of the witnesses this contention is defeated rather than sustained by the letters. Many of the words used, the architecture of many of the sentences and some of the subjects referred to are certainly beyond the ability or the apprehension of one whose mind was that of a child five or six years of age. For instance, the letter of December 7, 1909, is as follows: [258]

"With regard to the proposition made to you in my behalf by Mr. Lawrence K. Kentwell in his letter of October 12, 1909, as to allowing me Fifty Dollars ($50.00) per month, until such time as you are able to dispose or buy my contingent interest in the ahupuaas of Halemano and Wahiawa situate in

the district of Waialua, Oahu, T. H., for the sum of Forty-five Thousand Dollars ($45,000.00) Ten Thousand Dollars of which is to be paid to me in cash upon the execution of a warranty deed duly signed and delivered and the balance of $35,000.00 bearing no interest upon the death of my father John Dominis Holt.

"It is to be understood of course that the monthly allowance which you will advance to me from time to time shall be deducted from the sum of $10,000.00 on the final consummation of the deal.

"Trusting that you will do all you can in my behalf in getting this matter through satisfactory and kindly remember me to all the family at home, I remain with aloha,

"Sincerely yours,"

This letter has no characteristic that must of necessity be attributed to Eliza but is rather indicative of a person of more business experience and education than, according to the evidence, she possessed. The other letters, while not so sophisticated, cannot be said to bear upon their face the impress of her mentality or personality as distinguished from that of her father for instance, who, so far as we are informed to the contrary, is just as likely to have been their author.

In appraising the other evidence in the case we must do so with due regard to the comparative frequency with which the witnesses observed Eliza, the nature of their contacts [259] with her and their descriptions of her conduct and demeanor on differ-

ent occasions and during different periods. For example, the testimony of Mrs. Cushingham, who knew her at Makaha during the first period of her life and who observed her with the view of ascertaining the quality of her mind, strengthened as it is by the testimony of Mrs. Zablan and others, that she was mentally deficient, is much more reliable and conclusive than the testimony of the witnesses who while working on the Holt premises saw her playing on the beach and at other places and who considered her normal.

Coming to the period which Eliza spent at the Catholic school in Honolulu, we find the testimony of the Sisters, whose specific duty it was to teach her and to ascertain whether she was capable of making progress, a surer foundation for a conclusion as to her mentality than the testimony of the many witnesses who as children carelessly saw her playing about the school and noticed nothing abnormal in her conduct. The testimony relating to her mental condition during the short period she was at St. Andrew's priory is almost entirely without conflict—that she was simple-minded. The testimony bearing on her mental condition during the later periods of her life is much more voluminous, and, while not entirely in accord, nevertheless, when considered in connection with the frequency with which the various witnesses observed her behavior in the simplest things pertaining to her life and the opportunities they had of observing her general demeanor, tends so

strongly to establish the fact that she was mentally impotent as to exclude any other reasonable hyopthesis. No child of normal mind, who had spent several years in schools [260] of recognized standing, under the tutelage of competent teachers, would be unable to progress beyond the simplest and most rudimentary studies. No such girl, after she had reached the age of adolescence, would be unable to recite the alphabet and count beyond a few numbers or read only the simplest words or carry on a rational or sensible conversation or take ordinary care of her person or her clothes or intelligently perform any kind of household duties. No such girl, while in a state of advanced and obvious pregnancy, would sit in the daytime on a public street and play marbles with a number of boys, or without shame would answer the calls of nature in public places, in the presence of others, or do the many other irrational things Eliza is shown to have done. No such girl, testifying in a case in which a man was charged with having raped her, would be so utterly unable to give an intelligent account of what had occurred as was Eliza in the Hall case. We cannot accept Lorrin Andrews' testimony that she was merely acting. That assumption is entirely inconsistent with her mental ability. The reasons for her many manifestations of imbecility during the major part of her life are furnished by the testimony of Dr. Good, Dr. Waterhouse and Dr. Morton, who, long after she was a mature woman, tested her men-

tality by scientific methods and were of the opinion that she possessed the mind of a child five or six years old and that her condition was a continuing one. The testimony of these eminent experts is not weakened by that of Dr. Masson who saw her at the maternity hospital in New York but who is not a specialist in mental deficiency and who made no examination of her with reference to her mental condition. Nor is it weakened by the testimony of Dr. [261] Douglas who talked with her at the Kentwell home in Oxford. Dr. Douglas is admittedly not an expert on the subject of mentality and his opinion cannot be given the same weight as that of Dr. Good, Dr. Waterhouse or Dr. Morton.

The overwhelming weight of the evidence requires us to find, and we do find, that on May 2, 1910, Eliza Christian was and at all times has been mentally incompetent to execute a deed or to understand its purpose or effect or to engage in any business transaction of consequence. She was feeble-minded. Born in 1885, in May, 1910, she has the mentality of a child of not more than five or six. She could read only a very few words, and those very simple ones of two or three letters; could write her own name and could write simple words if they were spelled out to her by another person; she could not compose a letter or other writing; she was incapable of being taught any but the simplest things; she could not form any but the simplest sentences; she could not carry on an ordinary, sensible or rational conversation; if asked simple

questions, she could answer them "yes" or "no," and sometimes in a very few more words; she was incapable of reasoning and was easily influenced by suggestion; she was utterly incapable of grasping the significance of a transaction involving the purchase or the sale of land or of valuing property or of determining the wisdom or lack of wisdom of making a sale. In short, we find that at the date of the deed she was a congenital imbecile.

The next question to be considered is the effect of the grantor's mental incompetency on the deed of May 2, 1910. More specifically, the question is, does her mental incompetency render the deed absolutely void, requiring its [262] unconditional cancellation without regard to the equities of the case, or does it render it voidable merely, leaving the rights of the parties, including the cancellation of the deed, to be determined according to equitable principles? This question has been ably and elaborately argued by opposing counsel.

It is contended by the Waialua company that the deed is voidable, that is to say, it is a valid deed until set aside by judicial order, and that a careful balancing of the equities, as that term is defined by law, and as such equities are disclosed by the evidence, must bring us to the conclusion that the deed should not be canceled and that the decree appealed from should be reversed.

On the other hand, it is contnded on behalf of the petitioner that the deed is absolutely void and

should be canceled regardless of the effect of such action upon the Waialua company and regardless of the burdens that may be cast upon it by the cancellation. As an alternative contention it is claimed on behalf of the petitioner that even if it should be decided that the deed is voidable and that it is therefore necessary to consider the equities of the case, such consideration must bring us to the conclusion that the deed should be canceled and the decree appealed from affirmed.

If Eliza R. P. Christian prior to signing the deed had, in a proper proceeding, been judicially ascertained to be mentally incompetent, we think there can be no doubt that the deed would be entirely void. Such adjudication would be notice to the world of her mental state and whoever dealt with her would do so at his peril. We think, also, that if the Waialua company, or its agents duly authorized to obtain [263] her signature to the deed in question, and actual knowledge of her incompetency or had knowledge of facts which would put a reasonable person upon inquiry, which inquiry if honestly pursued would lead to such knowledge, the deed would, as between the parties, be entirely void.

There is no evidence, and indeed it is not even suggested, that there had been any prior adjudication of mental incompetency, so that situation is not really before us. It appears from the evidence that David L. Withington, long deceased, in pursuance of the direction of the Waialua company, went to England for the purpose of completing the

purchase of Eliza's interest in the lands and obtaining a deed from her. There is no dispute that Withington was the Waialua company's agent for this purpose and that he was the only representative of the company present at the time the transaction was closed. There is no evidence that prior to his arrival at Oxford Withington had ever seen Eliza or had been informed that she was mentally incompetent. Annie Kentwell's deposition contains the only testimony as to what occurred at the time the sale of Eliza's interest in the land was being discussed at Oxford. Her testimony on this subject is as follows: "I said to Mr. Withington, 'She is non compos mentis,' Mr. Withington said, 'I know it is all right we are taking the risk,' then my husband spoke up and said to me, 'it is all right dear, leave it to me.' * * * I said, 'If that is the case leave it to you then.' " This witness is greatly discredited by her thoroughly proven desire and that of her husband, Lawrence Kentwell, to facilitate the sale of Eliza's interest. Under these circumstances it is highly improbable that she would have done or said anything that might [264] have jeopardized the fulfillment of those wishes.

Leaving out Annie Kentwell's testimony as being unreliable, and deciding independently of it whether Eliza's mental condition was so apparent that it was discoverable by ordinary observation and was therefore in a legal sense known to Withington, we think it only fair to again refer to the testimony

of the notaries in New Jersey and New York and the testimony of Dr. Douglas and that of Mekia Kealakai and his wife and also to that of Henry Holmes. None of these witnesses saw anything about her indicating an impaired mind. It is true that in deciding the question whether Eliza was mentally incompetent we have not followed the testimony of these witnesses, nevertheless we think it of sufficient weight concerning the impression she made upon superficial observers to justify the conclusion that Withington, who is not shown to have had any closer contact with her than did these witnesses, likewise saw nothing in her to cause him to suspect that she was not of normal mind. Of course, if Withington, knowing of her incompetency, had taken the deed from her notwithstanding, it would have been a highly dishonorable and unprofessional act and thoroughly inconsistent with the character and reputation which he is shown by the evidence to have possessed. During the testimony of Arthur Withington relative to the professional and personal character of his brother, David Withington, counsel for petitioner made the following statement in open court: "I want to add my personal commendation of the remarks of witness and say that we do not come before this court with any intent or desire in any way to besmirch the name of Mr. David L. Withington. We agree that he was a man of estimable character. The only charge in this case is the mistake that [265] was made in this instance, as is apt to be made by the best of us."

Assuming, however, that the Waialua company had no knowledge of Eliza Christian's incompetency, it still remains to be decided whether the deed in question is nevertheless void or merely voidable. Upon this question courts of last resort are not in entire harmony.

Counsel for the petitioner claims with great earnestness that the rule laid down in Dexter v. Hall, 82 U. S. (15 Wall.) 9, 20, 21, is controlling in the instant case. In the Dexter case one Hall, while an inmate in a lunatic asylum in Philadelphia, signed and acknowledged a power of attorney to his brother-in-law, Harris, empowering him to sell certain lands which he (Hall) owned in California. In pursuance of this power Harris conveyed the lands to certain persons who in turn conveyed them to Dexter. Subsequently Hall died in the asylum, leaving a widow and four children who brought an action of ejectment against Dexter for the recovery of the lands. Their contention was that the power of attorney to Harris was void because of Hall's mental condition at the time he executed it and therefore the title to the lands never passed out of him. The Supreme Court of the United States, which ultimately decided the case, said: "Looking at the subject in the light of reason, it is difficult to percieve how one capable of understanding, and of acting in the ordinary affairs of life, can make an instrument the efficacy of which consists in the fact that it expresses his intention, or, more properly, his mental conclusions. The fundamental idea of

a contract is that it requires the assent of two minds. But a lunatic, or a person non compos ments, has nothing which the [266] law recognises as a mind, and it would seem therefore, upon principle, that he cannot make a contract which may have any efficacy as such. He is not amenable to the criminal laws, because he is incapable of discriminating between that which is right and that which is wrong. The government does not hold him responsible for acts injurious to itself. Why, then, should one who has obtained from him that which purports to be a contract be permitted to hold him bound by its provisions, even until he may choose to avoid it? If this may be, efficacy is given to a form to which there has been no mental assent. A contract is made without any agreement of minds. And as it plainly requires the possession and exercise of reason quite as much to avoid a contract as to make it, the contract of a person without mind has the same effect as it would have had he been in full possession of ordinary understanding. While he continues insane he cannot avoid it; and if, therefore, it is operative until avoided, the law affords a lunatic no protection against himself. Yet a lunatic, equally with an infant, is confessedly under the protection of courts of law as well as courts of equity. The contracts of the latter, it is true, are generally held to be only voidable (his power of attorney being an exception). Unlike a lunatic, he is not destitute of reason. He has a mind, but it is immature, insuffi-

cient to justify his assuming a binding obligation. And he may deny or avoid his contract at any time, either during his minority of after he comes of age. This is for him a sufficient protection. But as a lunatic cannot avoid a contract, for want of mental capacity, he has no protection if his contract is only voidable." [267]

While the language of the court is broad enough to include all contracts of insane persons, whether their insanity had been judicially predetermined or not, or whether it was known or unknown to those dealing with them, the case which the court actually had before it was the act of a man who was, at the time the power of attorney was executed, confined, under commitment, in a lunatic asylum. This in itself was sufficient to inform anyone coming in contact with him that he was in no condition to transact business and that it would be hazardous to deal with him. It cannot be said, therefore, that the facts before the court required it to decide or that it had in mind and therefore intended to decide that the deed of a mentally incompetent person, whose condition had not been judicially ascertained and was not otherwise brought to the attention of those for whose benefit the deed was made, was not voidable merely but utterly void.

In Luhrs v. Hancock, 181 U. S. 567, 574, the court said: 'The deed of an insane person is not absolutely void; it is only voidable; that is, it may be confirmed or set aside." The facts which gave rise to this expression were as follows: On Febru-

ary 27, 1886, the legal title to a certain tract of land in Arizona was in one William A. Hancock. On that date Hancock deeded the property, which was a homestead, to his wife, Lilly B. Hancock. On March 5, 1892, Herrick & Luhrs obtained a judgment against William Hancock upon which execution issued and the property, which Hancock had conveyed to his wife, was sold to George H. N. Luhrs, who received a sheriff's deed. On March 21, 1892, Mrs. Hancock and her husband, who had borrowed money from one Robert Allstatter, executed to Allstatter a mortgage on the premises. This mortgage was foreclosed and [268] Thomas W. Pemberton became the purchaser at the foreclosure sale, and on February 14, 1895, received a sheriff's deed and took possession of the premises from the Hancocks. Luhrs, who held the deed from the sheriff under the execution sale but who had never been in possesison of the property, brought an action of ejectment against the Hancocks, to which action Pemberton was afterwards made a party. Luhrs failed in the suit and Pemberton prevailed. On appeal to the supreme court of Arizona the judgment of the lower court was affirmed and on appeal from that court to the Supreme Court of the United States the judgment was also affirmed. The foundation of Pemberton's title was the mortgage which the Hancocks had executed to Allstatter and in order to defeat his rights under this mortgage it was sought to introduce evidence of the insanity of Mrs. Hancock at the time of its execution.

In certifying to the Supreme Court of the United States the exceptions that were taken to the rulings of the trial court, the supreme court of Arizona included the following: "(3) The rejection of evidence of the insanity of Mrs. Hancock at the time she executed the mortgage to Robert Allstatter, the foundation of Pemberton's title. (4) The admission in evidence of the note and mortgage over the objection of plaintiff claiming Mrs. Hancock insane and incompetent to make them." These two exceptions are the basis of the language which we have quoted from the opinion of the Supreme Court of the United States. Whether Mrs. Hancock had been adjudicated insane and placed under guardianship or whether the mortgagee knew of her insanity does not appear. We think it may be fairly assumed, from the ruling of the court, that neither of these conditions existed. If either had existed it seems obvious that the Dexter [269] case would have been adhered to or, if it was thought that the doctrine there announced was unsound, it was have been overruled. The only reasonable conclusion is that in the Luhrs case the court intended to lay down the rule so often announced by other courts, that the contract of an insane person whose infirmity had not been adjudicated and was unknown to those dealing with him is not entirely void but voidable.

Kendall v. Ewert, 259 U. S. 139, 146, is also urged upon our attention as laying down the rule that the deed of a mentally incompetent grantor is entirely

void. Confining ourselves to the facts of that case which are pertinent to this question, it appears that Redeagle, a Quapaw Indian, executed a quit-claim deed to one Ewert to certain lands. At the time he did this Redeagle was a common and habitual drunkard. Speaking of the effect of such extreme and continuous use of intoxicating liquors upon the mind the court said: "That habitual drunkards are not competent to properly transact business is so widely recognized in the law that in many States statutes provide for placing them under a guardian or committee, with authority to put restraint upon them and to preserve their property, not less for themselves than for those dependent upon them. A typical statute makes 'all laws relating to guardians for lunatics, idiots and imbeciles, and their wards * * * applicable to the guardians' for drunkards. (Ohio General Code, §11011.) The extent to which one must have fallen below the standard of ordinary business capacity before he will be generally recognized in a community as a common drunkard is so notorious that we do not hesitate to say that evidence of competency entirely clear should be required to sustain a transaction in which such a person has plainly, as in this [270] case, been overreached by a person dealing with him who is competent and aggressive. Men so reduced will sacrifice their property, as they have sacrificed themselves, to the craving for strong drink; and Ewert's letters show that he knew perfectly well that the Indian with whom he was deal-

ing had reached that unfortunate stage of decay." Upon these facts the court held that the deed was void. Most assuredly so, for the obvious reason that Ewert, the grantee, knew of the grantor's mental deficiency. We do not understand that this rule is even questioned. We know of no United States Supreme Court decision directly holding that the deed of a mentally incompetent grantor who is not under judicial guardianship and whose impaired mentality is unknown to those dealing with him is absolutely void. Luhrs v. Hancock, supra, seems to indicate that such a deed is voidable merely.

In Clark Car Co. v. Clark, 11 F. (2d) 814, 819, also called to our attention in behalf of the petitioner, the court said: "Under the weight of federal authorities, a contract executed by the attorney in fact for an insane person is absolutely void regardless of the other party's good faith, or whether or not he had notice of the insanity," citing Dexter v. Hall, supra. Again, however, the court by this language lays down a rule which is broader in its scope than the facts before it. It appears that one Clark had executed a power of attorney to his agent Hummel, authorizing Hummel to transact certain business for him and in his stead. Hummel, purporting to act under this power of attorney, had certain dealings with Lanahan in regard to Clark's property. Subsequently, after Clark's restoration to sanity, he brought a suit to set aside these transactions and it was in this connection that the language [271] above quoted was used. The court

also said: "In this application of law by the federal courts, the question of notice on the part of Lanahan and Hummel as to Clark's condition at the time of the execution of this deed is not important, for the minute Clark became mentally incompetent, his power of attorney was at least suspended during the period of the incompetency, and any contracts executed during that period would be absolutely void. However, both Hummel and the defendant Lanahan had notice of Clark's serious condition." In view of this last statement it would seem that the broad doctrine laid down by the court was dictum.

Edwards v. Davenport, 20 Fed. 756, is often referred to in support of the view that the contracts of mental incompetents are under all circumstances entirely void. In that case Davenport, who was an imbecile, had executed a mortgage to Jonathan Edwards as trustee for the Equitable Trust Company of New London, Connecticut. The mortgagee had no knowledge of Davenport's mental condition. In a suit to foreclose the mortgage the circuit court held that the mortgagee acquired no rights under it as against a certain interest which Davenport owned in the property because of his imbecility. In reaching this conclusion the court felt obliged to follow Dexter v. Hall, supra. The inapplicability of Dexter v. Hall to a case in which the grantee was ignorant of the incompetency of the grantor has already been discussed.

What seems to us to be the better rule is thus stated in 32 C. J. 742 (§528): "The requisites or essentials of conveyances generally apply to conveyances by insane persons. A conveyance will be invalidated by mental incapacity on the part of the grantor. There is some conflict of authority regarding [272] the effect of an insane person's conveyance. While some confusion has arisen by reason of the use of the term 'void' and 'voidable,' and there are cases which have held that the conveyance of an insane person, who has not been so judicially adjudicated, is not merely voidable but absolutely void, and that the doctrine of innocent grantee has no application to such a conveyance, the great weight of authority is in favor of the rule that such conveyance is voidable and not absolutely void." Devlin, in his carefully prepared work on deeds, says (§73): "The deed of a person non compos mentis who is not under guardianship transfers a seisin and is merely voidable." In 9 A. & E. Enc. L. (2 ed.), the general rule is given as follows (p. 119): "A person whose mind is so unsound as not to have capacity to contract is for the same reason incapable of making a binding deed of conveyance. But the deed of one who has not been judicially declared insane is not wholly void; it conveys the seisin, and must therefore be avoided at the grantor's instance after restoration to reason, or at the instance of his heirs or legal representatives after his death, or his privies in estate, or legal guardian, at any time until by lapse of time or

legal affirmance the right to avoid is lost." Regarding what the author considers the minority rule, it is said (p. 120): "On the contrary, it has been held that all conveyances of insane persons, except feoffments and conveyances by matter of record, are absolutely void and of no effect." The universal rule is said to be (p. 121): "And if such person is under guardianship, or has been judicially declared insane, it is universally held that his deed is absolutely void."

As we have already observed, the deed of a person whose mental incompetency is known to those dealing with him [273] is in the same category as the deed of a person whose mental incompetency has been judicially determined. In Brewster v. Weston, 235 Mass. 14, 16, the Court said: "While some confusion has arisen by reason of the use of the terms 'void' and 'voidable,' it is settled in this Commonwealth that the deed of an insane person is not void, but voidable, and may, after the grantor is restored to his right mind, be adopted and ratified. After a careful examination of many cases we are convinced that this is the prevailing doctrine in this country and that is it a sound doctrine.

It is contended on behalf of the petitioner that in the instant case there is no real distinction, so far as the rights of the parties are concerned, between a deed that is absolutely void and one that is voidable; that in either event the deed in question must be canceled regardless of whether the

grantor was fairly dealt with or not. On the other hand, it is contended by the Waialua company that the deed, being voidable, should not be canceled if it would be inequitable to do so. Again we encounter confusion in the law.

The rule contended for on behalf of the petitioner is thus stated in 3 Thompson on Real Property, 1007-1009 (§2848): "It is immaterial that in taking the deed the purchaser acted in good faith, and without knowledge of the grantor's insanity, and that this had not been judicially declared. One who deals with an insane person, as one who deals with an infant, does so at his peril. The fairness of the purchaser's conduct can not supply the grantor's want of capacity. Insanity is not always apparent nor is the minority of an infant always apparent; and there may be a loss in dealing in good faith with either; [274] but the rules of law can not be changed in order to avoid all possible loss in either case. * * * The deed of an insane person not under guardianship may be avoided not only as against the grantee, but as against subsequent bona fide purchasers from the latter. Where an insane person is entitled to avoid a conveyance as between himself and his immediate grantee, he is also entitled to avoid it as between himself and any grantee or mortgagee holding under his grantee. 'When a man is defrauded, he may, as against his grantee, avoid his deed, but not against those deriving in good faith, and for an adequate consideration, a title from such grantee. He has the ability to convey an indefeasible title, and he does convey such title

to all bona fide purchasers from his grantee. The insane man has not the power to convey such indefeasible title. This incapacity inheres in all titles derived from him. The grantee whose title is thus derived must rely on the covenants of his deed. He risks the capacity to convey of all through whom his title has passed. The right of infants and of insane alike to avoid their contracts is an absolute and paramount right, superior to all equities of other persons, and may be exercised against bona fide purchasers from the grantee.'" 2 Black on Rescission and Cancellation 718-720 (§254) announces the same rule.

In Hovey v. Hobson, 53 Me. 451, 453, the court said: "The deed of an insane man not under guardianship is not void but avoidable, and may be confirmed by him if afterwards sane, or by his heirs. If under guardianship, the deed is absolutely void * * *. The right of avoiding a contract exists, notwithstanding the person with whom the insane man contracted was not apprised of and had no reason to suspect the existence of such insanity, and did not overreach him by any fraud or deception." [275] In Brewster v. Weston, supra, the Court, in addition to what we have already quoted, said: "As a contract made by an insane person is voidable, it is not affected by the circumstance that the other party acted fairly and without knowledge of the want of mental capacity or of circumstances which ought to have put him on inquiry, because he who deals with one who

is insane or with an infant does so at his peril." In Hermanson v. Seppala, 255 Mass. 607, 609, decided in 1926, the Court said: "If the plaintiff was insane when the deed was executed, it is not a defence for the defendant to show that he was ignorant of the fact, and practised no imposition. The fairness of the defendant's conduct cannot supply the plaintiff's want of capacity.' Seaver v. Phelps, 11 Pick. 304, 305." There are other courts that take this view of the law.

Judge Story, in his great work on Equity Jurisprudence (14 ed., §§317, 318), makes the following comment on the law which should govern the cancellation of contracts of persons non compos mentis: "The ground upon which courts of equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics, and otherwise non comptes-mentis, is fraud. Such persons being incapable in point of capacity to enter into any valid contract or to do any valid act, every person dealing with them, knowing their incapacity, is deemed to perpetrate a meditated fraud upon them and their rights. And surely if there be a single case in which all the ingredients proper to constitute a genuine fraud are to be found, it must be a case where these unfortunate persons are the victims of the cunning, the avarice, and corupt influence of those who would make an inhuman profit from their calamities. Even courts of law now lend an indulgent ear to cases of defence against [276] contracts of this nature, and if the fraud is made

out will declare them invalid" (§317). "But courts of equity deal with the subject upon the most enlightened principles, and watch with the most jealous care every attempt to deal with persons non compotesmentis. Wherever from the nature of the transaction there is not evidence of entire good faith (uberrimae fidei), or the contract or other act is not seen to be just in itself or for the benefit of these persons, courts of equity will set it aside or make it subservient to their just rights and interests. Where indeed a contract is entered into with good faith and is for the benefit of such persons, such as for necesaries, there courts of equity will uphold it as well as courts of law. And so if a purchase is made in good faith without any knowledge of the incapacity, and no advantage has been taken of the party, courts of equity will not interfere to set aside the contract if injustice will thereby be done to the other side, and the parties cannot be placed in statu quo, or in the state in which they were before the purchase" (§318).

In Clay v. Clay's Committee, 179 Ky. 494, 495, 496 the court said: "It has been decided in this state and elsewhere, over and again, that the deed of a person of unsound mind, especially before he has been adjudged a lunatic, is not void but is voidable only. * * * The mere fact of insanity, even when clearly proved, is not sufficient ground upon which to authorize a court of equity to set aside a deed; but there must, in addition, exist some other equitable grounds warranting the cancellation. If the

price is adequate and the transaction fair, neither the insane grantor nor his committee has an absolute right to have the conveyance cancelled; and only when there is injustice or inequity will a court of equity be authorized or [277] justified in interposing to annul a transaction and to restore the parties to the statu quo ante. Unless the grantor, by reason of his insanity or imbecility, has been imposed upon and has suffered some injustice, no reason exists for the cancellation of the deed; and without reason therefor the transaction cannot be disturbed." In Matthiessen & Weicherns v. McMahon's Administrator, 38 N. J. L. 536, it is said on the syllabus: "The general rule is that contracts with lunatics and insane persons are invalid, subject to the qualification that a contract made in good faith with a lunatic for a full consideration, which has been executed without knowledge of the insanity or such information as would lead a prudent person to a belief of the insanity, will be sustained." In Scott v. Hay, 90 Minn. 304, 313 the court said: "It must be further held, on this contention, to be the recognized doctrine that where a contract with a person of unsound mind has been entered into in good faith, for a fair consideration, as found by the court here, without notice of anything that would put a prudent person upon inquiry of the infirmity, and has been so far performed that the parties cannot be replaced in their previous condition, it cannot be avoided. The rule has been thus stated by Baron Pollock in Molton v. Camroux, 2 Exch. 487, 502: 'We

are not disposed to lay down so general a proposition as that all executed contracts bona fide entered into must be taken as valid, though one of the parties be of unsound mind. We think, however, that we may safely conclude that when a person apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property, which is fair and bona fide, and which is executed and completed, and the property, the subject-matter [278] of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in statu quo, such contract cannot afterwards be set aside by the alleged lunatic or those who represent him.'" It is said in 2 Pomeroy's Equity Jurisprudence 2010 (§946): "In general, a lunatic, idiot, or person completely non compos mentis is incapable of giving a true consent in equity, as at law; his conveyance or contract is invalid, and will generally be set aside. While this rule is generally true, the mere fact that a party to an agreement was a lunatic will not operate as a defense to its enforcement, or as ground for its cancellation. A contract executed or executory made with a lunatic in good faith, without any advantage taken of his position, and FOR HIS OWN BENEFIT, is valid both in equity and at law. And where a conveyance or contract is made in ignorance of the insanity, with no advantage taken, and with perfect good faith, a court of equity will not set it aside, if the parties cannot be restored to their original position, and injustice would be done." There are

many other authorities of high rank which announce the same view of the law.

After much reading and careful thought, we believe the rule that the deed of a grantor who was mentally incompetent to execute it, but whose condition prior to its execution had not been judicially declared and which in contemplation of law was not otherwise known to those dealing with such incompetent, is voidable only is more strongly supported by reason and justice than the harsher rule that such deed is absolutely and unconditionally void. We also believe that it is in accordance with sound principles of equity and the highest standards of justice to say that such deed, when judically attacked, should not be canceled upon the sole ground that the grantor was mentally incompetent but that in determining whether it should be can- [279] celed the nature of the transaction in all its aspects and the good or bad faith of those dealing with the grantor in respect to such transaction should be carefully considered. In other words, if under recognized principles of equity it would work injustice to the Waialua Company to cancel the deed but would work no injustice to Eliza Christian to permit it to remain unmolested, the cancellation should be refused. On the other hand, if it would work no injustice to the Waialua Company to cancel it but would be unjust to Eliza Christian to refuse to cancel it, the deed should be canceled. When the grantee can be restored to the position it occupied immediately prior to the conveyance,

the deed of the incompetent should be canceled even though it was taken in ignorance of the incompetency and even though the consideration paid was adequate. When, in addition to the foregoing, it is found that in reality the conveyance was not for the benefit of the incompetent and that the grantor did not receive the consideration paid by the grantee, the case for cancellation is made even stronger.

In deciding whether cancellation would work injustice to the Waialua Company we must consider whether it can be restored to the position it occupied immediately before it received Eliza's deed. If it can be restored to that position no injustice will be done it by the cancellation and Eliza's right to cancellation becomes absolute without regard to the Waialua Company's good or bad faith. Having dealt with an imbecile, although in ignorance of her condition, the Waialua Company cannot hold her to her bargain on the sole ground that it acted in good faith if upon her release from it the Waialua Company's status quo can be restored. That is to say, if when [280] the deed is canceled the Waialua Company is left no worse off than it was before the deed was made it suffers no injustice by the cancellation. Of course it cannot claim that it would be worse off because it would be obliged to surrender an interest in land which, from natural causes, such as a greater and more profitable development of the sugar industry, a larger and more competitive market and the acquisition by Eliza of the fee simple estate, had largely increased in value. Certainly

it would lose the benefit of this increment, but this would be no impediment recognized by law to its restoration to its status quo ante. The increment would be to Eliza's property and the loss to the Waialua Company would be of something which in equity never belonged to it.

It must be remembered that Eliza's deed was inoperative as a binding divestiture of her contingent interest or of the larger prospective interest which later matured into a fee simple estate. If there is no equitable reason why she cannot claim her interest, she is entitled to it notwithstanding its present worth by natural increment has grown to be much greater than it was when she signed the deed of May 2, 1910. Take, for instance, the case of a vendee of land who seeks to rescind a contract of purchase and sale on some ground recognized by equity, it certainly would be no defense for the vendor to say that the land from purely natural causes had depreciated in value and therefore he could not be restored to his original position. In Dickerson v. Morse, 203 Ia. 480, 483, 484, the court, speaking on this subject, said: "We may take judicial notice of the fact of the general depreciation in land values since March 1, 1920, but we are not ready to hold that a depreciation in the market value of real estate constitutes a defense [281] to the instant action. A substantial restoration is all that in any event is required. The right to rescind does not depend upon plaintiff's ability to make the adverse party whole in a pecuniary sense as to the real estate conveyed. The status quo depends upon

returning to defendant what plaintiff has received. * * * The market depreciation of the land is not a matter affecting the right of rescission." In 9 C. J. 1212 (§101) the rule is stated as follows: "Is is no objection to a restoration of property received on a fraudulent sale that it has fallen in value since the date of the transaction. To entitle a defrauded purchaser to rescission he must do equity, but it does not follow that he must be able to return the property in the condition in which he received it. So if the property is of a perishable nature the holder is not bound to keep it in a state of preservation until the bill is filed. And, when the property is lost in whole or in part, through some inherent defect that existed at the time of its conveyance, plaintiff is called on to restore only what he can." In Neblett v. Macfarland, 92 U. S. 101, 104, the court said: "It is no objection to a restoration of property received on a fraudulent sale that it has fallen in value since the date of the transaction."

The converse of this must be equally true. If the vendor sought rescission on some sound equitable principle, his suit being otherwise meritorious, he certainly would not fail merely because the land from natural causes had increased in value and therefore it would be a disappointment to the vendee to be obliged to give it up. Restoration to the status quo is not prevented by such changes in value. If however, valuable and irremovable improvements are placed on the land in the justified belief that he who placed them there is the owner of [282] the land and

there is no way by which he can be compensated for them, a different question arises.

It is contended by the Waialua Company that its status quo cannot be restored because during the time that intervened between Eliza's deed and the commencement of this suit it, in perfect good faith, erected permanent improvements on the land at the aggregate cost of approximately $425,000. These improvements consist for the most part of pumps, railroads, buildings, reservoirs, ditches, waterways, roads, bridges, fences and an electric plant. They are all parts of an equipment necessary to the profitable cultivation of the land, which is adapted to and used for the raising of sugar cane. If there is not legal method available to the Waialua Company under which it can be adequately compensated for the improvements there would be force in this contention. If there is such a method, however, the contention cannot be sustained for the evident reason that the Waialua Company's rights, in so far as they relate to the improvements, can be fully protected.

It appears from the evidence that at the time Eliza's deed was signed the Waialua Company already owned in fee practically an undivided two-thirds interest in the lands in question. If the deed is canceled and Eliza's interest is thus restored to her she and the Waialua Company will become co-owners of the land as tenants in common. The Waialua Company could then by a suit in equity institute proceedings to have the land parti-

tioned. In such a suit a court of equity in decreeing partition would have ample power to do full justice between the parties. Section 2767, R. L. 1925, which relates to the powers of the court in partition suits, is as follows: "The court shall have power to hear, investigate and determine any and all [283] questions of conflicting or controverted titles or claims either as to the whole of the property or as to any share or interest therein, either with or without the intervention of a jury, as hereinafter provided; to remove clouds upon the title of the property or any share or interest therein; to vest titles by decrees, without the form or necessity of conveyance by minors or unknown or absent owners; to cause the property to be equitably divided between the parties according to their respective proportionate interests therein, as the parties shall agree, or by the drawing of lots; to set apart any particular portion or portions of land to any particular party or parties who by prior occupation or improvement or otherwise may be equitably entitled thereto, and make any proper adjustment or equalization thereof by the sale of other portions and the application of the proceeds for such purpose, or as a condition of any such particular allotment to require payment by such parties of any value of the portion so set apart to them in excess of their proportionate interest in the value of the whole property; to divide and allot portions of the premises to some or all of the parties and order a sale of the remainder, or to sell the whole thereof, where for any reason the partition thereof in kind would be impracticable in whole

or in part or be greatly prejudicial to the parties interested, and by decree or decrees to invest the purchaser or purchasers with title to any property sold, and use the proceeds to equalize the general partition. When partition of two or more separate tracts or parcels of land is sought, the whole share of any party in all of them may be set apart to him in any one or more of the tracts or parcels."

This statute is but an expression of the powers which courts of equity have always had. These powers include that of [284] securing, in one of several ways, compensation to a cotenant who has placed improvements on the land, adopting of course the method which will most clearly do justice to all concerned. For instance, the court may award in severalty to the improving tenant that part or those parts of the common property upon which the improvements are located. If this method is feasible it gives to such cotenant all that his money and efforts have produced. At the same time it takes from the other cotenants nothing to which they are entitled or which had been produced either by their money or labor. If because of the area, location or nature of the lands this method cannot be justly employed, another method that may be adopted is to ascertain the cost or value of the improvements, sell the common property and deduct for the improving tenant the sum of money representing the improvements and then divide the remainder among the cotenants according to their fractional ownerships. It is also permissible, under some circum-

stances, to use one of these methods as to a part of the land and the improvements and the other method as to the remainder of the land and the improvements. Still another authorized method which courts have sometimes found equitable is to require the other cotenants to pay to the improving cotenant the cost of moving the improvements to the portion or portions of land set apart to the tenant who has constructed the improvements, or to other lands owned by him outside the boundaries of the common property, where such improvements can be profitably used. This does not at all exhaust the methods by which the equities of cotenants may be adjusted in a partition suit. The methods we have mentioned are not intended as even a suggestion of what should be done in a suit to partition the Holt lands, but merely to illustrate the broad powers courts have in suits of that kind. [285]

We are not at liberty under the pleadings and the evidence before us to adopt any of the methods that would be appropriate in a partition suit. Since, however, such a suit will be available to the Waialua Company the improvements which it placed upon the land do not constitute an obstacle to its restoration to its status quo. In order to restore the Waialua Company to its status quo, the sum of $30,000, the consideration paid for Eliza's interest, together with interest thereon, must be returned or secured to it. There is an absolute offer in the petition to make this restitution. How it is to be made will be considered later.

Eliza's status quo will be automatically restored upon cancellation of her deed. She will then occupy the position she would have occupied if the deed had never been signed by her. That is, she will be the owner in fee of an undivided one-third interest in the land.

There are other considerations which confirm us in the view that it would be inequitable to permit the deed in question to remain uncanceled. One of these is that we believe from the evidence that Eliza never received the money that was paid for her interest. Another is that we also believe from the evidence that the disposal of her interest was not for her benefit.

Of the persons who were present at the American Consulate when Eliza's deed was signed we have only the testimony of Annie Kentwell as to what occurred. When asked for her recollection as to the delivery of any check at that time she said: "As far as I can remember I think Mr. Withington gave the cheque to my husband but I am not quite sure; he may have given it to Mr. Holt, I am not sure." When asked if there was one check or more than one she said: "I cannot say. I cannot remember that." [286] The witness was asked this question: "I will ask you, Mrs. Kentwell, so far as the monies recited as having been paid in the document of May 2, 1910, the recitation there being that the sum of 35,000 dollars was paid, has Mrs. Christian to the best of your knowledge ever received that sum or any portion of that sum?" to which she answered, "No." When asked whether to her knowledge

Eliza Holt Christian, at the time the deed was signed, had any banking account in Oxford or anywhere else, she answered: "She did not," and when asked whether to her knowledge Eliza received any sum of money at that time personally, the witness answered: "No, she did not receive any." The witness also said that so far as she knew Eliza had not had any sum of money since the execution of the deed other than a few shillings she might have had for making purchases.

There is no apparent reason for disbelieving this testimony. On the contrary it is so strongly corroborated by other circumstances as to be convincing. It is evident that the dominant influence in Eliza's affairs was Lawrence Kentwell, a man of considerable business experience and an educated lawyer. All of the negotiations for the sale of Eliza's interest in the Holt lands were carried on and concluded with him. When Henry Holmes went to Oxford to close the option on the Makaha lands most of his consultations were with Kentwell and when the money was paid it was paid to him. Our belief from the evidence is that Eliza was so mentally incompetent that she was incapable of the least appreciation of the value of money or of dealing in any way with a bank, either in the deposit or withdrawal of money. The weight of the evidence is entirely in accord with this view. The conclusion, therefore, that it was not Eliza but Kentwell who re- [287] ceived the money paid for her interest in the Holt lands seems inescapable. If it was paid to her whatever became of it? According to Annie Kentwell

she never had a bank account and never had any money except very small change. There is no evidence that when a receiver was appointed for her in England any such sum as $30,000 was turned over to him. We think it by no means a strained inference that the money was also used by Lawrence Kentwell for his own purpose.

That it was not beneficial to Eliza to dispose of her interest at the time the deed was signed is obvious. She was then living with her father and the Kentwells at the home of the latter in Oxford. Her life, because of her imbecile condition, was very restricted and her wants were accordingly simple. There was no necessity for her to have more than enough money to supply them. Annie Kentwell, by the instrument of August 31, 1906, to which we have already referred, had undertaken to support Eliza during her life. She was in no danger, therefore, of becoming a public charge or of not being supplied with the things necessary to her sustenance and comfort. In her circumstances it would clearly be the part of wisdom to hold on to her contingent interest when by doing so she might eventually become owner of a vested and more valuable interest. It was certainly of no benefit to her to exchange her interest for a sum of money which she did not need and which she herself did not receive.

It is contended on behalf of the petitioner that there are other reasons why the deed should be canceled. One of these reasons is that in taking th deed from James L. Holt to Eliza's interest the

Waialua Company violated what was then a provision of section 55 of the Organic Act. The provision was as follows: [288] "That no corporation, domestic or foreign, shall acquire and hold real estate in Hawaii in excess of one thousand acres; and all real estate acquired or held by such corporation or association contrary hereto shall be forfeited and escheat to the United States * * *." This provision evidently was inteded to place a restriction upon the power of corporations to acquire lands in the Territory and was for the protection of the public and not for that of individual grantors. The penalty for a violation of the provision is not the reversion of the lands to the grantor, but their escheat to the United States Government. We think, therefore, that the petitioner can claim no advantage from the violation of the Organic Act complained of.

Another reason assigned for the cancellation of the deed is that the consideration was inadequate. We cannot agree with this. At the time the deed was signed Eliza's interest was entirely contingent. Whether it ever ripened into an absolute interest depended on her survivorship of her father who was the life tenant. If she predeceased him the fee simple interest upon his death would vest in his heirs at law then living. In this event the Waialua Company would get nothing by its deed nor would it be able to recover the consideration which it had paid. Because of Eliza's imbecility and her inability to take the care of herself which a person of normal

mind would be able to take, her life was encompassed by many hazards to which the life of a normal person is not exposed. It is very doubtful whether any reliable insurance company would have issued a policy on her life. During the negotiations for the purchase of her interest there was some talk of procuring such a policy but this was abandoned. At the time the deed was signed Eliza's father was seventy-one years of age, and while [289] it was unlikely that he would marry and beget other children, it was not beyond the range of probability that he would adopt children who under the law would also become his heirs. Even, therefore, if Eliza survived him there might be other heirs with whom the fee simple estate would have to be shared. In this event Eliza's interest would be correspondingly diminished, and what the Waialua Company obtained from her would to the same extent be diminished. In 1918 John D. Holt did endeavor to adopt the Kentwell children—six in number—and his effort failed solely for the reason that the proceedings were not in accordance with Hawaiian statutes.

While the Waialua Company was negotiating for the purchase of Eliza's interest, L. L. McCandless, a man of large financial means and an experienced dealer in agricultural lands in this community, was also endeavoring to purchase it. It is inferable from the evidence that he knew of the Waialua Company's activities and also knew what it had offered. Notwithstanding this he offered the same amount and

at no time was his offer increased. This is a strong indication that McCandless considered $30,000 to be all Eliza's interest was then worth. It appears from the testimony of James L. Holt that as far back as 1908 Lawrence Kentwell was trying to dispose of Eliza's interest and there is no evidence that at any time more than $30,000 was offered for it. Prior sales of undivided interests in these same Holt lands tend to show a market value of not exceeding $30,000 for a one-third contingent interest. The trial judge, by the application of certain mathematical formulae based on mortuary tables, reached the conclusion that her interest was worth $71,778.20. The problem that confronted the Waialua Company was not, however, [290] a mathematical problem but a human problem. Its purchase of her interest was a speculation that might or might not turn out to its advantage, according to subsequent events. If nothing transpired to destroy or diminish it the Waialua Company would be the gainer, but if its hopes in that regard were disappointed by Eliza's predecease of her father or the coming into existence of other heirs, it would be the loser. The success of its speculation could not be predicated upon any mathematical formula.

It may be safe enough for well-managed insurance companies to base their estimates of risk on Mortuary tables because in the long run, according to the law of averages, their gains exceed their losses. In a single transaction, however, where the value of a contingent interest in land is to be determined,

such tables are by no means a dependable criterion. Tynte v. Hodge, 13 Week. Rep. 172, involved the valuation of a reversion. The actuaries' figures on the value of the reversion varied from £50,000 to £80,000. Auctioneers, basing the value on market value, set it at from £25,000 to £28,000, the latter being the actual consideration paid. The court accepted the latter evidence, and dismissed the bill. The court said: "The calculations of actuaries founded on the average value of lives may, if adopted, work great injustice in a great variety of individual cases. The life in question may be an extraordinarily good or an extraordinarily bad one, which is likely to last beyond the usual time, or the contrary. How, then, can it be right to make a rule govern an individual case to which it may not at all apply? And to this let me add an observation that has occurred to me in reading this case over more than once, [291] that when you are dealing with the question what a man should pay for an insurance or the like, averages are reasonable enough; but to a person who is to purchase a particular reversion, the average value of life is a very poor security. What answer is it to a man, who by the accidental termination of a life loses the whole of his property, to be told that the life ought to have lasted, and then he would have been quite safe? You cannot value property in that way, and it is easily seen how completely the evidence is mistaken on that ground. It may be said that the lender can guard himself by an assurance; but when you are talking of the value of the reversion of a man of

forty-seven as against a life of sixty-eight, one sees at once what extraordinary fallacies may be introduced if you give heed to any such mode of calculating the value." See also Humes v. United States, 276 U. S. 487; Vanderbit v. Eidman, 196 U. S. 480.

It is further claimed that James L. Holt, the nominal grantee in the deed, received a secret profit from the transaction and that this is also a reason why it should be canceled. The chief justice finds from the evidence that James L. Holt did make such a profit and is of the opinion that this was inequitable and unjust to Eliza and therefore emphasizes the correctness of a decree of cancellation. The majority of the court, however, deem it unnecessary to pass upon this question.

It is contended by the Waialua Company that in no event can Eliza's deed be canceled because for nearly twenty years after it was signed no legal steps were taken to have it set aside and that this constitutes laches on her part which debars her from the relief which is now sought in her behalf. It is [292] also contended that she is barred by our statute of limitations.

That laches cannot be imputed to a person in the mental condition that Eliza Christian was in when she signed the deed is too well settled to require discussion. 21 C. J. 241, states the rule as follows: "Laches cannot be imputed to one of unsound mind; and mental affliction not wholly incapacitating plaintiff may excuse delay. A lunatic being under

the protection of the court, a suit in his behalf is in time if brought promptly after the appointment of a committee or guardian, and is not barred by the laches of a next friend or others not legally chargeable with the protection of his rights. But a person must proceed with reasonable promptness after recovering his reason.' Of course, if after the deed was signed Eliza had become of normal mind, it would have been necessary in order to escape the effect of laches for her to institute proceedings to have the deed canceled within a reasonable time after her disability was removed.

Regarding the contention that her suit is barred by our statute of limitations, it is argued that it being an action in personam the bar of six years fixed by section 2639, R. L. 1925, is applicable. This section provides that "the following actions shall be commenced within six years next after the cause of such action accrued, and not after * * * ."

Assuming that the present action is included in the enumeration of those required to be brought within six years, we must consider whether in view of Eliza Christian's mental condition it was necessary to commence the instant suit within the period mentioned in the statute.

It is contended that this was necessary for the reason that section 2648, R. L. 1925, specifies the classes of persons to which the period of six years is not applicable. This section [293] is as follows: "If any person entitled to bring any action in part 1 of this chapter specified (excepting actions against

the high sheriff, sheriffs, or other officers) shall, at the time the cause of action accrued be, either, 1. Within the age of twenty years; or, 2. Insane; or, 3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term of less than his natural life; such persons shall be at liberty to bring such actions within the respective times in said part 1 limited, after such disability is removed." Regarding this section it is argued that the word "insane," as it therein appears, should be given a narrow and technical meaning and that it should not be so construed as to include those whose mental condition is merely enfeebled, no matter to what extent they are thereby incapacitated. More specifically, the argument is that all classes of mental incompetents, except insane persons, are subject to the bar fixed by section 2639, and that Eliza, not being insane but merely feeble-minded, should have brought her action within the six-year period.

We are unwilling to adopt the meaning of the word "insane" which is sought to be attributed to it. Such meaning would place within the rigid prescription of section 2639 all classes of mental incompetents including congenital imbeciles, incurable idiots and persons who from one cause or another are mentally incapable of comprehending the simplest transactions of life and would exclude from it only those who are technically insane. We believe the legislature never intended to perpetrate such an injustice but intended to use the word "insane" in its generic sense. In 32 C. J. 594 (§4), the

author of the text says: "'Insanity' is a broad, comprehensive, and generic term, of ambiguous import, for all unsound and deranged conditions of [294] the mind. It includes every species of organic mental derangement, whatever may be its source or cause, whether the mental condition is congenital, or the result of arrested mental development, or of the act of Providence, or of the party's own imprudence, or of religious excitement, or of physical disease, or of dissipation, or of old age, or of unknown causes, or whether it is personal or hereditary. And it ordinarily implies every degree of unsoundness of the mind, whether it is casual, temporary, or permanent, whether of a mild or violent form; and it includes not only that derangement of the mind, produced by disease of the brain, such as is recognized by law as a defense to crime, which is the sole product of it, but it may also embrace conditions of subverted reason, such as may be produced by intoxication. The word has been frequently used to designate all mental impairments and deficiencies formerly embraced in the terms 'idiocy,' 'lunacy,' and 'unsoundness of mind.'" Eliza Christian's disability not having been removed the statute of limitations never began to run against her and therefore when her suit was brought had not tolled.

For the foregoing reasons it is our conclusion that the deed of May 2, 1910, so far as it affects Eliza R. P. Christian's interest in the land described, should be canceled.

We come now to another phase of the case. As we have already indicated, the trial judge, in addition to decreeing that the deed in question, so far as Eliza Christian is concerned, should be canceled, also decreed that the Waialua Company should pay to her acting guardian the sum of $540,906.07 as and for rents from April 10, 1922, up to the date of the decree. The question arises as to whether a decree for rentals can be entered in the instant suit. [295]

It is contended by the Waialua Company that no such decree can be entered for the reason that on March 17, 1905, it took a lease on the Holt lands at Waialua at an annual rental of $9000, in which lease Eliza R. P. Christian joined as a consenting party; that the term of this lease was twenty-five years, beginning April 1, 1905, and ending April 1, 1930; that by the pleadings in this case the validity of the lease was expressly excluded from the issues and therefore could not properly have been adjudicated by the court below and cannot be adjudicated by this court; that until the lease has been judicially determined to be invalid as to Eliza Christian the Waialua Company's possession of her interest in the Holt lands from April 10, 1922, up to the date of the decree was presumably lawful and therefore it is not liable to her in this suit for rents during this period even though it should be held that her deed of May 2, 1910, was invalid.

We find in the petition the following allegation regarding the lease: "Relief in equity against said lease need not be and cannot be herein prayed for,

respondent's sole claim of right to the said lands being now based upon the said deed of May 2, 1910, hereinafter referred to." In the Waialua Company's answer we find the following reference to the lease: "It admits that relief from said lease cannot be prayed for in this action and alleges that relief cannot be granted from said lease in this action." It is clear from these quotations that the parties were in agreement that no relief against the lease was prayed for or could be granted Eliza in the pending suit. Whether the lease should be held invalid was therefore excluded from the issues which the court was called upon to determine.

Unless the lease is absolutely void on its face or [296] unless it had before its expiration (for the reasons presently to be considered) lost its force, we think the contention of the Waialua Company must be sustained. If its invalidity depends solely on Eliza's mental incompetency at the time she signed it it is in the same category as the deed of May 2, 1910. That is to say, it is voidable and not absolutely void and therefore its effect, so far as Eliza is concerned, would, like the deed, have to be determined according to principles of equity. Since the Waialua Company has not only not been confronted with this issue but has been specifically informed by the petition that no relief arising out of the invalidity of the lease will or can be prayed for in the pending suit it would manifestly be unfair to now decide against it the questions upon which the fate of the lease may ultimately depend.

In these circumstances it was error for the trial court to enter a decree against the Waialua Company for rents and that portion of the decree must therefore be reversed.

The issue of whether the lease was invalid because of Eliza's mental condition was material to her right to recover rents and it should therefore have been presented by the pleadings and not excluded from them. Its omission and exclusion were perhaps induced by the petitioner's supposition that the only claim made by the Waialua Company to Eliza's interest was predicated upon the deed of May 2, 1910. This was, however, a mistaken supposition for if the deed fell the Waialua Company had a perfect right to claim that its posession was justified by the lease. It would be unjust, however, to hold that this cannot be now cured by amendment. Such amendment should in the interest of justice and a complete determination, in this suit, [297] of the rights of the parties be allowed. For that purpose the case should be remanded with proper instructions to the lower court.

It is contended on behalf of the petitioner that as to Eilza the absolute voidity of the lease appears from the lease itself and therefore it is no impediment to her recovery of rents in the instant suit, More specifically, the contention is that it appears from the lease that Eliza had only a contingent interest in the lands and therefore had nothing to demise and that she was not in privity with the lessors. The following cases are cited in support

of this contention: Standard Metallic Paint Co. v. Prince Mfg. Co., 19 Atl. (Pa.) 411; Matlack v. Kline, 216 S. W. (Mo.) 323; Coakley v. Chamberlain, 8 Abb. Pr. (N. S.) 37. These cases, however, are not in point for the reason that in none of them had the remaindermen joined in the lease or in any way assented to it. In Gas, etc., Co., v. Patterson, 184 Pa. St. 364, 367, 368, the lessee had obtained a lease for a specific term from a life tenant. Upon the death of the life tenant he sought, in a suit against persons who at the time the lease was executed were contingent remaindermen but who upon his death became owners in fee of the demised premises, to have the lease canceled upon the ground that it was terminated by the death of the life tenant. The lease was signed not *only the* life tenant but by the remaindermen and contained the following clause: "The said party of the first part hereby guarantees peaceable possession of the premises hereby leased during the term of this lease, and agrees and binds himself that if the said party of the second part should be legally dispossessed thereof, to pay and reimburse the said party of the second part for all improvements made upon the said demised premises by them." In holding [298] that the lease was not terminated by the death of the life tenant, the court said: "In the absence of anything showing a different intention, we would be forced to the conclusion that this lease terminated at the death of Alexander McClure. In this lease, how-

ever, we have the provision quoted in the foregoing findings of fact" (being the provision above quoted). "And we have also the further provision that 'all covenants herein bind executors, administrators and assigns,' which, while in itself and by itself, is of no special significance, but taken in connection with the other provisions quoted, there is shown plainly an intention of the parties, that if the said lessor, through his executor, administrators and assigns, should in any way secure the peaceable possession guaranteed, the lease would be binding upon the parties to the full and of the term thereof, and only in case of actual dispossession would the lessee be entitled to compensation for its improvements, and not other damages. The plaintiff claims it was dispossessed by operation of law, but it was not actually dispossessed, on the contrary all the parties interested have assured it peaceable possession for the full term of the lease, not asking any new or additional consideration, but only that it continue to perform the obligations of the lease to the end of the term thereof, as it seems plain, from the instrument itself, was the intention of the parties, provided it shall have the peaceable possession guaranteed to it." The bill was dismissed.

This case lays down a rule which we believe to be sound, namely, that when the owner of a contingent remainder in land joins in a lease made by the life tenant and the lease contains a guaranty of possession during its term it is not terminated by the death of the life tenant nor does his

death [299] affect the obligation of the lessee to remain in possession of the premises during the remainder of the term. The same rule should, of course, be applied when it is claimed by the former remainderman who had joined in the lease and who had guaranteed possession under it that it was terminated by the death of the life tenant.

Moreover, it is the settled law in this jurisdiction and in many others that a contingent remainder is alienable. Motors Co. v. Nalaielua, ante 418. The prevailing rule is thus stated in 24 A. & E. Enc. L. 406: "On reason, therefore, in any case where the remainderman is not ascertained, but where there is a person in existence in whom the remainder would immediately vest on the present happening of the contingency or the present determination of the particular estate, such person has a possibility coupled with an interest which he may transfer to another, subject, of course, to the same contingency by which it is affected in his hands. And this view is amply supported by authority as well as reason." It would seem inconsistent to say that a contingent remainderman is bound by a conveyance of his interest but is not bound by his consent to a lease of it.

It is also contended on behalf of the petitioner that even if the lease imposed any obligation on Eliza that obligation was merged in the deed which she signed on May 2, 1910, and was therefore extinguished. We cannot agree with this. Of course, if the deed had been a valid conveyance there would

have been no longer a necessity for the Waialua company to claim any rights, including that of possession, under the lease, but the deed, for the reasons we have already expressed, being invalid, the Waialua company's rights under the lease remain unaffected until it is canceled. [300]

The Waialua company further claims that by the instrument of August 31, 1906, Eliza conveyed to Annie Kentwell her interest in the Holt lands during her (Eliza's) life and that by the deed of May 2, 1910, in which Annie Kentwell and her husband Lawrence Kentwell, joined as grantors, this interest passed to James L. Holt and by subsequent conveyance to the Waialua company and therefore its possession of Eliza's interest in the lands was lawful and no decree against it for rents can be entered in this suit. The instrument referred to is as follows:

"This indenture—made this 31st day of August, A. D. 1906, by and between—Eliza R. P. Christian —(the only child and heir of John Dominis Holt, the elder) of Honolulu, Island and County of Oahu, Territory of Hawaii, of the first part, and— Annie Holt Kentwell—of the same place, party of the second part."

"Witnesseth—Whereas the party of the first part has for many years last past been supported and maintained at the home of the party of the second part, and at the cost and expense of the said party of the second part, and

"Whereas—the said first party is the only child and heir of John Dominis Holt, the elder, being also a devisee under the will of R. W. Holt, deceased, and is entitled in expectancy to a certain undivided interest or moiety in certain lands situate at Waialua, Oahu, now leased to the Waialua Agricultural Company, Limited, by lease dated the 17th day of March, 1905, and recorded in the Hawaiian Registry of Deeds in Liber ___ Folio ....., and

"Whereas—by virtue of being such heir of John Dominis Holt, the elder, and such devisee under the will of R. W. Holt, [301] deceased, aforesaid, she, the said party of the first part, shall upon the death of him, the said John Dominis Holt, the elder, be entitled to her share of the rents reserved in said lease aforesaid, which share of said rents aforesaid is now enjoyed by her father, the said John Dominis Holt, the elder, and

"Whereas—the party of the second part has agreed to support and to maintain the party of the first part for and during the period of the natural life of her, the said party of the first part,

"Now Therefore This Indenture Witnesseth—That the said—Eliza R. P. Christian—in consideration of the premises and of One Dollar to her in hand paid by—Annie Holt Kentwell—of Honolulu aforesaid, the receipt whereof is hereby duly confessed and acknowledged and for other and valuable consideration to the said—Eliza R. P. Christian—moving from said—Annie Holt Kentwell—,

she, the said—Eliza R. P. Christian—, does hereby give, sell, assign, release, transfer and set over unto the said—Annie Holt Kentwell—, her heirs, executors and administrators, all her title and interest in and to any and all rents issues and profits to which she may hereafter be entitled or which may be due and payable to her by, through or under the lease to the Waialua Agricultural Company, Limited, dated the 17th day of March, 1905, and recorded in said Liber ___ Folio___ or by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to demand, receive, collect and receipt for all such rents, issues and profits from whomsoever due during the term of the natural life of her, the said—Eliza R. P. Christian—.

"And—it is expressly agreed and understood between [302] and by the parties hereto that the party of the second part shall support and maintain her, the party of the first part, for and during the natural life of said first *part*.

"And—it is further agreed and understood by and between the parties hereto that in case the party of the first part shall survive the party of the second part, the heirs of said second party shall be entitled to perform the covenant of this agreement on the part of said second party to be kept and performed, and they shall during the life of said first party be entitled to the benefit or benefits hereof."

On its face this instrument purports to be an assignment of Eliza's interest in rents, issues and profits and if it is to be given any other interpretation it is because of the implication of law that such assignment is a conveyance of an interest in the land from which the rents, issues and profits are derivable. In Hapai v. Brown, 21 Haw. 499, 505, this court said: "A gift of the income or the rents, issues and profits of property is to be construed as a gift of the property itself unless from some language in the will it appears that the testator intended something different." This is a general rule of construction. See 2 Tiffany on Real Property §441; Beilstein v. Beilstein, 194 Pa. St. 152; Drusadow v. Wilde, 63 Pa. St. 170.

It is contended on behalf of the petitioner that if this is the effect of the instrument it is void for the reason that Eliza had a husband living at the time she executed it and that he did not give his consent in writing as required by section 2993, R. L. 1925. This contention may be passed without decision for the reason that, assuming the instrument to be void as a conveyance of an interest in land, it is nevertheless valid [303] as an assignment of rents. That rents due under an existing lease are severable from the reversion and may be assigned independently of the reversion is well settled. See Kaleiheana v. Keahipaka, 23 Haw. 169, 171. Nor did the provisions of section 2993 present any obstacle to the assignment of rents by Eliza independently of the written consent of her hus-

band. The only restriction placed upon her power to deal with her separate property was that she could not sell or mortgage her real estate without his written consent. In other respects she could deal with it as if she were a feme sole.

Laying aside for the moment the question of whether Eliza was mentally competent to bind herself by this instrument and treating its execution as the act of a mentally competent person it must be assumed that the object she sought to accomplish by it was to provide compensation to Annie Kentwell for her agreement to support Eliza during the latter's life. It must also be assumed that she intended to execute a valid instrument and not one that was invalid. If the instrument which she executed would be ineffectual as a conveyance of her interest in the land but would be effectual as an assignment of rents it should be given the construction which would accomplish Eliza's purpose and not that which would defeat it.

Because of the deed of May 2, 1910, in which Annie Kentwell and her husband, Lawrence Kentwell, joined as grantors, and by which they made a full and complete conveyance of all their interest in the Holt lands, including all claims and demands arising out of the lease of 1905, the instrument of 1906, which we have just been considering, unless hereafter set aside because of Eliza's mental incompetency, is a protection to the Waialua company against the payment to any one of the rents that accrued under the lease. The Waialua company's

liability for [304] rents since the termination of the lease is not involved in this suit.

Whether the instrument of 1906 should be set aside because of Eliza Christian's mental incompetency is not within the issues presented by the pleadings. It should, however, if the petitioner wishes to do so, be made an issue by amendment and the court below will be so instructed.

The decree appealed from, in so far as it relates to the cancellation of the deed of May 2, 1910, is affirmed and the Waialua Agricultural Company will be required to reconvey to Eliza R. P. Christian all of the interest which it has acquired from her under and by virtue of that deed upon her payment to the Waialua Agricultural Company of the sum of $30,000 with interest at six per cent per annum from May 2, 1910, to the date of the decree of this court, or upon her assuring to the Waialua Agricultural Company the payment of said sum together with interest by a mortgage upon the interest so reconveyed or in any other satisfactory manner. So far as it requires the Waialua Agricultural Company to pay to the guardian of Eliza R. P. Christian the sum of $540,906.07 because and on account of rents the decree appealed from is reversed and the case is remanded to the circuit judge with instructions to permit amendments to the pleadings which will serve to put in issue the validity of the lease of 1905 in so far as it may be affected by the mental condition of Eliza R. P. Christian and also to permit amendments to the

pleadings which will serve to put in issue the validity of the written instrument of August 31, 1906, so far as it may be affected by Eliza's mental condition and to receive all evidence that may be offered which is material to these issues and to determine whether the lease and the instru- [305] ment of 1906 were ineffective because of Eliza's mental incapacity and also to determine the question, consistently with such conclusions as may be reached on the issue of the validity of the two instruments and consistently also with the views and findings of this court, of whether the petitioner is entitled to recover against the Waialua Agricultural Company anything by way of rents and damages. An interlocutory decree in conformity with these conclusions will be signed upon presentation.

(s) ANTONIO PERRY.
(s) JAS. J. BANKS.
(s) CHARLES F. PARSONS.

BARRY S. ULRICH
(Ulrich & Hite on the briefs) for petitioner.

A. L. CASTLE and
H. PHLEGER
(Brobeck, Phleger & Harrison and Robertson & Castle on the briefs) for respondent Waialua Agr. Co.

[Title of Court and Cause.]

OBJECTIONS TO ORDER REMANDING CAUSE.

Received and filed in the Supreme Court May 21, 1931. (s) Robert Parker, Jr., Assistant Clerk. [307]

Comes, now WAIALUA AGRICULTURAL COMPANY, LIMITED, Respondent-Appellant above named, and objects to the making and entry of any order whatsoever in the above entitled cause except a decree in its favor reversing the decree of the lower court and dismissing Petitioner's bill.

Dated at Honolulu, T. H., this 21 day of May, 1931.

HERMAN PHLEGER and
ROBERTSON & CASTLE,
By (s) ALFRED L. CASTLE
Attorneys for Respondent-Appellant, Waialua Agricultural Company, Limited.

Service of a copy of the foregoing Objection to Order Remanding Casue is hereby acknowledged this_____.

_____

Attorneys for Petitioner-Appellee. [308]

[Title of Court and Cause.]

ORDER REMANDING CAUSE.

Received and filed in the Supreme Court May 21, 1931, at 10:02 o'clock A. M. (s) Robert Parker, Jr., Assistant Clerk [309]

The above-entitled cause having duly come on for argument in this court upon an appeal duly taken and perfected by WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation, respondent-appellant herein, from the decree and judgment duly made and entered in said cause by the Honorable Albert M. Cristy, Second Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, sitting at chambers, in equity, on the 16th day of October, A. D. 1929; A. L. Castle, Esquire, of the firm of Robertson & Castle, and H. Phleger, Esquire, of the firm of Brobeck, Phleger & Harrison appearing for said respondent-appellant, and Barry S. Ulrich, Esquire, of the firm of Ulrich & Hite appearing [310] for ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her Guardian, petitioner-appellee; and this Court having on, to-wit, April 18, 1931, made, entered and filed its written opinion herein containing its findings of fact and conclusions and rulings of law;

NOW, THEREFORE, in pursuance and effectuation of said opinion and of the findings of fact and conclusions and rulings of law so set forth therein as aforesaid,

IT IS HEREBY ORDERED:

I.

That that certain decree heretofore made and entered by the Honorable A. M. Cristy on October 16, A. D. 1929 and herein appealed from, be and said decree is hereby set aside and the cause is hereby remanded to said Judge of the Circuit Court, together with the opinion and decision of this Court herein, for further proceedings in said Circuit Court consistent with said opinion of this Court made and entered April 18, 1931.

II.

That said Circuit Judge be and said Judge is hereby instructed to permit suitable amendments to be made to the petition and pleadings herein which will serve to put in issue the validity of that certain lease dated March 17, 1905, being Exhibit A-8 in said cause, insofar as it may be affected by the mental condition of the said Eliza R. P. Christian; and said Circuit Judge is further instructed [311] to permit suitable amendments to be made to petition and pleadings herein which will serve to put in issue the validity of that certain instrument in writing of August 31, 1906, being Exhibit 2-G in said cause, insofar as it may be affected by the mental condition of the said Eliza R. P. Christian; and said Circuit Judge is further instructed to receive such further evidence as may be offered bearing upon or relating to any questions of fact as to which findings of fact have not heretofore been

made by this Court, which questions of fact and which evidence are or may be material to the issues thus to be raised by said amended pleadings with reference to the validity of and petitioner's right to cancellation of said lease of March 17, 1905, and said instrument in writing of August 31, 1906, or which are or may be material to the matter of any accounting for rents, issues and profits which may be decreed herein.

III.

That said Circuit Judge be and said Circuit Judge is hereby further instructed, consistently with the conclusions of law and findings of fact heretofore made and reached by this Court and consistent with the views and findings of fact to be made by said Circuit Judge not inconsistent with findings heretofore made by this Court, to determine the question of the validity of said lease of March 17, 1905, and of said instrument in writing of August 31, 1906, and the question of petitioner's right to cancellation of said instruments herein; and said Circuit Judge is further instructed to determine, [312] consistently with the views and findings of this Court, the question as to what, if any, amount and/or measure of relief petitioner is entitled to have and recover against the Waialua Agricultural Company, Limited, respondent herein, by way of rents and damages.

IV.

That said Circuit Judge be and said Judge hereby is instructed to make and enter its final decree herein

consistent herewith, at the conclusion of said further proceedings to be had before said Circuit Judge as aforesaid, which said final decree shall provide:

1. That that certain deed dated May 2, 1910, cancellation of which was and is prayed for herein, be canceled and set aside, in the manner and to the extent that cancellation thereof has heretofore been decreed by said decree of October 16, 1929, herein appealed from.

2. That respondent Waialua Agricultural Company, Limited, be ordered and required by suitable indenture to reconvey to Eliza R. P. Christian, herein appearing by her Guardian as aforesaid, all of the right, title and interest in and to the lands described in the petition herein which it, said respondent, acquired or claimed to have acquired from her through, under or by virtue of said deed of May 2, 1910, upon payment to it, said Waialua Agricultural Company, Limited, by or for her, said Eliza R. P. Christian, of the sum of $30,000.00, together with interest at the rate of 6% per annum from May 2, 1910, to the date of said decree to be [313] entered by said Circuit Judge as aforesaid, or upon the giving of assurance to said Waialua Agricultural Company, Limited, of the payment of said sum together with interest thereon, either by way of mortgage upon the interest so reconveyed or in any other satisfactory manner.

3. That such relief, if any, as to said Judge may seem just and proper consistent with the conclusions reached as aforesaid by said Judge and

with the views, findings of fact and conclusions of law heretofore reached by this Court be granted with respect to that certain lease dated March 17, 1905, being Exhibit A-8 herein, and that certain instrument in writing dated August 31, 1906, being Exhibit 2-G herein.

4. That petitioner do have and recover against Waialua Agricultural Company, Limited, such amount and/or measure of relief, if any, by way of rents and damages as to said Judge may seem just and proper consistent with the conclusions reached as aforesaid by said Judge and with the views, findings of fact and conclusions of law heretofore reached and announced by this Court; and

5. Said Decree, consistent with the opinion and Order of this Court, to further render full and complete equity and justice in the premises.

Made and entered this 21st day of May, A. D. 1931.

BY ORDER OF THE COURT.

[Seal] ROBERT PARKER, JR.
Assistant Clerk
Supreme Court of the Territory of Hawaii.

Approved:

(s) ANTONIO PERRY,
Chief Justice.

[314]

[Title of Court and Cause.]

NOTICE OF ORDER REMANDING CAUSE

Filed May 22, 1931 at 2:05 o'clock P. M. (s) J. A. Thompson, Clerk Supreme Court. [315]

To THE HONORABLE ALBERT M. CRISTY, Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, Sitting at Chambers, in Equity:

YOU WILL PLEASE TAKE NOTICE that in the above-entitled case the Supreme Court has rendered and filed the following order remanding cause.

"ORDER REMANDING CAUSE

"The above-entitled cause having duly come on for argument in this court upon an appeal duly taken and perfected by Waialua Agricultural Company, Limited, an Hawaiian corporation, respondent-appellant herein, from the decree and judgment duly made and entered in [316] said cause by the Honorable Albert M. Cristy, Second Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, sitting at chambers, in equity, on the 16th day of October, A. D. 1929; A. L. Castle, Esquire, of the firm of Robertson & Castle, Phleger & Harrison appearing for said respondent-appellant, and Barry S. Ulrich, Esquire, of the firm of Ulrich & Hite appearing for ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. von HOLT, her Guardian, peti-

tioner-appellee: and this Court having on, to-wit, April 18, 1931, made, entered and filed its written opinion herein containing its findings of fact and conclusions and rulings of law;

"NOW, THEREFORE, in pursuance and effectuation of said opinion and of the findings of fact and conclusions and rulings of law so set forth therein as aforesaid,

"IT IS HEREBY ORDERED:

I.

"That that certain decree heretofore made and entered by the Honorable A. M. Cristy on October 16, A. D. 1929 and herein appealed from, be and said decree is hereby set aside, and the cause is hereby remanded to said Judge of the Circuit Court, together with the opinion and decision of this Court herein, for further proceedings in said Circuit Court consistent with said opinion of this Court made and entered April 18, 1931.

II.

"That said Circuit Judge be and said Judge is hereby instructed to permit suitable amendments to be made to the petition and pleadings herein which will serve to put in issue the validity of that certain lease dated March 17, 1905, being Exhibit A-8 in said cause, insofar as it may be affected by the mental condition of the said Eliza R. P. Christian; and said Circuit Judge is further instructed to permit suitable amendments to be made to petition and

pleadings herein which will serve to put in issue the validity of that certain instrument in writing of August 31, 1906, being Exhibit 2-G in said cause, insofar as it may be affected by the mental condition of the said Eliza R. P. Christian; and said Circuit Judge is further instructed to receive such further evidence as may be offered bearing upon or relating to any question of fact as to which findings of fact have not heretofore been made by this Court, which questions of fact and which evidence are or may be material to the issues thus to be raised by said amended pleadings with reference to the validity of and petitioner's right to cancellation of said lease [317] of March 17, 1905 and said instrument in writing of August 31, 1906, or which are or may be material to the matter of any accounting for rents, issues and profits which may be decreed herein.

III.

"That said Circuit Judge be and said Circuit Judge is hereby further instructed, consistently with the conclusions of law and findings of fact heretofore made and reached by this Court and consistent with the views and findings of fact to be made by said Circuit Judge not inconsistent with findings heretofore made by this Court, to determine the question of the validity of said lease of March 17, 1905, and of said instrument in writing of August 31, 1906, and

the question of petitioner's right to cancellation of said instruments herein; and said Circuit Judge is further instructed to determine, consistently with the views and findings of this Court, the question as to what, if any, amount and/or measure of relief petitioner is entitled to have and recover against the Waialua Agricultural Company, Limited, respondent herein, by way of rents and damages.

IV.

"That said Circuit Judge be and said Judge hereby is instructed to make and enter its final decree herein consistent herewith, at the conclusion of said further proceedings to be had before said Circuit Judge as aforesaid, which said final decree shall provide:

"1. That that certain deed dated May 2, 1910, cancellation of which was and is prayed for herein, be canceled and set aside, in the manner and to the extent that cancellation thereof has heretofore been decreed by said decree of October 16, 1929, herein appealed from.

"2. That respondent Waialua Agricultural Company, Limited be ordered and required by suitable indenture to reconvey to Eliza R. P. Christian, herein appearing by her Guardian as aforesaid, all of the right, title and interest in and to the lands described in the petition herein which it, said respondent, acquired or claimed to have acquired from her through, under or by virtue of said deed of May 2, 1910,

upon payment to it, said Waialua Agricultural Company, Limited, by or for her, said Eliza R. P. Christian, of the sum of $30,000.00, together with interest at the rate of 6% per annum from May 2, 1910 to the date of said decree to be entered by said Circuit Judge as aforesaid, or upon the giving of assurance to said Waialua Agricultural Company, Limited of the payment of said sum together with interest thereon, either by way of [318] mortgage upon the interest so reconveyed or in any other satisfactory manner.

"3. That such relief, if any, as to said Judge may seem just and proper consistent with the conclusions reached as aforesaid by said Judge and with the views, findings of fact and conclusions of law heretofore reached by this Court be granted with respect to that certain lease dated March 17, 1905, being Exhibit A-8 herein, and that certain instrument in writing dated August 31, 1906, being Exhibit 2-G herein.

"4. That petitioner do have and recover against Waialua Agricultural Company, Limited such amount and/or measure of relief, if any, by way of rents and damages as to said Judge may seem just and proper consistent with the conclusions reached as aforesaid by said Judge and with the views, findings of fact and conclusions of law heretofore reached and announced by this Court; and

"5. Said Decree, consistent with the opinion and Order of this Court, to further render full

and complete equity and justice in the premises.

"Made and entered this 21st day of May, A. D. 1931.

"BY ORDER OF THE COURT.

[Seal] "(Signed) ROBERT PARKER, JR.
Assistant Clerk
Supreme Court of the Territory of Hawaii"

Approved

(s) ANTONIO PERRY
Chief Justice

Dated, Honolulu, T. H., May ___, 1931.

BY THE COURT

[Seal] (s) J. A. THOMPSON
Clerk
Supreme Court of the Territory of Hawaii

The form of the foregoing notice is hereby approved, and it is ordered that the same shall issue forthwith.

Dated: Honolulu, T. H., May 22, 1931.

(s) ANTONIO PERRY
Chief Justice [319]

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii.

Eq. No. 2915 Reg. Pg.
At Chambers In Equity

Bill for Cancellation Accounting and Incidental Relief.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. von HOLT, her Guardian,
Petitioner,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation, JAMES L. HOLT, and ANNIE HOLT KENTWELL,
Respondents.

NOTICE OF APPEAL AND APPEAL

Filed Oct. 10, 1932 at 12:45 o'clock P. M. Robert Parker, Jr., Clerk Supreme Court.

1st Circuit Court Territory of Hawaii. Filed 1932 Sep 10 A M 10 46 (s) D. K. Stewart, Clerk. [348]

Now comes WAIALUA AGRICULTURAL COMPANY, LIMITED, respondent in the above entitled cause, and gives notice of apeal and hereby appeals to the Supreme Court of the Territory of Hawaii from the decree made and entered in the above entitled court and cause on the 6th day of September, 1932.

Dated at Honolulu, T. H., this 9th day of September, 1932.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
By ROBERTSON & CASTLE
Its Attorneys.

I hereby certify that I have mailed a copy of the foregoing Notice and Appeal to Annie Holt Kentwell by registered mail, to 159 Woodstock Road, Oxford, England, this 9th day of Sept 1932.

(s) ALFRED L. CASTLE

Service of a copy of the foregoing notice of appeal and appeal is hereby admitted this 10th day of September, 1932.

ULRICH & HITE per CMH
Attorneys for Petitioner.

(s) JOHN R. DESHA
Attorney for Respondent, James L. Holt.

Attorney for Annie Holt Kentwell.

I further hereby certify that I served Annie Holt Kentwell with a copy of the foregoing appeal by leaving a copy of the same at the law offices of Ulrich & Hite this 10th day of Sept. 1932.

(s) ALFRED L. CASTLE [349]

[Title of Court and Cause.]

SECOND AMENDED PETITION

EXHIBITS "A", "B", "C", "D", "E", "F", and "G"

Presented at 9:55 o'clock A. M. May 25, 1931. John Lee Kai, Clerk. [350]

Comes now ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. von HOLT (substituted for George H. Holt, Deceased), her Guardian, by her attorneys, Ulrich & Hite, and, as grounds for the relief herein prayed for, shows unto this Honorable Court as follows:

I.

That the said George H. Holt was upon the first day of February, 1927, by order and decree duly entered in the [351] above-entitled Court, appointed guardian in Hawaii of the estate of the said Eliza R. P. Christian, resident in England, and found and adjudged to be an incompetent person, and upon the filing of a bond in the amount of $15,000.00 he, the said George H. Holt, did qualify as such guardian, and at the time of the filing of the petition and commencement of proceedings herein, he, the said George H. Holt was the duly acting and qualified guardian of said incompetent person, and so continued until the time of his death, as hereinafter stated.

That thereafter and during the pendency of these proceedings, the said George H. Holt did die, and on, to-wit, the 11th day of March, 1929, HERMAN

V. von HOLT was by order of the above-entitled Court duly appointed Guardian of the estate in Hawaii of said Eliza R. P. Christian, an incompetent person, as successor to and in the place of the said George H. Holt, deceased, and did duly qualify as such guardian, and ever since has been and now is the duly acting and qualified guardian of said incompetent person, and has been duly substituted herein as guardian of said incompetent, petitioner herein.

II.

That respondent, Waialua Agricultural Company, Limited, is now and at all times hereinafter mentioned has been a corporation duly organized and existing under and pursuant to the provisions of the laws of the Territory of Hawaii, with its principal place of business in Honolulu in said [352] Territory.

III.

That the respondent James L. Holt is a resident of the City and County of Honolulu, Territory of Hawaii, and is a son of James R. Holt and grandson of Robert William Holt, all as more fully hereinafter appears; and that the respondent Annie Holt Kentwell is a resident of Oxford, England.

IV.

That Petitioner, Eliza R. P. Christian, formerly Eliza R. P. Holt, was and is the daughter and sole heir of John Dominis Holt, now deceased, and that the said John Dominis Holt was a son of Robert William Holt, said Robert William Holt having been

a resident of the Territory of Hawaii, and the owner of large properties in said Territory, who died in the year 1862.

V.

That upon his death in the year 1862 as aforesaid, said Robert William Holt, seized of considerable properties as aforesaid, left a will wherein and whereby, among other things, it was provided that the bulk of his estate should be divided into four equal parts, one part of which to go to and become the property of his daughter, Elizabeth M. Aldrich, the remaining three-quarters thereof to be held in trust to pay the income from equal and undivided thirds thereof to each of his sons, Owen J. Holt, James R. Holt, and John Dominis Holt, for their respective lives, with [353] remainder over in fee as to each undivided one-third to the heirs at law of the said three sons as they respectively should die, a copy of which said last Will and Testament of Robert William Holt is hereto annexed, marked Exhibit "A", and by reference made a part hereof. That after the distribution of one-fourth of said estate to said Elizabeth M. Aldrich, daughter of testator, as aforesaid, and after the payment of all debts and specific legacies, there was in said estate and undistributed the following pieces and parcels of real property, situate, lying and being in the district of Waialua, Island of Oahu, Territory of Hawaii, said property being more particularly described as follows:

1. Ahupaa of Paalaa, being Apana 34, L.C.A. 7713, Royal Patent 4475, containing an area of 12,237 acres;
2. The lands described in Royal Patent 973 to Robinson et al., containing an area of 1,942 acres;
3. The lands described in Royal Patent 431 to Kanohanui, containing an area of 100 acres;
4. The lands described in Royal Patent 235 to Topliff et al, containing an area of 36 acres;
5. The lands described in Royal Patent 238 to Anderson, containing an area of 25.8 acres;
6. All Kuleanas or grants lying within the above described land.

VI.

That under and pursuant to the provisions of said Will of Robert William Holt, his son, John Dominis Holt, became [354] and was entitled to the income for life from an undivided one-third of all of the above described lands, and that Eliza R. P. Christian, the only child and sole heir at law of her father, the said John Dominis Holt, as aforesaid, became and was entitled to accede to and become the owner in fee simple of an undivided one-third interest in all of said lands upon the death of her said father, and subject only to her survival of him.

VII.

That the said Eliza R. P. Christian is, was, and at all times hereinafter mentioned has been, insane and mentally incompetent.

VIII.

That for many years prior to 1910, and prior to the happenings of the events in that year hereinafter described, the respondent Waialua Agricultural Company, Limited had used and occupied large portions of the above described lands as a tenant under leaseholds executed to it by persons holding the legal estate in trust pending the death of the life tenants, as aforesaid, and as the purchaser of certain undivided interests in said lands, on a considerable portion of which lands said respondent corporation had planted and grown sugar cane in the course of its business in the cultivation and production of sugar, and other portions of which it had subleased to others for the growth and cultivation of pineapples.

Petitioner alleges upon information and belief, that [355] in the year 1910, becoming desirous of acquiring said lands in fee simple, and more particularly of acquiring the undivided one-third in said land as to which the said John Dominis Holt was entitled to the income for life and as to which the said Eliza R. P. Christian would be entitled to the fee upon his death, the said respondent corporation did undertake, enter upon and carry through the negotiations and transactions more fully hereinafter described:

IX.

That in said year 1910 the said Eliza R. P. Christian was wholly incompetent mentally as aforesaid, and was unable to care for herself or her affairs, and was then residing in Oxford, England,

with her cousin, Annie Holt Kentwell, in whose care she had been for many years; that the said Eliza R. P. Christian was then and there completely under the control of one Lawrence Kentwell, the husband of the said Annie Holt Kentwell; that at said time respondent James L. Holt was residing in Honolulu, Hawaii, and was on friendly terms with and had been in correspondence with the said Lawrence Kentwell; that the said incompetent, the only child and sole heir in expectancy of her father, John Dominis Holt, was of the age of 24 years and, aside from her said mental affliction, was in generally good physical health and condition, whereas the said John Dominis Holt, upon whose death the vesting of the interest in fee in the said Eliza R. P. Christian alone depended, was a man of 71 years of age; that [356] at said time the interest in expectancy in fee in an undivided one-third of said lands to which said incompetent would be entitled upon the death of her said father, was of the value of upwards of $300,000.00, and that all of the foregoing facts and circumstances were well known to respondent corporation, notwithstanding that the true worth and value of said property, dependent upon circumstances peculiarly within the knowledge of said respondent corporation was unknown to and not disclosed to said Lawrence Kentwell, and was, of course, entirely impossible of being understood by said incompetent, petitioner herein.

X.

Petitioner alleges upon information and belief that thereupon the respondent corporation did employ and retain the law firm of Castle & Withington of Honolulu to represent it and act for it in the matter of procuring the conveyance to it of the so-called Christian interest in said property, and that as a first step in the plan then and thereupon undertaken by said respondent and in or about the months of March or April, 1910, the said James L. Holt was induced to come to and attend certain meetings or conferences held in the offices of said attorneys, Messrs. Castle & Withington, in the course of which said James L. Holt was induced to enter into an agreement, portions of which agreement were reduced to writing and signed by the parties to be bound, W. R. Castle signing as Trustee and acting for and on behalf of said respondent corporation, the substance and effect of which [357] agreement was as follows: That it was agreed in substance that the said James L. Holt, being in the confidence of and in contact with said Lawrence Kentwell, under whose complete influence and control was said incompetent, Eliza R. P. Christian, should endeavor to induce said Lawrence Kentwell to procure the signature of said incompetent to a deed purporting to convey the interest of said incompetent in said land at a cost to respondent corporation not to exceed the sum of $40,000.00, which moneys, it was agreed, were to be furnished by said respondent cor-

poration through its representatives; it being further agreed that, notwithstanding that said James L. Holt was without funds to make said purchase, and notwithstanding that said purchase was to be made for immediate retransferal to said respondent corporation or its representatives or appointees in trust, yet that the conveyance, if procured, was to be taken in the name of said James L. Holt; that it was further agreed that upon procuring of said conveyance said James L. Holt was then and thereupon to execute his conveyance of the interest to be so acquired from said Eliza R. P. Christian, together with his own similar and equal interest in expectancy in said lands as the sole heir at law of James R. Holt, and that he was to receive from said respondent as consideration for his services in the premises and for his interest in said property the sum of $60,000.00; a further sum of $20,000.00 to be paid to one John F. Colburn at that time the assignee and holder of the life interest in said property [358] of John Dominis Holt and James R. Holt, and trustee for James L. Holt for certain purposes, making a total contemplated expenditure to said corporation of $120,000.00 for petitioner's interest as well as for the other interest above indicated in said lands.

XI.

Petitioner alleges upon information and belief that then and thereupon said James L. Holt, pursuant to said agreement, did endeavor to ascertain from England whether or not, if attempted, said

plan might be reasonably expected to be successful, and having, as it was thought, ascertained that such was the fact, David Withington, Esquire, a member of said law firm of Castle & Withington, representing respondent corporation in the premises as aforesaid, who was then in the city of Boston, state of Massachusetts, was instructed by said respondent corporation to proceed forthwith to England and there to appear, ostensibly as attorney for James L. Holt, but in fact acting in the interests of respondent corporation as aforesaid, in an endeavor to procure through said Lawrence Kentwell, or in such manner as could be done, a conveyance of the said Christian interest at an expenditure to said corporation of not to exceed $40,000.00.

XII.

Petitioner alleges upon information and belief that thereupon said David Withington, Esq. did forthwith proceed to England, and did there call upon said Lawrence Kentwell [359] in whose home was the said incompetent, Eliza R. P. Christian; that the said David Withington, representing said respondent corporation as aforesaid, though ostensibly representing said respondent James L. Holt as aforesaid, was then and there given and did have ample opportunity for ascertaining for himself and those whom he represented the fact of said incompetency. Upon information and belief petitioner further alleges that said David Withington, as such attorney and representative, was fully aware of said

mental incompetency of said Eliza R. P. Christian at the time of the happening of all of the events which there transpired as herein described.

XIII.

Plaintiff alleges upon information and belief that the said David Withington, acting for respondent corporation as aforesaid, did then and there represent to Lawrence Kentwell as well as to said incompetent, Eliza R. P. Christian, who was, however, incapable of understanding said representation, that the interest of said Eliza R. P. Christian was of a value of not more than $30,000.00, although in truth and in fact the value of said interest was in an amount of many times that sum, and did persuade and induce said Lawrence Kentwell to assist in procuring the signature of said incompetent to a deed purporting to convey the interest of said incompetent to the respondent James L. Holt as aforesaid, and did succeed in procuring the signature of said incompetent to said deed, said signature being [360] affixed by said incompetent without any knowledge or understanding of the meaning of said document or of said signature; and that in said manner, although petitioner was wholly incompetent as aforesaid, her signature was procured to said document, and that said document was signed by no person for or on her behalf as her guardian or otherwise, all of which was well known to defendant corporation, and that said document was signed on, to-wit, May 2, 1910, in the manner aforesaid by said in-

competent and by said Annie Holt Kentwell, purporting to convey her interest in the said land, and by John Dominis Holt, notwithstanding that all of his interest had theretofore been alienated and assigned away; that said document was subsequently returned to Hawaii and was recorded in the Office of the Registrar of Conveyances on, to-wit, the 23rd day of June, 1910, in Liber 337, page 75, of the records of said office, and that a true and correct copy thereof is hereto annexed, by reference made a part thereof, and marked "Exhibit B."

XIV.

Petitioner alleges upon information and belief that thereafter the said respondent corporation, through its agents and representatives, did represent to the respondent James L. Holt that it had disbursed in procuring the execution to said James L. Holt of the conveyance hereinabove referred to and marked "Exhibit B", annexed hereto, through the said David Withington in England, the following sums of money, pursuant to the agreement theretofore entered into with said respondent [361] James L. Holt by W. R. Castle as trustee as hereinabove set forth, that is to say:

Stated to have been paid to Eliza R. P. Christian £6,141/5 at $4.88½	$30,000.00
Stated to have been paid to Annie Holt Kentwell £1,023/10/10 at $4.88½	5,000.00
Stated to have been paid by David L. Withington for various incidental expenses £19/15 at $4.88½	92.92
Stated to have been paid by David L. Withington for other incidentals, including present to clerk	17.50
Total	$35,110.32

That petitioner is without information as to the manner of payment of said sum of $30,000.00 stated to have been paid to said Eliza R. P. Christian as aforesaid, or as to what person said moneys were paid, or as to how said moneys were used and applied, save and except that petitioner alleges that said money could not have been paid to and disposed of by said Eliza R. P. Christian, personally, inasmuch as she was wholly and utterly unable, because of her mental condition, to receive, handle or dispose of moneys, and petitioner further alleges that said sum of $30,000.00 was grossly, utterly and wholly inadequate as consideration for the interest of said Eliza R. P. Christian, as was well known to said respondent corporation and to its agents and representatives, and that said transaction was un-

conscionable and inequitable and in fraud of the rights of said incompetent, Eliza R. P. [362] Christian.

XV.

Petitioner alleges upon information and belief that promptly after the return of said deed of May 2, 1910 to Honolulu, and in fact even before said deed had been recorded, and pursuant to the agreement theretofore entered into as aforesaid, said respondent James L. Holt, on to-wit, May 28, 1910, did execute his deed to W. R. Castle as agent and trustee for respondent corporation, purporting to convey, among other things, the one-third interest in said lands of the said incompetent, Eliza R. P. Christian, but that upon the making of said conveyance the said James L. Holt received no money or consideration of any kind for the transfer to said W. R. Castle as trustee of said interest of the said incompetent, Eliza R. P. Christian, theretofore paid for by said respondent corporation as aforesaid, and was paid compensation only for the conveyance of his own interest in said land, also covered by said indenture of May 28, 1910, and for his services in the premises as aforesaid, for which interest and for which services said James L. Holt was paid the sum of $60,000.00, the balance of the consideration of $120,000.00 recited in said conveyance of May 28, 1910, representing sums alleged to have been disbursed in England in procuring the said indenture of May 2, 1910, and moneys paid to one John F. Colburn appearing as a party to said inden-

ture of May 28, 1910; and that said deed of May 28, 1910 is hereto annexed, by reference made a part hereof, and marked "Exhibit C". [363]

XVI.

That thereafter and for a period of approximately ten years and until May 17, 1920, as petitioner is informed and believes, the said William R. Castle, attorney for said respondent corporation as aforesaid, did continue to hold in trust as aforesaid for said respondent corporation, all rights covered by said deed of May 2, 1910, being Exhibit B, attached hereto; that at the expiration of said period and on said May 17, 1920, said William R. Castle, trustee as aforesaid, did convey said rights to certain persons as trustees in the premises, as your petitioner is informed and believe and therefore alleges the fact to be, with the knowledge of and at the instigation and request of his beneficiary, said respondent corporation, all as more fully hereinafter set forth.

XVII.

That on May 17, 1920, W. R. Castle, trustee as aforesaid, did convey, among other things, all the rights covered by said conveyance marked "Exhibit B" attached hereto, and all rights covered by Exhibit C attached hereto, to J. R. Galt, A. L. Castle, T. H. Petrie, R. A. Cooke and R. B. Anderson, as trustees designated and named trustees of the "Helemano Real Estate Trust"; and petitioner alleges upon information and belief that notwithstanding that the sum of $127,912.49 was recited in

said conveyance as consideration therefor, $120,000.00 thereof represented and was merely the $120,000.00 theretofore claimed to have been paid for said [364] lands ten years earlier, and recited as consideration in that certain conveyance to W. R. Castle, trustee, hereinabove referred to as "Exhibit C", and that the additional amount of upwards of $7,900.00 represented additional expenses incurred in the premises by the respondent corporation through its representatives, and that no new or independent consideration was furnished by any person or corporation other than respondent corporation, and that said trustees of the said Helemano Real Estate Trust as above mentioned, did thereafter and at all times hold such properties and rights as were conveyed by said indenture of May 17, 1920, in trust for said Waialua Agricultural Company, Limited, respondent herein, as ultimate beneficiary, and that a copy of said indenture of May 17, 1920, conveying said properties and rights to said trustees of said Helemano Real Estate Trust in trust as aforesaid, is hereto attached, by reference made a part hereof, and marked "Exhibit D".

XVIII.

That thereafter said trustees of said Helemano Real Estate Trust continued to hold said properties in trust as aforesaid until July of the year 1921; that on July 9, 1921, the provisions of Section 55 of the Organic Act providing for the government of the Territory of Hawaii theretofore providing, among other things, that no corporation should acquire or hold real estate in Hawaii in excess of

1,000 acres in area, and that all real estate so acquired or held should escheat to the United States, was amended by the Congress of [365] the United States by repealing and deleting from said Section said provisions thereof, and that immediately thereafter and on July 20, 1921, by instrument in writing of that date, the said trustees of said Helemano Trust did convey all of the aforesaid properties directly to respondent corporation, Waialua Agricultural Company, Limited; and petitioner alleges upon information and belief that, notwithstanding that said conveyance of July 20, 1921 recites a consideration of $128,045.49, said sum represented merely moneys theretofore expended by said corporation as hereinabove indicated for said property, with the small additional expenditure indicated, accruing as incidental to the final conveyance to the ultimate beneficiary, respondent corporation, for whom said properties had been held throughout under various trusts as hereinabove set forth, and petitioner alleges that said respondent corporation took and received said property with full and complete knowledge of all the matters and things hereinabove set forth, and that the dealings with said property herein indicated to have taken place after the procuring of the deed of May 2, 1910 hereinabove referred to as "Exhibit B", were dealings carried through at the instigation, request and under the direction of respondent corporation, by whose agents and representatives and at whose expense said original conveyance of May 2, 1910 had been procured.

XIX.

Petitioner alleges that on April 10, 1922 John Dominis [366] Holt, father of petitioner and the holder of the life interest intervening prior to the vesting of the rights of said petitioner in the lands referred to, died, leaving as his sole surviving heir the said petitioner, Eliza R. P. Christian, and that from and after said day said Eliza R. P. Christian became and was as such heir vested with an estate in fee simple in and to an undivided one-third of all the lands hereinabove described, and all rights of respondent corporation acquired by leases or by other forms of assignment of the interest of the intervening life tenant terminated; but that nevertheless respondent corporation continued thereafter to use and occupy said land without right or authority in the premises, and without accounting to petitioner for the reasonable worth of said right and user. That, however, at said time and at all times herein mentioned, said Eliza R. P. Christian was wholly and utterly incompetent mentally, and unable to act on her own behalf in the premises and until said George H. Holt was later appointed guardian, as herein set forth, was without any person authorized and qualified to act for her in the premises; and that said respondent corporation has, since the death of said John Dominis Holt, wrongfully and without right or justification claimed to be the owner of petitioner's property by virtue of the deed hereinabove referred to as "Exhibit B", notwithstanding the facts and circumstances inci-

dental to the procuring of said indenture, and notwithstanding the total incapacity of said [367] Eliza Christian to have entered into or bound herself by any such undertaking, and petitioner is wholly and utterly without any or adequate relief in the premises, otherwise than through the order and decree of this Court, cancelling said deed as to her and granting further relief as herein otherwise prayed for.

XX.

That since the appointment and qualification of said George H. Holt as guardian of the estate of the said Eliza R. P. Christian, an incompetent, all due diligence has been used in promptly investigating all matters and things having to do with the rights of the said incompetent, and with all due diligence a careful and searching investigation has been carried through, which has disclosed the facts and circumstances hereinabove set forth, which has occupied the time which has intervened since said appointment, and that promptly upon having completed said investigation and ascertained said facts and circumstances, said incompetent, acting through her said guardian, made due and timely demand upon the respondent corporation that it do account to the said Eliza R. P. Christian, incompetent as aforesaid, for the use of her lands since the death of the said John Dominis Holt, and that it otherwise do justice in the premises, and that upon refusal of said respondent to comply with said demand within a reasonable time, petitioner, by her said guardian, promptly filed her complaint herein. [368]

XXI.

Petitioner alleges that the value of the lawful right and interest of the said Eliza R. P. Christian in and to the lands herein referred to and now held and claimed by said respondent corporation is in an amount greatly in excess of a million dollars, and that the reasonable rental for the use and occupancy of said interest in said land during the period of approximately six years which has intervened since the death of the said John Dominis Holt, and properly payable to petitioner herein, is in an amount of many times the sum of $30,000.00, with interest since May 2, 1910; and that the properties which would be restored to petitioner under the decree prayed for herein and the moneys which would be payable to her on accounting as herein prayed for would be and are in value greatly in excess of said sum of $30,000.00 together with interest since May 2, 1910, and together with any and all moneys expended in the permanent improvement of said property since the vesting of petitioner's interest therein or for that matter since May 2, 1910; and petitioner, that justice full and complete may be done in the premises in such manner as to the court may seem just, equitable and in accord with the evidence to be adduced herein, does hereby offer to allow to respondent corporation, a credit in the amount of $30,000.00 with interest from May 2, 1910 to date, and such sum or sums, if any, as this court may find should reasonably be restored to defendant as moneys [369] expended in the permanent improvement of said properties, in the event that the

court finds from the evidence that in equity, such should be done, such credit to be allowed in the accounting for rentals herein prayed for, and/or as a charge against the properties, restoration of which to petitioner is herein prayed for, or in such other manner or to such other extent as to this Court may seem just and proper.

XXII.

Petitioner alleges that, by instrument of lease dated March 17, 1905, executed by certain persons other than the said Eliza R. P. Christian as lessors, said Waialua Agricultural Company, Limited, respondent herein, did secure a lease covering the interest of the said lessors in said premises for the term of twenty-five years at a certain rental therein specified, and that the signature of the said Eliza R. P. Christian, recited therein as one assenting to said lease, was procured to said lease, a copy of which lease is hereto annexed, made a part hereof, and marked "Exhibit F".

In this connection petitioner alleges that at the time of the affixing of her signature to said lease of March 17, 1905, as at all other times, the said Eliza R. P. Christian was wholly and utterly incompetent mentally to bind herself by executing said document, as one assenting thereby to the lease by others named as lessors of their interests in said property, and was mentally incompetent to thereby bind her- [371] self in any manner or to any extent.

Petitioner further alleges that respondent corporation, lessee named in said lease, had knowledge

and notice, either actual or constructive, of the fact of said mental incompetence at the time of the execution of said lease.

Petitioner further alleges that neither she, the said Eliza R. P. Christian, nor anyone acting on her behalf then received or has ever received any consideration whatever for the execution of said document as aforesaid, and, further, that neither she nor anyone acting on her behalf, or claiming any rights under or by virtue of her alleged assent to said lease, has ever received any rent from said respondent corporation pursuant to the provisions of said lease, or at all, and petitioner alleges that said lease has never become operative in any manner or to any extent between said Eliza R. P. Christian and said respondent corporation.

Petitioner further alleges that the binding or attempting to bind of the said Eliza R. P. Christian with respect to her interest in said properties by the terms and provisions of said lease and at the rental and for the term therein provided would have been and was a most improvident and injurious transaction from the point of view of the welfare of the said Eliza R. P. Christian and was in no sense beneficial, and, further, that she never received any benefit of any kind under or pursuant to the provisions of said lease or by reason of her alleged assent thereto.

Petitioner further alleges that said lease from its [371] inception was and at all times has been wholly and utterly inoperative, ineffective and of no bind-

ing force or effect, with respect to the rights or interests of this petitioner.

Petitioner further alleges that prior to the commencement of this litigation and the filing of petitioner's petition herein, no claim of right of any kind based on said lease with respect to said Eliza R. P. Christian or her interest in said lands was ever made by said respondent corporation, but that during the pendency of these proceedings said respondent corporation has for the first time claimed and now claims certain rights as against said Eliza R. P. Christian, claimed to have arisen from and by virtue of her signature as an assenting party affixed to said lease, and petitioner alleges that full and complete justice and equity in the premises can only be done through and by the order of this court in these proceedings cancelling and annulling said lease of March 17, 1905 as to her, the said Eliza R. P. Christian, and cancelling and annulling as to her any and all effect of her signature appearing as an assenting party thereto.

XXIII.

Petitioner alleges that the signature of the said Eliza R. P. Christian was procured to a certain instrument in writing dated August 31, 1906, purported to have been entered into between said Eliza R. P. Christian and the respondent Annie Holt Kentwell, a copy of which instrument is hereto annexed and made a part hereof, and marked [372] "Exhibit G"; and that according to the provisions of said instrument said Eliza R. P. Christian did

purport to assign to said Annie Holt Kentwell a right to rentals under that certain lease dated March 17, 1905 and above *referred, all* as appeared in said instrument. Petitioner alleges that at the time of the execution of said document of August 31, 1906, said Eliza R. P. Christian was wholly and utterly incompetent mentally to bind herself, as was then well known by said Annie Holt Kentwell, named as grantee or assignee therein.

Petitioner further alleges that no consideration of any kind was paid to said Eliza R. P. Christian or to anyone on her behalf for the execution by her of said indenture; that she received no benefit by virtue of the provisions thereof; that the provisions thereof were in no sense beneficial as to her, and that said indenture was at all times wholly and completely void and of no effect, or binding force whatever, and that said Annie Holt Kentwell, well knowing of the mental incompetence of the said Eliza R. P. Christian, well known by her to have been a congenital imbecile, has at no time claimed and now claims no rights by virtue of said indenture.

Petitioner further alleges, however, that by reason of the fact that said Annie Holt Kentwell joined in and executed that certain deed of May 2, 1910, being Exhibit B, purporting thereby to convey and transfer to James L. Holt, he taking for Waialua Agricultural Company, Limited, respondent [373] herein, all as is more fully hereinabove set forth, all of her right and interest in the lands in question, and notwithstanding that said Annie Holt

Kentwell thereby in no sense purported to convey any rights claimed by her by virtue of said assignment of August 31, 1906, and said respondent through said James L. Holt as aforesaid in no sense purported to purchase any such rights, and notwithstanding said respondent corporation purchasing through said James L. Holt as aforesaid paid no consideration whatever for any such rights supposed to come under or by virtue of said document, it having at that time paid to or for said Annie Holt Kentwell the sum only of $5,000.00 as consideration only for certain rights supposed to be held by said Annie Holt Kentwell in and to the life estate of John Dominis Holt, yet nevertheless said respondent corporation, which respondent, prior to the commencement of these proceedings never in any manner claimed any rights under or by virtue of said indenture, now claims to have acquired and to hold certain rights against petitioner Eliza R. P. Christian by virtue of said indenture, and your petitioner is wholly without adequate or complete relief in the premises otherwise than through the order and decree of this court, ordering and directing that said indenture dated August 31, 1906 be cancelled and annulled, and that adequate relief can be had by petitioner only through the cancellation of said indenture in these proceedings, in which proceedings in the granting of complete relief other instruments should [374] and must be cancelled, an accounting by respondent corporation must be ordered and taken which could not be taken in an

action at law, and other forms of equitable relief should and must be granted.

XXIV.

Petitioner alleges that after the appointment of the said George H. Holt as Guardian for said incompetent, and promptly upon ascertaining of the facts and circumstances hereinabove set forth, petitioner, acting by her said guardian, did disaffirm the said deed of May 2, 1910.

And petitioner proceeding by her guardian herein, without admitting any force or effect in said conveyance of May 2, 1910, or in said lease of March 17, 1905 above referred to, or in her assent thereto; or in said indenture dated August 31, 1906 hereinabove referred to, has disaffirmed and does hereby disaffirm said deed of May 2, 1910; and does disaffirm said lease of March 17, 1905 and her assent thereto; and does disaffirm said indenture dated August 31, 1906; and in the settlement to be had herein does tender back any and all consideration which may be shown to have been paid as consideration for said conveyance of May 2, 1910, together with interest thereon, together with moneys expended in the permanent improvements in said property in the event and to the extent that this court may find herein that repayment should be made in equity and in justice; and while alleging that no consideration of any kind was or ever has been paid to her with respect to or [375] under said lease of March 17, 1905, and that no consideration of any kind was or

has been paid as consideration for the conveyance of any right or interest of any kind in said lands by virtue of said indenture dated August 31, 1906, does nevertheless with respect to said lease and said indenture of August 31, 1906, offer to do full and complete equity in the premises, and to abide by such judgment or order as may be made by the court with respect thereto and/or upon cancellation of said instruments or either of them to repay any moneys or consideration which may be found to have been in any way paid with respect thereto, with interest thereon, in any manner and/or to any extent that may be found by this court to be just and equitable.

XXV.

That petitioner has no adequate and complete remedy at law.

WHEREFORE PETITIONER PRAYS:

1. That respondents above named and each of them be cited to appear and make answer unto petitioner's foregoing Petition in the manner and form provided by law, answer under oath being hereby expressly waived;

2. That it be ordered and decreed that respondents above named surrender up for cancellation that certain deed dated May 2, 1910, a copy of which is hereto annexed and [376] marked "Exhibit B", and that said deed be cancelled and annulled as to said Eliza R. P. Christian by order of this Court and as to her decreed to be of no further force or effect.

3. That it be ordered and decreed that respond-

ents above named surrender up for cancellation as to the said Eliza R. P. Christian, that certain indenture of lease dated March 17, 1905, a copy of which is hereto annexed and marked "Exhibit F", and that said lease be cancelled and annulled as to said Eliza R. P. Christian by order of this court, and as to her decreed to be of no force or effect.

4. That it be ordered and decreed that respondents above named surrender up for cancellation that certain indenture dated August 31, 1906, a copy of which is hereto annexed and marked "Exhibit G", and that said indenture be cancelled and annulled by order of this court and decreed to be of no force or effect.

5. That it be ordered and decreed that respondent Waialua Agricultural Company, Limited, do fully and completely account to petitioner of and concerning the reasonable and full rental of the undivided one-third interest in fee of petitioner in and to all of the lands hereinabove described, from April 10, 1922 to and including the date of judgment entered herein, together with interest thereon, and that said respondent Waialua Agricultural Company, Limted, do pay to petitioner a sum of money which shall be [377] and represent the aggregate of rentals accrued and accruing on said lands since said April 10, 1922, to and including the date of judgment entered herein, together with interest thereon from the dates upon which said rentals shall have accrued, credit to be given to said Waialua Agricultural Company, Limited, in such accounting

for such sum or sums, if any, as to this Court may seem just and proper.

6. That it be ordered and decreed that respondent Waialua Agricultural Company, Limited, make and execute a good and sufficient deed of conveyance, conveying and releasing to petitioner an undivided one-third interest in and to all of the lands hereinabove described.

7. And that the Court do grant such other and further relief as to the Court may seem just and equitable, to the end that complete justice and equity may be done in the premises, and that petitioner do have her costs of suit incurred herein.

Dated: Honolulu, T. H., May 23, 1931.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. von HOLT, (substituted for George H. Holt, Deceased),

By ULRICH & HITE,

By BARRY S. ULRICH

Her Attorneys [378]

Territory of Hawaii,
City and County of Honolulu—ss.

HERMAN V. von HOLT, being first duly sworn, on oath deposes and says: That he is the Herman V. von Holt named as guardian of Eliza R. P. Christian, an incompetent person, petitioner herein and that by him as such guardian said incompetent makes said Second Amended Petition herein; that he has read said foregoing Second Amended Peti-

tion, knows the contents thereof, and that the allegations therein contained are true, save as to those matters stated to be alleged upon information and belief, and that as to them, he believes them to be true.

HERMAN V. von HOLT
Guardian of Eliza R. P. Christian,
an incompetent person.

Subscribed and sworn to before me this 23rd day of May, A. D. 1931.

[Seal] KATHRYN R. CONNOR
Notary Public, First Judicial Circuit, Territory of Hawaii. [379]

EXHIBIT F

Stamped
$18.00

This Indenture made and executed this 17th day of March, 1905, by and between Carlos A. Long, in his capacity as administrator-de-bonis-non-with-the-Will-annexed of the Estate of Robert William Holt, Deceased, Robert L. Colburn, R. William Holt, George H. Holt, Edward S. Holt, Helen A. Holt; individually, and also in her capacity as Guardian of each and all of the minor children being by name Valentine S. Holt, Wattie E. Holt, Amelia A. Holt, Helen A. Holt, James R. Holt and Irene N. Holt: Elizabeth K. Richardson, wife of Edward Vivian Richardson, and Hawaiian Realty & Maturity Company, Limited and Hawaiian corporation, herein-

after named the Lessors, parties of the first part; and, Waialua Agricultural Company, Limited an Hawaiian corporation, party of the second part; and, John F. Colburn, James Lawrence Holt and Eliza R. P. Christian, wife of Albert Christian, parties of the third part:

Whereas, all and singular the lands hereinafter described and demised, are now held and claimed in fee simple in certain proportions by and between said parties hereto (except said James Lawrence Holt and said Eliza R. P. Christian,) as tenants in common, in fee,—But It Is Understood that nothing herein contained by way of recital of any claim or interest in said premises or any thereof, [380] shall be either herein or in any other transaction or proceeding between the parties hereto or any of them, or between any of the parties hereto and any third party or parties, construed to either limit, extend or otherwise affect the real title or interest in or to any of the lands or property herein described and demised, as now existing in or on the part of any party or parties to this Instrument; and,

Whereas, the titles of the respective parties hereto, in and to said premises have been, and are considered, solely for the purposes of this transaction, to exist in the following proportions that is to say:

(1) Of said Carlos A. Long, (herein individually referred to as said Administrator,) in his said representative capacity, two-thirds (2/3) of the whole;

N.F. ~~(2) Said John F. Colburn in his individual~~
N.F. capacity, but as Trustee for James Lawrence
N.F. Holt, and others, under the terms of a certain
N.F. Instrument, dated July 1, 1902, and recorded
N.F. in Liber 241, at pages 21 to 31 of the Ha-
N.F. waiian Registry of Deeds, as modified and
N.F. amended by an Instrument between said John
N.F. F. Colburn and said James Lawrence Holt
N.F. dated March 4, 1905, Two-thirds (2/3) of the
N.F. whole, or a right to have the same distributed
N.F. to him in fee, or otherwise, under the Will of
N.F. said Robert William Holt, according to the
N.F. construction which shall be ultimately be
N.F. ~~placed upon said Will;~~

(3) Said R. Wiliam Holt, one undivided twenty-seventh [381] portion and interest of and in that portion of said demised premises covered by Royal Patent (Grant) 973, and known as the Wahiawa Lands;

(4) Said Robert L. Colburn an undivided Two Twenty-sevenths (2/27) portion and interest of and in all of said demised lands;

(5) Said George H. Holt, an undivided One Twenty-seventh (1/27) portion and interest of and in all of said demised lands;

(6) Said Edward S. Holt, an undivided One Twenty-seventh (1/27) portion and interest of and in all of said demised lands;

(7) Said Elizabeth K. Richardson, an undivided One Twenty-seventh (1/27) portion and interest of and in all of said demised lands;

(8) Said Hawaiian Realty & Maturity Company, Limited, an undivided One Twenty-seventh (1/27) portion and interest of and in all of said demised lands;

(9) Said Waialua Agricultural Company, Limited, an undivided One Twenty-seventh (1/27) portion and interest of and in all of said lands described in Royal Patent (Grant) No. 973, and known as the Wahiawa lands, together with an undivided Two Twenty-sevenths (2/27) portion and interest of and in all and singular other, the lands herein demised:

(10) Said Helen A. Holt, individually, and in her capacity as Guardian as aforesaid, (said interests not [382] being herein segregated for the purpose of fuller description,) One undivided Twenty-seventh, of all and singular the lands herein demised;

Whereas, heretofore, to wit, prior to the 4th day of March, 1904, said R. William Holt, George H. Holt, Edward S. Holt, Elizabeth K. Richardson, Helen A. Holt, (in her individual and representative capacity as aforesaid,) Hawaiian Realty & Maturity Company, Limited, and said Lessee, together with John D. Holt to whose interests therein said Robert L. Colburn has since succeeded, and one Hannah Kaulani Holt, then the widow of Owen J. Holt, and who has since deceased owned in common certain interests in a certain lease which was, on or about the ____day of November, 1862 executed by one W. A. Aldrich, as Executor of the Last Will

and Testament of said Robert William Holt, to James Robinson Holt and Owen J. Holt aforesaid, which said interest in said lease, at the date last aforesaid, covered and affected an undivided moiety of all and singular the premises herein demised, to extend for and during the natural life of James Robinson Holt aforesaid, and,

Whereas, on said 4th day of March, 1904, in a certain action then pending in and before the District Court in and for the District of Waialua, in the Island of Oahu, wherein one, Henry Smith, Administrator-with-the-Will-annexed of said estate of Robert William Holt, was Plaintiff, and said Lessee, and others then claiming under said [383] last mentioned Lease were Defendants, a certain Judgment was rendered wherein and whereby it was adjudged and decreed that said last mentioned lease was and is forfeited; which said judgment still stands and obtains, in all its original force and effect; and

WHEREAS it has been agreed by all the parties hereto, that said Lessors shall demise, and said parties of the third part, shall assent to the demise by said Lessors of said lands to said Lessee, for the term, and upon the covenants and conditions hereinafter more particularly set forth; and that notwithstanding any and all doubts that may have heretofore prevailed among the parties hereto as to the legality, sufficiency and effect of said judgment of forfeiture as rendered as aforesaid, by said District Court in and for said District of Waialua, on said 4th day of March, 1904, said judgment and the for-

feiture thereby declared is and are, and the same is by all the parties hereto, and for all the purposes hereof, hereby recognized, acknowledged, assented to, and concurred in;

Now Therefore This Indenture Witnesseth:

That said Lessors for and in consideration of the premises, and of the rents herein reserved, and the covenants herein expressed as on the part of said Lessee to be observed and performed hath let, and they do hereby lease and demise unto said Lessee, all and singular those certain lands and premises situated in the District of Waialua, Island of Oahu, more particularly described as follows, [384] that is to say,

1: Royal Patent (Grant) 235, and Royal Patent (Grant) 238, being of lands now held by said Lessee under a Lease W. A. Co. No. 108 executed by and on behalf of the Estate or Robert William Holt, to Robert Halstead, dated January 13, 1893, and whereof said Lessee is now the Assignee, and the term whereof is still unexpired. But it is agreed between the parties hereto, that said last mentioned Lease is hereby surrendered by said Lessee, such surrender to take effect upon the First day of April, One Thousand Nine Hundred and Five; and the term hereby in and to the lands therein demised, shall then begin.

2: All and singular those Twelve (12) pieces or parcels, (be the number more or less,) of Apana 34 of Royal Patent (Grant) 4475, Land Commission Award 7713, of the Ahupuaa of Paalaa.

3: Royal Patent (Grant) 431 of the Kaheeka Tract.

4: Royal Patent (Grant) 973 known as the lands of Wahiawa.

Together with all and singular the rights, easements and appurtenances to said lands, or any thereof, legally belonging and appurtenant.

To have and to hold unto the said Lessee and its assigns, for and during the *full and* term of Twenty-five Years, (25) beginning with the First day of April, in the year A. D. One Thousand Nine Hundred and Five.

The said Lessee Yielding and Paying rent for said [385] premises in the sum of One Thousand Five Hundred Dollars, ($1500.00) for and in respect of said lands of Wahiawa covered by said Royal Patent (Grant) 973, and the further sum of Seven Thousand Five Hundred Dollars ($7500.00) for and in respect of all and singular the lands herein demised other than the lands of Wahiawa, and said Lessee further Yielding and Paying, by way of additional rent, any and all such sums as shall, for taxes and other imposts from year to year and from time to time, commencing with the levy and assessment in and for the year 1905, be levied upon, or assessed against said demised premises, or (and) any and every part and portion thereof, by any and every competent authority, whether the same be a State, or Territorial Municipal, or pertaining to or levied or assessed by any other political subdivision of this Territory, whether under the

name of a County, City, Town or any Board or other Governmental Body thereof, or of any thereof, and for whatever purpose or purposes the same or any thereof shall be levied or assessed.

And said Lessee doth hereby covenant and agree with said Lessors, and with each and all of said Lessors, that it will, and its assigns shall well and truly pay and discharge the rent herein and hereby reserved, in respect of each of said tracts, in manner and amount as the same is hereinabove assigned; and that it will make such payments only in United States Gold Coin of the present Standard of weight and fineness; and that it will divide such pay- [386] ments, and pay said rent to said Lessors respectively, and to their respective heirs, executors, administrators and assigns, in the aggregate annual sums, and in the proportion hereinafter expressed and stipulated, that is to say;

(a) To said Administrator, and to his successor and successors in said trust, if any and to his successor and successors in title, Two-thirds of the annual rental hereby reserved to-wit, the sum of Six Thousand Dollars ($6000.00).

(b) To said Robert L. Colburn, and his heirs, executors, administrators and assigns, Two Twenty-sevenths (2/27) of the rent hereby reserved, to-wit, the sum of $666.67.

(c) To R. William Holt and his heirs, executors, administrators and assigns, the sum of Fifty-five and Fifty-five Hundredth Dollars ($55.55).

(d) To said George H. Holt, and his heirs, executors, administrators and assigns, the sum of $333.33.

(e) To said Edward S. Holt and his heirs, executors, administrators and assigns, the sum of $333.33.

(f) To said Elizabeth K. Richardson, and her heirs, executors, administrators and assigns, the sum of $333.33.

(g) To said Hawaiian Realty & Maturity Company, Limited, and its assigns, the sum of $333.34.

(h) To said Helen A. Holt, individually, and in her representative capacity as aforesaid and to her heirs, executors, administrators and assigns, and successors in said Guardianship, and to said minor children respectively, [387] upon their attaining majority their personal representatives and assigns, the aggregate sum of $333.34.

Said Lessee reserving to itself, or paying to its own assigns in respect of its ownership in said premises as aforesaid, the aggregate annual sum of $611.11.

The said Lessee doth further covenant to pay said Lessors respectively, and their respective heirs, executors, administrators and assigns, the annual aggregate sums hereinabove expressed as being payable to them respectively, in equal quarterly installments, in advance, upon the first days of January, April, July and October, of each year during the

term of this Lease, and beginning with the First day of April in the year One Thousand Nine Hundred and Five.

And said Lessee doth hereby further covenant and agree to and with said Lessors, and to and with each of them, and to and with their respective successors in trust, heirs, executors, administrators, and assigns, as the case may be, that it, said Lessee at the end, or other earlier termination of the term hereby limited, will peaceably and quietly quit, yield up, and re-deliver the possession of said demised premises, together with all and singular the buildings, and improvements that shall then be upon said demised premises, to said Lessors, and their respective successors in trust, heirs and assigns: such re-delivery of possession to be made to the said parties hereby contemplated, in undivided parts or portions according to the [388] proportions hereinabove declared to pertain to them respectively, except as the same, or any part thereof, shall in the interval, be definitely partitioned between said Lessors and said Lessee as owners thereof in fee.

It is a condition of this Lease that, at any time before the determination, (either by efflux of time, Judicial decree of forfeiture, or mutual agreement of parties,) of the term hereby limited, said Lessee and its assigns shall be at liberty to deal as by general law existing at the date of this Lease permitted, with respect to fixtures and the removal thereof from said premises; Provided However, that said Lessee shall not in any event be permitted to

demolish, destroy, impair, or remove any permanent improvements of the general character of ditches, sluices, embankments, dams, runways, trestles, bridges, culverts, houses, fences, or other similar structures or excavations which shall be dug into, or built into or upon the earth, in a manner calculated and intended to be permanent, or which shall be built upon foundations or piers of cement, masonry, or other similarly durable and permanent foundations. But provided Further that nothing herein contained shall operate to prevent the Lessee from making such changes and alterations in the improvements, and in the method of development of the resources of the demised premises as it shall from time to time elect, and excepting perishable structures such as laborers houses and similar wooden buildings. [389]

And said Lessors, and said parties of the third party, do hereby covenant each for himself, herself, and itself to and with said Lessee and its assigns, that said Lessee, while paying said rent, (including taxes and other imposts,) as herein reserved at the times and in the manner herein specified for the payment of the same, and observing and performing all other, the conditions and covenants of this Lease as on its (said Lessee's) part to be observed and performed, shall peaceably and quietly hold and enjoy the use and possession of said demised premises, free from let or hindrance from any other person or persons having lawful claim or title to the same, or to any thereof. Provided How-

ever, and it is an express limitation upon this covenant, that said Lessors respectively shall be bound hereby only to the extent of their, and each of their respective shares and interests in said demised premises as hereinabove set forth; or shall hereafter be found to exist by any competent court or authority.

But if said Lessee or its assigns shall make default in the payment of said taxes or other imposts, and permit the same or any part thereof to become delinquent and to become a charge or lien upon the premises hereby demised, or any part or portion thereof; or if said Lessee or its assigns shall fail or neglect to pay to said Lessors, or to any or either of them or their respective successors in trust, heirs, executors, administrators and assigns as the case may be, the rent herein reserved and made payable [390] to said Lessors respectively, at the time or times and in manner whereon and wherein the same is hereby made payable,—and further if such failure or neglect to pay rent shall continue for and during Ten days after any installment thereof, by the terms of this Lease, shall become due and payable,—then, and in either such event, and at any time thereafter, while such or any such default shall continue, the said Lessors, and their respective successors in interest hereunder, or any one or more of such Lessors or Successors in interest, concerning whom such default shall so exist and continue, may, either in person or by authorized agent, enter upon said premises and by such entry terminate this Lease

as to the undivided part or parts, portion or portions, interest or interests which shall then belong or pertain to the person or persons concerning whom such default shall then exist, and who shall make such entry and declare such forfeiture as herein contemplated.

And, (or) any one or more of such Lessors or their successors in interest hereunder may, either with or without having first made such entry and declaration, at any time while such default shall continue with respect to such Lessor or successor in interest so acting, proceed by action at law, or otherwise, as may be at the time of such proceeding permitted by any Statute in force upon the Island of Oahu, and in any Court or Courts, and before any tribunal having jurisdiction of the cause, to avoid, terminate and have forfeited this lease, and all rights [391] of said Lessee and its assigns hereunder, in respect of the part and parts, portion or portions, interest and interests of the person and persons so acting as is in this paragraph contemplated.

And whenever and as often as any such action as is contemplated in or by the last two preceding paragraphs or either of them shall be taken, the person or persons so taking such action shall be entitled to a restitution of the possession of such undivided (or divided as the case may be) part, portion, and interest, of and in said demised premises as shall then belong and pertain to the person or persons so proceeding;—or to the

possession of which, he, she, it or they shall then be legally entitled.

And it is further understood and agreed between the parties hereto, and made a condition of this Lease, that any Declaration, or Judgment or Forfeiture of this Lease or of any interest herein or hereunder, which shall be made, decreed, or rendered, in pursuance of the three next preceding paragraphs hereof, or of any or either of said three paragraphs, shall be considered a termination of this lease, to the extent, and for the purpose of thereupon absolutely terminating the right of said Lessee to demolish, impair, or remove from said premises, any of the fixtures, including buildings, machinery, pumps, mills, and milling, and (or) pumping plant which shall then be upon said premises, the intent hereof being to expressly negative the right of said Lessee and its assigns, to [392] demolish, impair, or remove such fixtures, buildings, mills, pumps, etc., etc., from said premises during any interval that may elapse between the date of such Declaration, Decree of Judgment of Forfeiture, and the date whereon a final judgment concerning the same may or might be obtained in any Appellate Court or Courts.

It is a further condition of this Lease, that the rentals, and all and singular the different sums and installments hereinabove provided to be paid by way of rent hereunder to the respective Lessors herein, shall be payable to them and their respective successors, in interest, heirs, executors, administra-

tors and assigns, as the case may be, in the City of Honolulu, at the Office of the Lessee or of its agent from time to time, and that the ten days period of default hereinbefore provided shall not begin to run as to the several shares or interests hereinbefore provided for until demand for such share or shares of rent respectively shall have been made at said office, by the persons thereunto respectively entitled, or their respective agent, authorized in writing, or their respective attorneys.

It is a further condition of this lease that in any action which shall be brought to terminate this Lease, or declare, or have adjudged a forfeiture thereof, service of process upon the Manager of said Lessee's plantation, or upon any other person who shall for the time being, be in charge and control of the property of said Lessee, within [393] said District of Waialua shall be deemed sufficient service of process (which terms shall be construed to embrace all legal writs and documents that shall be involved) upon said Lessee, and said Lessee hereby expressly waives any statutory right or benefit that shall exist in its favor as to such service, and which shall be different from, or opposed to the condition in this paragraph expressed.

In witness whereof the said Hawaiian Realty & Maturity Company, Limited, and said Lessee have caused this Instrument to be signed by their appropriate officers, and their respective corporate seals to be hereto attached; and said Lessors other than said Hawaiian Realty & Maturity Company,

Limited, and said parties of the Third part, have hereunto set their hands and seal the day and year first herein above written.

Executed in presence of

CARLOS A. LONG,
Administrator-de-bonis-non-with-the-Will-annexed of the Estate of Robert William Holt, deceased.
ROBERT L. COLBURN.
EDWARD S. HOLT.
HELEN A. HOLT.
HELEN A. HOLT
As Guardian of Valentine S. Holt, Wattie E. Holt, Amelia A. Holt, Helen A. Holt, James R. Holt and Irene N. Holt.
ELIZABETH K. RICHARDSON
[394]
HAWAIIAN REALTY & MATURITY COMPANY, LTD.
By L. K. KENTWELL,
Its President.
[Corporate Seal] By HENRY P. KAOHI,
Its Secretary pro tem.
WAIALUA AGRICULTURAL COMPANY, LIMITED.
By G. P. CASTLE,
Its President.
[Corporate Seal] By W. A. BOWEN,
Its Treasurer.
JOHN F. COLBURN.
JAMES L. HOLT.
ELIZA R. P. CHRISTIAN.

Territory of Hawaii
Island of Oahu
First Judicial Circuit,
City of Honolulu.—ss.

On the eighteenth day of March, one thousand nine hundred and five, before me, N. Fernandez, a Notary Public in for said Territory, Island, Circuit and City, duly commissioned and sworn, personally appeared Carlos A. Long Administrator-de-bonis-non-with-the-Will-annexed of the Estate of Robert William Holt, deceased; and John F Colburn; and James Lawrence Holt; and L. K. Kentwell, President, and Henry P. Kaohi, the Secretary pro tem. of Hawaiian Realty & Maturity Company, Limited, an Hawaiian Corporation; and Eliza R. P. Christian, wife of Albert Christian, each of said persons being personally known to me, and further known to me to be the persons described in, and who executed the foregoing instrument; and they, and each of them acknowledged to me that they executed said instrument freely and voluntarily, and for the uses and purposes therein set forth. And said L. K. Kentwell, and said Henry P. Kaohi, further [395] acknowledged to me that they executed said instrument as and for the free act and deed of said Hawaiian Realty & Maturity Company, Limited. And said Eliza R. P. Christian, upon an examination by me held separate and apart from, and out of the hearing of her husband, the said Albert Christian, further acknowledged to me that

she signed and executed said instrument freely and without compulsion, fear, or constraint from her said husband.

And on the 20th day of March, one thousand nine hundred and five, at the Territory, Island, Circuit and City, aforesaid, personally appeared before me Robert L. Colburn, George P. Castle, the President, and W. A. Bowen, the Treasurer of Waialua Agricultural Company, Limited, an Hawaiian corporation, each and every of said persons being personally known to me, and further known to me as the persons described in, and who executed the foregoing instrument; and they, and each of them, acknowledged to me that they executed the said instrument freely and voluntarily and for the uses and purposes therein set forth. And said George P. Castle, and said W. A. Bowen further acknowledged to me that they executed said instrument as and for the free act and deed of said Waialua Agricultural Company, Limited.

And on the twenty-second day of March, one thousand nine hundred and five, at the Territory, Island, Circuit and City aforesaid, personally appeared before me Edward S. Holt, he being personally known to me, and further [396] known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the said instrument freely and voluntarily, and for the uses and purposes therein set forth.

And on the twenty-third day of March, one thousand nine hundred and five, at the Territory, Island, Circuit and City aforesaid, personally appeared before me Elizabeth K. Richardson, wife of Edward Vivian Richardson, she being personally known to me, and further known to me to be the person described in and who executed the foregoing instrument, and she acknowledged to me that she executed the said instrument freely and voluntarily, and for uses and purposes therein set forth. And said Elizabeth K. Richardson upon an examination by me held separate and apart from, and out of the hearing of her husband, the said Edward Vivian Richardson, further acknowledged to me that she signed and executed said instrument freely and without compulsion, fear or constraint from her said husband.

And on this twenty-seventh day of March, one thousand nine hundred and five, at the Territory, Island, Circuit and City aforesaid, personally appeared before me Helen A. Holt, widow, in her own behalf and as Guardian of Valentine S. Holt, Wattie E. Holt, Amelia A. Holt, Helen A. Holt, James R. Holt and Irene N. Holt, minor children of James R. Holt, the Younger, deceased, she being personally known to me, and further known to me to be the person described in and who executed the foregoing instrument, and she [397] acknowledged to me that she executed the said instrument freely and voluntarily, and for the uses and purposes therein set forth, individually and in her capacity as Guardian aforesaid.

And I do hereby further certify that the following changes and alterations were made in the Text of said instrument before the execution and acknowledgment of the same, by the parties aforesaid, that is to say:—On page two thereof, one entire paragraph consisting of the fourth line to the twelfth line of said page two inclusive, numbered from the top, was expunged and stricken out. On page eight thereof, in the fifth line from the top, the word "and" was interlined between the words "herself" and "itself."

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last in the foregoing Certificate above written.

[Seal] N. FERNANDEZ

Notary Public, First Judicial Circuit, Territory of Hawaii. [398]

Exhibit G.

Stamped $15.

THIS INDENTURE—made this 31st day of August A. D. 1906, by and betwen—ELIZA R. P. CHRISTIAN—(the only child and heir of John Dominis Holt, the elder) of Honolulu, Island and County of Oahu, Territory of Hawaii, of the first part, and—ANNIE HOLT KENTWELL—of the same place, party of the second part.

WITNESSETH—Whereas the party of the first part has for many years last past been supported and maintained at the home of the party of the

second part, and at the cost and expense of the said party of the second part, and

WHEREAS—the said first party is the only child and heir of John Dominis Holt, the elder, being also a devisee under the Will of R. W. Holt, deceased, and is entitled in expectancy to a certain undivided interest or moiety in certain lands situate at Waialua, Oahu, now leased to the Waialua Agricultural Company, Limited, by lease dated the 17th day of March, 1905, and recorded in the Hawaiian Registry of Deeds in Liber , Folio, and

WHEREAS—by virtue of being such heir of John Dominis Holt, the elder, and such devisee under the will of R. W. Holt, deceased, aforesaid, she, the said party of the first part, shall upon the death of him, the said John Dominis Holt, the elder, be entitled to her share of the [399] rents reserved in said lease aforesaid, which share of said rents aforesaid is now enjoyed by her father, the said John Dominis Holt, the elder, and

WHEREAS—the party of the second part has agreed to support and to maintain the party of the first part for and during the period of the natural life of her, the said party of the first part,

NOW THEREFORE THIS INDENTURE WITNESSETH—That the said—ELIZA R. P. CHRISTIAN—in consideration of the premises and of One Dollar to her in hand paid by—ANNIE HOLT KENTWELL—of Honolulu aforesaid, the receipt whereof is hereby duly confessed and acknowledged and for other and valuable consideration to the said—ELIZA R. P. CHRISTIAN—mov-

ing from said—ANNIE HOLT KENTWELL—, she, the said—ELIZA R. P. CHRISTIAN—, does hereby give, sell, assign, release, transfer and set over unto the said—ANNIE HOLT KENTWELL—, her heirs, executors and administrators, all her title and interest in and to any and all rents, issues and profits to which she may hereafter be entitled or which may be due and payable to her by, through or under the lease to the Waialua Agricultural Company, Limited, dated the 17th day of March, 1905, and recorded in said Liber Folio or by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to demand, receive, collect and receipt for all such rents, issues and profits from whomsoever due during the term of the natoral life of her, [400] the said—ELIZA R. P. CHRISTIAN—.

AND—it is expressly agreed and understood between and by the parties hereto that the party of the second part shall support and maintain her, the party of the first part, for and during the natural life of said first part.

AND—it is further agreed and understood by and between the parties hereto that in case the party of the first part shall survive the party of the second part, the heirs of said second party shall be entitled to perform the covenant of this agreement on the part of said second party to be kept and performed, and they shall during the life of said first party be entitled to the benefit or benefits thereof.

IN WITNESS WHEREOF—the said—ELIZA R. P. CHRISTIAN—and—ANNIE HOLT KENTWELL—have hereunto set their hands and seals the day and year first above written.

ELIZA R. P. CHRISTIAN
ANNIE HOLT KENTWELL

Executed in the presence of:
JOHN D. HOLT

Territory of Hawaii,
County of Oahu,
District of Honolulu.—ss.

On this 31st day of August, A. D. 1906, personally appeared before me—ELIZA R. P. CHRISTIAN—(w) and—ANNIE HOLT KENTWELL—(w), both known to me to be the persons [401] described in and who executed the foregoing instrument, who severally acknowledged to me that they executed the name freely and voluntarily, and for the uses and purposes therein set forth.

[Notarial Seal] N. FERNANDEZ,
Notary Public First Judicial Circuit, Territory of Hawaii. [402]

[Title of Court and Cause.]

MOTION FOR ALLOWANCE OF AMENDMENTS TO PLEADINGS.

Filed at 10:15 o'clock A. M., May 25, 1931, John Lee Kwai, Clerk. [403]

Comes now ELIZA R. P. CHRISTIAN, and incompetent person, by HERMAN V. von HOLT,

(substituted for George H. Holt, Deceased), her Guardian, by her attorneys, Ulrich & Hite, and moves that amendments to the petition in the above-entitled Court and Cause be allowed and permitted in accordance with the second amended petition attached hereto and made a part hereof.

This motion is based upon all the records and files [404] herein.

Dated: Honolulu, T. H., May 23, 1931.

ELIZA R. P. CHRISTIAN,
an incompetent person, by
HERMAN V. von HOLT (substituted for George H. Holt, Deceased), her Guardian,
Petitioner,
By ULRICH & HITE,
By CHAS M. HITE
Her Attorneys.

NOTICE.

To: Waialua Agricultural Company, Limited, James L. Holt, and Messrs. Robertson & Castle; Brobeck, Phleger & Harrison; and John R. Desha, their attorneys:

YOU AND EACH OF YOU will please take notice that the foregoing Motion will be presented before and will be heard by the Honorable ALBERT M. CRISTY, judge of the above-entitle Court, in his courtroom in the Judiciary Building, Honolulu, T. H., on Tuesday, the 26th day of May, A. D. 1931,

at the hour of 9 o'clock A. M., or as soon thereafter as counsel can be heard.

ULRICH & HITE,
By CHAS M. HITE,
Attorneys for Movants.

CERTIFICATE

I, CHAS. M. HITE, of counsel for petitioner above named, hereby CERTIFY that a true copy of the foregoing [405] Motion and Notice, together with a true copy of the Second Amended Petition referred to in said Motion, was served upon respondents WAIALUA AGRICULTURAL COMPANY, LIMITED and JAMES L. HOLT on Saturday, the 23rd day of May, 1931, at the hour of 9 o'clock a. m., by handing to their attorneys said true copies.

CHAS. M. HITE [406]

[Title of Court and Cause.]

OBJECTIONS TO ALLOWANCE OF PROPOSED SECOND AMENDED BILL.

Filed at 10:15 o'clock A. M., Oct. 31, 1931, L. R. Holt, Clerk. [407]

Now comes the respondent, WAIALUA AGRICULTURAL COMPANY, LIMITED, by its attorneys, Robertson & Castle, and objects to the allowance of the proposed second amended petition in the above entitled cause and specifies its objections as follows:

1. That said proposed amendment is contrary to the rules of law and of equity and comes too late.

2. That a new case is sought to be made by said proposed amendment.

3. That the said proposed amendment is not supported by affidavit showing any grounds for the same (a) that there is newly discovered evidence, (b) that such evidence is material, (c) that the petitioner has shown due diligence, (d) that any proposed evidence was unknown to the petitioner at the hearing of said cause; [408]

4. That no supplemental bill adding new parties, and creating new issues can be filed after an interlocutory decree except to introduce new evidence of which the petitioner was ignorant, and had shown due diligence at the time of hearing on the original bill, which evidence is material, and then only when supported by an affidavit with all such necessary allegations.

5. That the proposed amendment is barred by the laches and negligence of the petitioner; that the attention of the petitioner was repeatedly called to the fact that the lease of March 17, 1905, and the deed of August 31, 1906, barred an accounting during the original hearing; that the petitioner was aware of the existence of these instruments and introduced them in evidence; that by the first amended petition filed March 5, 1929, during the last days of the hearing on cancellation of the deed of May 2, 1910, the petitioner alleged relief could not be prayed for against said lease in these pro-

ceedings, which this respondent admitted and the deed of August 31, 1906, was not mentioned in said amended petition; that the respondent has been greatly injured by said delay in the loss of evidence, especially by the death of W. W. Goodale, Manager of the respondent's plantation, and who negotiated said lease of March 17, 1905, for the respondent;

6. That the petitioner does not offer to do equity and cannot do equity in the proposed amended complaint;

7. That the proposed second amended petition does not comply with the facts as found by the Supreme Court;

8. That the petitioner was given an election to amend the complaint by the Supreme Court and while exercising such election still is seeking to preserve the question of error in the Supreme Court decree on its decision on accounting; [409] that the petitioner should either exercise his election or allow a decree to be entered on the findings of the Supreme Court and appeal therefrom.

9. That the petitioner while accepting the decree of the Supreme Court cancelling the deed of May 2, 1910, which cancellation was based on an adjudication that the deed of August 31, 1906 was a valid instrument, now is seeking to set aside said deed of August 31, 1906, and is thereby occupying an inconsistent position in the same suit.

These objections are based upon all the pleadings, records and evidence in the above entitled cause and

the affidavit hereto attached marked "Exhibit A" and made a part hereof.

DATED, Honolulu, T. H., Oct. 30, 1931.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
By ROBERTSON & CASTLE,
Its Attorneys. [410]

EXHIBIT A.

Territory of Hawaii
City and County of Honolulu.—ss.

ALFRED L. CASTLE being first duly sworn on oath deposes and says: That he is a member of the firm of Robertson & Castle, counsel for the respondent Waialua Agricultural Company, Limited; that W. W. Goodale referred to in the within objections died in April, 1929.

ALFRED L. CASTLE

Subscribed and sworn to before me this 30th day of October, 1931.

[Seal] ELSIE HIORTH,
Notary Public, First Judicial Circuit Territory of Hawaii. [411]

[Title of Court and Cause.]

SPECIAL DEMURRER TO SECOND AMENDED PETITION.

Filed at 9:30 o'clock A. M., Nov. 14, 1931, D. K. Sherwood, Clerk. [412]

The respondent, Waialua Agricultural Company, Limited, by its attorneys, Robertson & Castle, by protestation, not confessing or acknowledging all or any of the matters and things in said petitioner's second amended petition, and saving and reserving unto itself all benefits and advantages of further demurrer, plea or answer to the residue of said second amended petition, and without waiving its objections or its exceptions heretofore filed to said second amended petition, does demur to so much and such part of the said second amended petition as is hereinafter set forth, and for the reasons and grounds as are hereinafter more specifically set forth:

1. That the allegation in Paragraph IX, beginning line four of page seven of the second amended petition "that all of the foregoing facts and circumstances were well known to [413] respondent corporation, notwithstanding that the true worth and value of said property, dependent peculiarly within the knowledge of said respondent corporation was unknown to and not disclosed to said Lawrence Kentwell" is scandalous and impertinent and ought to be expunged.

2. That the allegation in Paragraph X, line nineteen of page seven of said second amended peti-

tion beginning "the said James L. Holt was induced" to the end of the paragraph, being line five of page nine of said second amended petition, is impertinent and ought to be expunged.

3. That the allegation in Paragraph XI, line seven of page nine of said second amended petition, beginning "then and thereupon said James L. Holt, pursuant to said agreement, did endeavor to ascertain from England whether or not, if attempted, said plan might be reasonably expected to be successful and having, as it was thought, ascertained that such was the fact," is impertinent and ought to be expunged.

4. That the allegation in Paragraph XI, beginning line sixteen, page nine of said second amended petition "and there to appear" to the end of said paragraph, line twenty-two and page nine of said second amended petition, is impertinent and scandalous and ought to be expunged.

5. That the allegation in Paragraph XII, line three of page ten of said second amended petition, being "though ostensibly representing said respondent James L. Holt as aforesaid," is impertinent and ought to be expunged.

6. That the allegation in Paragraph XII, line seven, page ten, of said second amended petition, being "Upon information and belief petitioner further alleges that said David L. Withington, as such attorney and representative, was fully aware of said mental [414] incompetency of said Eliza R. P. Christian at the time of the happening of all the events which there transpired as herein described,"

is scandalous and impertinent and ought to be expunged.

7. That the allegation in Paragraph XIII, line fourteen of page ten of said second amended petition, beginning with the words "that the said David L. Withington" and ending with the words "well known to defendant corporation" in said paragraph, being line seven of page eleven of said second amended petition, is scandalous and impertinent, and ought to be expunged.

8. That the allegation in Paragraph XIV, line twenty-two of page twelve, of said second amended petition beginning with the words "petitioner alleges that said sum of $30,000 was grossly, utterly and wholly inadequate as consideration for the interest of said Eliza R. P. Christian as was well known to said respondent corporation and to its agents and representatives and that said transaction was unconscionable and inequitable and in fraud of the rights of said incompetent Eliza R. P. Christian," is scandalous and impertinent and ought to be expunged.

9. That all the allegations in Paragraph XVIII beginning line twenty on page fifteen of said second amended petition with the words "that on July 9, 1921," to the end of the clause, line two page sixteen of said second amended petition and ending with the words "said provision thereof" are impertinent and scandalous and ought to be expunged.

10. That all allegations in Paragraph XXII from line nine on page twenty of said second

amended petition to line twenty on page twenty-two of said second amended petition are impertinent [415] and ought to be expunged.

11. That all the allegation in Paragraph XXIII from line twenty-one on page twenty-two of said second amended petition to line four on page twenty-five of said second amended petition, are impertinent and ought to be expunged.

12. That the allegations in Paragraph XXIV, line eleven on page twenty-five of said second amended petition, beginning with the words "or in said lease of March 17, 1905," and ending with the words "August 31, 1906" in line seventeen of said page twenty-five, are impertinent and ought to be expunged.

13. That the allegations in Paragraph XXIV, line twenty-four on page twenty-five of said second amended petition, beginning with the words "and while alleging that no consideration of any kind" and ending on line six on page twenty-six of said second amended petition with the words "August 31, 1906," are impertinent and ought to be expunged.

14. That the praying in said second amended petition for relief against a lease of March 17, 1905, "Exhibit F," and an indenture of August 31, 1906, "Exhibit G," are impertinent and said prayer and said exhibits ought to be expunged.

15. That that portion of the second amended petition seeking relief against the lease of March 17, 1905, is barred by laches and acquiescence of the petitioner and the trustee of the R. W. Holt estate to the injury of this respondent.

16. That that portion of the second amended petition seeking relief against the lease of March 17, 1905, shows a non-joinder of necessary parties to-wit: the lessors named in said lease and the successors in trust to Carlos A. Long, Trustee of the Estate of R. W. Holt.

17. That the portion of the second amended petition seeking relief against the lease of March 17, 1905, and the deed of [416] August 31, 1906, shows that these matters were known to the petitioner at the time of the hearing on the original complaint and this court has no jurisdiction to grant such relief.

18. That the second amended petition shows the petitioner is guilty of laches and acquiescence to the injury of the respondent sufficient to bar the cancellation of the deed of August 31, 1906.

19. That the petitioner is asserting an inconsistent claim in the second amended petition in that the Supreme Court ordered cancellation of the deed of May 2, 1910, on the ground that the deed of August 31, 1906 was a valid instrument and now the petitioner is seeking to annul said deed of August 31, 1906, while claiming the benefit of the interlocutory decree of the Supreme Court as against the deed of May 2, 1910, and the petitioner is estopped to assert said claim that the deed of August 31, 1906 is void.

20. That the second amended petition seeking supplemental relief is not supported by any affidavit of the petitioner or anyone for the petitioner show-

ing that the petitioner has exercised due diligence or that the supplemental relief is based on newly discovered evidence or any other equitable grounds.

21. That the second amended petition seeks additional and supplemental relief which creates a new and different case from that of the original petition in that there is sought a cancellation of the lease of March 17, 1905, and the deed of August 31, 1906, when those instruments have been adjudicated valid instruments in the main case, and the evidence upon which such cancellation is sought is not shown to have been newly discovered or that the petitioner has exercised due diligence in presenting the same. [417]

22. That the second amended petition insofar as it seeks additional relief from the original bill sets forth no grounds for such relief either equitable or otherwise.

23. That this respondent cannot in equity and good conscience be compelled to answer said second amended petition until the costs incurred in the trial of this case in the above entitled court be taxed in its favor and paid by petitioner.

WHEREFORE and for divers other errors and imperfections appearing in said second amended petition, this respondent humbly prays the judgment of this honorable Court whether it shall be compelled to make any answer to such parts of said second amended petition as is so demurred unto as aforesaid, and this respondent humbly prays to be hence dismissed as to such part of said second

amended petition with its costs in this behalf wrongfully sustained.

Dated, Honolulu, T. H., November 14, 1931.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
By ROBERTSON & CASTLE
Its Attorneys.

I hereby certify that the foregoing special demurrer is not intended for delay.

ALFRED L. CASTLE
Counsel for the Respondent, Waialua Agricultural Company, Limited.

Service of a copy of the foregoing Special Demurrer to Second Amended Petition is hereby acknowledged this 14th day of November, 1931.

ULRICH & HITE
Attorneys for Petitioner.
JOHN R. DESHA
Attorney for James L. Holt, one of the Respondents. [418]

[Title of Court and Cause.]

ANSWER OF JAMES L. HOLT.

Filed at 11:00 o'clock A. M., Dec. 5, 1931, John Lee Kwai, Clerk. [486]

Comes now JAMES L. HOLT, respondent above named, by his attorney JOHN R. DESHA, and, for

answer to the second amended petition on file herein, shows unto this Honorable Court as follows:

I.

With reference to all those allegations in said second amended petition which are the same allegations as those contained in the original petition in the above entitled cause, as amended by the first amended petition herein, respondent shows to the Court the fact that on or about May 18, 1928, he did file in the above entitled cause, his answer, duly signed and sworn to, on the said 18th day of May, 1928, wherein and whereby he did make answer to the allegations of the original petition herein, and did thereafter permit said answer to stand as his answer to the first amended petition herein, and that thereafter and upon the issues raised by the allegations of said original petition herein and the first amended petition herein, together with his answer thereto as aforesaid, and the other pleadings in said cause, evidence was adduced bearing upon the issues raised as aforesaid and said matter did proceed to final judgment and decree in the above entitled Court, and that thereafter on appeal duly taken to the Supreme Court of the Territory of Hawaii by the repondent, Waialua Agricultural Company, [487] Limited, the issues raised by said first amended petition and by your respondent's answer thereto and by the other pleadings in said cause dealing with the question of the validity as to petitioner of that certain deed of May 2, 1910, and with the question of the mental capacity at all times of

the said Eliza R. P. Christian were finally determined by the decision of the said Supreme Court of the Territory of Hawaii, and your respondent, abiding by the said decision of the Supreme Court of the Territory of Hawaii in the premises, makes no further or other answer to the matters already answered as aforesaid, and in this connection refers merely to the answer heretofore filed by him herein as aforesaid, but with respect to the allegations in said second amended petition which are different from the allegations of said original petition, as amended by said first amended petition, as aforesaid, and which have been included as amendatory matter authorized by the order of the Supreme Court of the Territory of Hawaii heretofore made and entered herein, and which have to do with the question of the validity as to petitioner of a lease dated March 17, 1905, and a written instrument dated August 31, 1906, your respondent makes answer as follows:

II.

Answering the allegations contained in Paragraph XXII of said second amended petition, referring to a certain instrument of lease dated March 17, 1905, and to the procuring of the signature of the said Eliza R. P. Christian as an assenting party to said lease, under certain circumstances in said paragraph enumerated, your respondent alleges that he has no knowledge of the matters and things therein alleged sufficient upon which to base a belief, excepting the allegation as to the mental incompetence of the said

Eliza R. P. Christian at that time, and therefore that as to all allegations in said paragraph contained excepting said allegation as to mental incompetence, he leaves petitioner to her proof thereof, but that as to said allegation of mental incompetence, [488] he knows that said Eliza R. P. Christian was at all times wholly and utterly mentally incompetent, and that she was so mentally incompetent on said date of March 17, 1905, in said paragraph referred to, and he therefore admits the allegation in said paragraph contained as to the mental incompetence of the said Eliza R. P. Christian.

III.

Answering the allegations contained in Paragraph XXIII of said second amended petition, having to do with a certain instrument in writing dated August 31, 1906, purported to have been entered into and executed between said Eliza R. P. Christian and Annie Holt Kentwell, your respondent alleges that he has no information of any kind of and concerning said written instrument or of its purported execution, and that he has no knowledge or information sufficient upon which to predicate a belief of and concerning the allegations in said paragraph contained, save and except the allegation therein contained as to the mental incompetence at that time of Eliza R. P. Christian, and the allegation as to the payment of $5,000.00 for the interest claimed by Annie Holt Kentwell in the life estate of John Dominis Holt at the time of the joinder by her in that certain deed dated May 2, 1910, and that he

therefore leaves petitioner to her proof of all the allegations in said paragraph contained, save and except the allegation as to the mental incompetence of the said Eliza R. P. Christian, and said allegation as to the payment of said $5,000.00 as aforesaid, and that with respect to said allegation as to mental incompetence, he admits the truth of such allegation in said paragraph contained, and avers that the said Eliza R. P. Christian, to his knowledge, at that time, as at all other times in her life, was and has been wholly and utterly incompetent mentally, and that as to the allegation in said paragraph contained to the effect that the $5,000.00 claimed to have been paid with respect to the joinder in the deed of May 2, 1910, of Annie Holt Kentwell, was paid only as consideration for certain rights claimed and supposed to be held by said Annie Holt Kentwell in and to the life estate of John Dominis Holt, your respondent [489] knows said allegation to be true, and therefore admits the allegation in this regard in said paragraph XXIII contained.

IV.

Your respondent having heretofore, in his original answer filed herein to the original petition as amended by the first amended petition herein, submitted himself to the jurisdiction of this Court as to all matters and issues thereby raised and presented, now likewise with respect to the second amended petition herein, insofar as it presents new or other or amendatory issues, upon such said second amended petition, and his answer thereto herein-

above set forth, and upon such evidence as has been adduced or may yet be adduced upon further hearing hereof, submits himself to the jurisdiction of this Honorable Court and to such decree or judgment as may seem just and equitable in the premises.

Dated at Honolulu, T. H., this 5th day of December, A. D. 1931.

JAMES L. HOLT

Respondent.

Territory of Hawaii
City and County of Honolulu.—ss.

JAMES L. HOLT, being first duly sworn, on oath deposes and says: That he is the James L. Holt described in and who signed the foregoing answer; that he has read the said answer, knows the contents thereof, and that the allegations therein contained are true, save and except as to those matters stated to be alleged upon information and belief, and as to them, he believes them to be true.

JAMES L. HOLT

Subscribed and sworn to before me this 5th day of December, A. D. 1931.

[Seal] CHANG CHAU
Notary Public, First Judicial Circuit, Territory of Hawaii. [490]

[Title of Court and Cause.]

REPLICATION.

Filed at 2:10 o'clock P. M., Dec. 7, 1931, John Lee Kwai, Clerk. [491]

Comes now Eliza R. P. CHRISTIAN, an incompetent person, by HERMAN V. von HOLT, her Guardian, and, by way of replication to the answer of James L. Holt to the second amended petition, re-asserts, re-alleges and re-avers all of the matters and things set forth and contained in said second amended petition.

Dated: Honolulu, T. H., December 7, 1931.

ELIZA R. P. CHRISTIAN, an incompetent person,

Petitioner.

By HERMAN V. von HOLT

Her Guardian.

Served on Respondent James L. Holt, Dec. 7, 1931 by mailing his attorney, J. R. Desha, true copy hereof.

CHAS. M. HITE [492]

[Title of Court and Cause.]

NOTICE TO PRODUCE

Filed at 1:50 o'clock P. M., Dec. 8, 1931. D. K. Sherwood, Clerk.

Receipt of a copy acknowledged this 8th day of December, 1931.

ULRICH & HITE
Attorneys for Petitioner. [493]

To: HERMAN V. VON HOLT, Guardian of ELIZA R. P. CHRISTIAN, Petitioner herein, and ULRICH & HITE, his attorneys:

Demand and notice is hereby made on you to produce at the trial in the above entitled cause the original deed from Eliza R. P. Christian to Annie H. Kentwell, dated August 31, 1906, recorded in the Hawaiian Registry of Conveyances in Book 294, pages 211-213;

AND you are hereby notified that upon your failure to so produce, the respondent, Waialua Agricultural Company, Limited, in said cause will prove the said deed and its contents by other methods.

Dated, Honolulu, T. H., December 8th, 1931.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
By ROBERTSON & CASTLE
Its Attorneys [494]

[Title of Court and Cause.]

ANSWER OF WAIALUA AGRICULTURAL COMPANY, LIMITED, TO SECOND AMENDED PETITION.

Filed at 3:58 o'clock P. M., Dec. 24, 1931. D. K. Sherwood, Clerk. [500]

Now comes WAIALUA AGRICULTURAL COMPANY, LIMITED, one of the respondents herein, now and at all times saving and reserving unto itself all benefit and advantage of exceptions which can or may be had or taken to it, any errors, uncertainties and other imperfections in the second amended petition of Eliza R. P. Christian, an alleged incompetent person, suing by Herman V. von Holt (substituted for George H. Holt, deceased), her alleged guardian, and for answer to the three separate causes of action set forth in said second amended petition (the first of which cause of action, relating to a deed of May 2, 1910, is set forth in paragraphs I to XXI, inclusive, thereof, and the first [501] sentence of paragraph XXIV thereof, the second of which causes of action, relating to a lease of March 17, 1905, is set forth in paragraph XXII and part of XXIV thereof, and the third of which, relating to a deed of August 31, 1906, is set forth in paragraph XXIII and part of paragraph XXIV thereof) denies each and every allegation of said second amended petition, excepting as hereinafter admitted, qualified or explained, and for specific answer does hereby admit, deny and allege as follows, that is to say:

ANSWER TO FIRST CAUSE OF ACTION

For answer to the first cause of action set forth in the second amended petition herein, as set forth in Paragraphs I to XXI inclusive thereof, Paragraph XXV and the first sentence of Paragraph XXIV thereof, relating to the deed of May 2, 1910, this respondent admits, denies and alleges as follows:

FOR A FIRST DEFENSE.

1.

It denies the allegations of Paragraph I.

2.

It admits the allegations of Paragraphs II, III, IV, V and VI, except that the land described includes only a portion of Ahupuaa of Paalaa, being a portion of Apana 34, L. C. A. 7713, R. P. 4475 containing 12,018.44 acres, and a portion of Grant 973 which contains 1902 acres instead of 1942 acres as alleged, and respondent denies that all kuleanas within the demised lands were demised by the will of Robert William Holt.

3.

It denies the allegations of Paragraph VII, and further answering thereunto, says that said Eliza R. P. Christian, [502] during all the transactions referred to in said second amended petition, was legally competent to look after her own interests and to make conveyances of her property with full knowledge of the purpose and effect thereof.

4.

It denies the allegations of Paragraph VIII, except as expressly admitted, but admits that for several years prior to 1910, it used and occupied large portions of the lands described in the petition as tenant of persons holding the legal estate in trust and with the assent of the beneficiaries of the said trust and as owner of certain undivided interests in said lands; that on a considerable portion of said lands it planted and grew sugar cane in the course of its business and sublet other portions for the growth and cultivation of pineapples; and more particularly alleges that on or about March 17, 1905, a lease of said lands was executed by this respondent as lessee and by certain lessors including the petitioner Eliza R. P. Christian, and that a copy of said lease is attached to the second amended petition herein and marked "Exhibit F" and is hereby expressly referred to and made a part hereof; thereupon and on or about April 1, 1905, the respondent entered into the possession of all of said lands and at all times subsequent to April 1, 1905, mentioned in said Paragraph VIII of said petition the respondent was in possession of all of said lands as lessee under said lease and as owner of said undivided interest in said lands.

5.

In answer to Paragraph IX, it denies the allegations thereof except as expressly admitted, but admits that said Eliza R. P. Christian had lived in the house of said Annie Holt Kentwell for many years; that at said time respondent James L.

Holt [503] was a resident of Honolulu, Hawaii, and was on friendly terms and had been in correspondence with said Lawrence Kentwell and said Eliza R. P. Christian; that the said Eliza R. P. Christian was the only child and sole heir in expectancy of her father, John Dominis Holt, and that said John Dominis Holt was a man approximately seventy-one years of age, and alleges that, as the Supreme Court of Hawaii in an interlocutory decision entered herein on April 18, 1931, found, the market value of the one-third contingent interest of said Eliza R. P. Christian in said lands, as of the 2nd day of May, 1910, was not more than the sum of $30,000.

6.

It denies all of the allegations of Paragraph X, but admits and alleges that in the purchase of said Eliza R. P. Christian's interest it was represented by the law firm of Castle & Withington of Honolulu; that it, through its agent, entered into an arrangement with said James L. Holt, at his suggestion and at his request, for the acquiring of a two-thirds interest in said lands, both in praesenti and in expectancy, including the share and expectancy of said Eliza R. P. Christian, and the interest owned by said James L. Holt, and understood that said James L. Holt would, and did in order to convey such interest, secure the conveyance of the interest of said Eliza R. P. Christian and of said Annie Holt Kentwell to him, so that said interest might be united with those which he had acquired from his

father, J. R. Holt, his uncle John Dominis Holt, and his brother, Robert Holt, which latter interests were then held in trust for said James L. Holt by one John F. Colburn, together with the said James L. Holt's own interest; that the fact that the said James L. Holt was [50] dealing with the respondent Waialua Agricultrual Company, Limited, through its agents, was well known to said Eliza R. P. Christian, said Annie Holt Kentwell, said John Dominis Holt, and said Lawrence Kentwell, and the fact that said James L. Holt could not hope to purchase the interests of said Eliza R. P. Christian and said Annie Holt Kentwell except upon the advancing of moneys by said Waialua Agricultural Company, Limited, was perfectly understood by said Eliza R. P. Christian, said Annie Holt Kentwell, said Lawrence Kentwell and said John Dominis Holt, and fully approved by them.

7.

In answer to Paragraph XI, it denies the allegations thereof, but says that David L. Withington did proceed to England to secure the conveyance of the interests of said Eliza R. P. Christian and said Annie Holt Kentwell, and did represent the respondent Waialua Agricultural Company, Limited, as well as said James L. Holt, and further says that when said David L. Withington went to England all terms of the agreement to convey said property and/or interests had been settled and understood by the parties to said conveyance and that it was well understood by all parties thereto

that said David L. Withington represented both the respondent Waialua Agricultural Company, Limited, and said James L. Holt.

8.

In answer to Paragraph XII, it denies all the allegations thereof, except that it says that said David L. Withington did go to England and did meet said Annie Holt Kentwell, together with the other members of her household, including said Eliza R. P. Christian and said John Dominis Holt; [505] that said David L. Withington did have opportunity to observe and did observe the mental condition of said Eliza R. P. Christian and was convinced and knew that she was legally capable of handling her business affairs and of making conveyances, including the conveyance in this proceeding, with full knowledge of their purpose and effect. Respondent further alleges that in all of the acts and transactions referred to in the petition, said David L. Withington acted fairly and honestly and made no misrepresentations or untrue or unfair statements whatever and concealed none of the facts with respect to said transactions. Respondent further alleges that, as the Supreme Court of Hawaii found in its said interlocutory decision, neither this respondent nor said David L. Withington had any notice or knowledge whatever of the alleged incompetence of said Eliza R. P. Christian.

9.

In answer to Paragraph XIII, it denies each and every allegation thereof except as herein expressly

admitted; that it says that the deed, a copy of which is attached to the second amended petition herein and marked Exhibit "B", and made a part hereof, was duly and knowingly executed by all the parties to the same with full knowledge of the facts for an adequate consideration; that all said parties were competent to contract or to convey land and/or interests therein, and that said deed having been duly executed and acknowledged was duly recorded in the Hawaiian Registry of Conveyances as set forth in said petition.

10.

In answer to Paragraph XIV, it denies each and every of the allegations thereof, save and except that it [506] admits that it rendered an account to said James L. Holt, paid to Eliza R. P. Christian the sum of $30,000.00 on behalf of said James L. Holt, paid to Annie Holt Kentwell the sum of $5,000.00 on behalf of said James L. Holt, and expended the sum of $110.32 in miscellaneous expenses. It further alleges that, as said Supreme Court found in said interlocutory decision, the market value of the one-third contingent interest of said Eliza R. P. Christian in said lands was, on the 2nd day of May, 1910, not more than the sum of $30,000.00.

11.

In answer to Paragraph XV, it denies the allegations thereof and alleges the facts to be that in conformity with the agreement theretofore reached between the parties and the respondent, Waialua Agricultural Company, Limited, through its agents,

said respondent, through its agents, paid the sum of $120,000.00 for a two-thirds undivided interest in fee in said lands, including the one-third interest of James L. Holt, the life estate of John Dominis Holt, the contingent interest of Eliza R. P. Christian, the contingent interest of Robert Holt, the interest of John F. Colburn and the interest of Annie Holt Kentwell.

12.

In answer to Paragraph XVI, it admits that said William R. Castle did continue to hold in trust for the respondent Waialua Agricultural Company, Limited, all the rights covered by said deed of May 2, 1910, and that on May 17, 1920, said rights were conveyed to others with the knowledge of said Waialua Agricultural Company, Limited, but not at its instigation and request. [507]

13.

In answer to Paragraph XVII, it denies the allegations therein contained, except that it admits the execution of the deed dated May 17, 1920, and alleges that the consideration therein mentioned was actually paid for in cash by the beneficiaries of said Helemano Real Estate Trust and said interests were actually owned by said beneficiaries.

14.

In answer to Paragraph XVIII, it denies the allegations thereof, except that it admits that on July 20, 1921, by instrument in writing the Trustees of said Helemano Real Estate Trust did convey the

properties mentioned in said instrument directly to the respondent Waialua Agricultural Company, Limited, on the payment td said Trustees for the beneficiaries of said trust and in proportion to their respective interests of the full consideration mentioned in said instrument.

15.

It denies all the allegations in Paragraph XIX, except that John Dominis Holt died on April 10, 1922, and left as his sole surviving heir said Eliza R. P. Christian; it admits that since the death of said John Dominis Holt it has claimed, and now is the owner of, the property described in the second amended petition herein by virtue of the deeds referred to in said second amended petition as Exhibits B, C, D and E, but denies that such claim and ownership is wrongful or without right.

16.

It denies the allegations of Paragraph XX and alleges that on the 2nd day of May, 1910, the petitioner, Eliza R. P. Christian was living with her cousin Annie Holt Kentwell, [508] her cousin's husband, Lawrence Kentwell, and her father, John Dominis Holt, all of whom joined with her in the execution of said deed of May 2, 1910; that said Eliza R. P. Christian continued, except for temporary absences, to live with her said cousin, Annie Kentwell, and her said father until the time of his death, as aforesaid, and has continued, except for temporary absences, to live with Annie Holt Kent-

well until the present time; that on or about March 25, 1924, said Annie Holt Kentwell, purporting to act on behalf of said petitioner, employed the present attorneys of record for petitioner herein for the purpose of investigating the claims of the petitioner to these lands, as well as other claims of the petitioner; that said attorneys thereupon immediately proceeded to and did investigate said claims and on September 14, 1925, said attorneys stated in writing that they were ready for court action on behalf on said petitioner with respect to the claim of said petitioner to the lands described in the petition herein; that on or about the 22nd day of June, 1926, in further pursuance of the action theretofore taken by said Annie Holt Kentwell and said attorneys, the said Annie Holt Kentwell was appointed receiver for said petitioner Eliza R. P. Christian under the terms of the British Lunacy Act; that on February 1, 1927, said George Holt was appointed guardian of said petitioner Eliza R. P. Christian by the Circuit Court of the First Circuit, Territory of Hawaii, and that no notice of the claim asserted in this suit, or of any claim of the invalidity of said deed of May 2, 1910, on the ground of the alleged mental incompetence of said petitioner or on any ground whatever, was ever given this respondent until April 5, 1928, immediately prior to the filing of the original petition in this suit; that between the time of the execution of said deed of May [509] 2, 1910, and the time when such notice was first given on April 5, 1928, this respondent be-

lieved the said deed to be in all respects valid and binding and, in reliance thereon and in good faith, and without any notice or knowledge of any claim that said deed was defective because of the alleged incompetence of petitioner or on any other ground, did during said period of time, expend $424,637.00 for permanent improvements upon said lands, which have enhanced the value of said land in at least that sum, and that the value of said improvements to said lands is at the present time at least the said sum of $424,637.00; that of said sum of $424,637.00 so expended for permanent improvements as aforesaid, the sum of $350,000.00 was spent after the death of John Dominis Holt on April 10, 1922, in the belief that it had become the owner in fee simple absolute of said one-third interest in said lands.

17.

It denies the allegations of Paragraph XXI and alleges that expenditures have been made by it for improvements in the amounts and under the circumstances alleged in the next preceding paragraph of this answer.

18.

It denies the alleations contained in the first sentence of Paragraph XXIV of the second amended petition and in this respect alleges that neither the said George H. Holt, as guardian of the petitioner, nor any other person on behalf of said petitioner ever disaffirmed or attempted to disaffirm or gave any notice of disaffirmance of said deed of May 2, 1910. [510] at any time prior to April 5, 1928,

immediately prior to the filing of the original petition in this suit.

19.

It denies the allegations contained in Paragraph XXV of the second amended petition.

FOR A SECOND DEFENSE to the first cause of action contained in the second amended petition, this respondent alleges that on or about March 17, 1905, a certain lease was executed by and between his respondent as lessee and certain lessors, including the petitioner Eliza R. P. Christian, a copy of which lease is attached to the second amended petition herein and marked Exhibit "F" and which is hereby expressly referred to and made a part hereof; that on or about April 1, 1905, this respondent entered into possession of said lands as lessee under said lease and as owner of certain undivided interests in said lands and has ever since remained in possession of said lands; that the existence of said lease and of the term for years thereby created constitutes and is a bar to any recovery herein based upon any claim to the possession of said lands or to any rents, issues or profits therefrom at any time prior to April 1, 1930. Respondent further alleges that an August 31, 1906, the petitioner herein made, executed and delivered to Annie Holt Kentwell named as a respondent herein, a certain deed and assignment of rents, issues and profits, wherein and whereby the said petitioner conveyed to said Annie Holt Kentwell all of the rents, issues and profits to which she might thereafter be entitled or which

might be due and payable to her by, through or under the said lease of March 17, 1905, or by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to take, [511] receive, collect and receipt for all such rents, issues and profits, from whomsoever due, during the term of her natural life, and whereby also the said petitioner conveyed to the said Annie Holt Kentwell an estate in said lands for and during the term of the natural life of said petitioner; that a full, true and correct copy of said deed and assignment is attached to the second amended petition herein, marked Exhibit "G", and is hereby expressly referred to and made a part hereof; that thereafter and on May 2, 1910, said Annie Holt Kentwell conveyed to James L. Holt all of her interest, whether present, prospective or in remainder, vested or contingent, of every name and description, in and to said lands, including the said rents, issues and profits of the life estate acquired from said petitioner by Annie Holt Kentwell under said deed and assignment of August 31, 1906; that thereafter the said rents, issues, profits and life estate so acquired from said petitioner by Annie Holt Kentwell passed by mesne conveyances to this respondent, which thereby acquired all of said rents, issues, profits and life estate for valuable consideration and without any notice whatever of any alleged mental impairment or incompetency of the said petitioner; and that by reason of the transfers aforesaid this

respondent is the owner of all the said rents, issues, profits and life estate which passed from the petitioner to Annie Holt Kentwell by said deed and assignment of August 31, 1906, and that such transfers and conveyances as aforesaid constitute a bar to any right of possession to said lands or to the rents, issues and profits thereof, on the part of said petitioner or any person claiming under her at any time during her natural life and constitute also a release and bar to any claim to rentals under the lease aforesaid of March 17, 1905. [512]

FOR A THIRD AND SEPARATE DEFENSE to the first cause of action contained in the said second amended petition, this respondent alleges that the claim of said petitioner is barred by her laches and unreasonable delay in the prosecution of said claim and in this respect the respondent realleges all of the facts set forth in Paragraph 16 of this answer to the first cause of action, and in addition alleges that during the interval between the execution of said deed of May 2, 1910, and the first assertion of the petitioner's claim on April 5, 1928, this respondent has at all times believed that said deed of May 2, 1910, was in all respects valid and binding and, in reliance thereon, has expended large sums for permanent improvements, as hereinbefore more particularly alleged; that many of the witnesses who had personal knowledge of the circumstances surrounding the execution of said deed have died and that by reason of their death this respondent is unable to prove the facts with respect to such

circumstances, and with respect to the mental capacity of the petitioner at the time of the execution of said deed; that during said inerval of time many items of documentary evidence affecting the execution of said deed have been lost or destroyed; that during said interval of time said lands have increased enormously in value; and that by reason of such unreasonable delay and lapse of time and the risks undertaken, expenditures made, and evidence lost, this respondent has been grievously prejudiced and injured by the failure of the petitioner or anyone on her behalf to assert her said claim more seasonable.

FOR A FOURTH AND SEPARATE DEFENSE, this respondent alleges that any decree for the cancellation of said deed [513] of May 2, 1910, would result in an inequitable forfeiture of property of this respondent of great value and that such cancellation and the forfeiture resulting thereform would constitute and be an inequitable unconscionable penalty wholly disproportionate to the property interest conveyed by petitioner under said deed.

FOR A FIFTH AND SEPARATE DEFENSE, this respondent alleges that it will be impossible, upon a cancellation of said deed of May 2, 1910, to restore the status quo existing immediately prior to its execution.

ANSWER TO SECOND CAUSE OF ACTION

And for answer to the new and separate and second cause of action set forth in the second amended

petition herein, in paragraphs XXII and part of XXIV thereof, relating to a lease of March 17, 1905, this respondent does hereby admit, deny and allege as follows:

FOR A FIRST DEFENSE

this respondent alleges that this cause came regularly on for hearing upon the first amended petition herein before the Circuit Court of the First Judicial Circuit, Territory of Hawaii; that in and by said first amended petition all the matters and things referred to in the second cause of action contained in the second amended petition herein were expressly excluded from consideration therein; that thereafter and on October 16, 1929, the said Circuit Court duly made its decree upon said first amended petition; that thereafter an appeal was taken to the Supreme [514] Court of the Territory of Hawaii, which court, on April 18, 1931, duly rendered its decision and thereafter and on May 21, 1931, made its interlocutory order herein, and that thereafter and on May 23, 1931, the petitioner filed her second amended petition herein, whereby, for the first time, she asserted the said second cause of action; that none of the facts stated in the second cause of action were newly discovered, but that on the contrary the petitioner and her guardian and attorneys had, at the time of the filing of the original petition herein, or could have had with reasonable diligence at the time, all the knowledge with respect to the allegations contained in said second cause of action that they now have; that said second cause of ac-

tion is not separately stated in said second amended petition; that said second cause of action constitutes extraneous matter wholly foreign to the subject matter of the original petition herein and the first amended petition herein, and constitutes an attempt to institute for the first time, as part of these proceedings, a claim and cause of action separate and distinct from that originally asserted and litigated herein, which separate and distinct claim the petitioner is not entitled to have considered in these proceedings.

FOR A SECOND DEFENSE,

this respondent admits, denies and alleges as follows:

It denies the allegations contained in paragraph XXII of the second amended petition, except as expressly admitted; admits that an instrument of lease dated March 17, 1905, a copy of which is attached to the second amended petition and marked Exhibit "F" thereto, was executed by Eliza R. P. [515] Christian and certain other persons as lessors and that this respondent did thereby secure a lease covering the interest of the said lessors in the premises therein described for a term of twenty-five years at the rental therein specified, and admits and alleges that the said petitioner Eliza R. P. Christian did sign the said lease. This respondent denies that at the time of affixing her signature to said lease of March 17, 1905, or at any other time, the said Eliza R. P. Christian was wholly or utterly

or at all incompetent, mentally or otherwise, to bind herself by executing said document, as one assenting thereby or otherwise, or was mentally or otherwise incompetent to bind herself in any manner or to any extent, and in this respect this respondent alleges that at the time of affixing her signature to said lease of March 17, 1905, and at all other times, said Eliza R. P. Chritsian was entirely competent, mentally and otherwise, to bind herself by executing said document or by any other legal act. This respondent denies that it had any knowledge or notice, either actual or constructive, of any mental incompetency of said Eliza R. P. Christian, if any such mental incompetence existed, at the time of the execution of said lease, and in this respect this respondent alleges that, as heretofore found by the supreme Court of Hawaii, it never had any knowledge or notice or suspicion of any incompetence or mental infirmity whatever of said Eliza R. P. Christian. This respondent denies that said Eliza R. P. Christian has not received any consideration for the execution of said lease dated March 17, 1905, and in this respect alleges that said Eliza R. P. Christian received the following considerations, among others, for her execution of said lease: (1) the covenants and promises of this respondent [516] therein contained; (2) the joinder in the execution thereof by the other parties thereto, thereby assuring unified possession and control of the permises by a solvent lessee, interested in developing and improving petitioner's property, for a period of twenty-five years;

(3) the undertaking of this respondent to pay rent for said premises during said period of twenty-five years to the persons who would be entitled from time to time during said term to the reversion thereunder, and the payment by the lessee therein named of the taxes on said premises; (4) the actual and the extensive improvement of said premises by this respondent as such lessee, inuring to the benefit of all persons interested in the title thereto, whether as reversioners, contingent remaindermen or vested remaindermen, with all the benefits flowing from such improvements. This respondent denies that no one acting on behalf of the petitioner, or claiming any rights under or by virtue of her alleged assent to said lease, has ever received any rent pursuant to the provisions of said lease, and in this respect this respondent alleges that the petitioner transferred all of her rights to said rents to one Annie Holt Kentwell by the indenture, hereinafter referred to, of August 31, 1906, and that said Annie Holt Kentwell transferred all of her interest in said premises, including all her rights to said lands, and the rents, issues and profits thereof, to the original grantor of this respondent by the deed of said Annie Holt Kentwell, dated May 2, 1910, and that the said rights thereafter passed to this respondent by mesne conveyances, and that this respondent is now the owner and holder thereof, and alleges that all rental due or payable under said lease has been duly paid to the person or persons entitled thereto.

This respondent denies that said lease has never [517] become operative in any manner or to any

extent between the petitioner and this respondent; and in this respect alleges that, as found by said Supreme Court in said interlocutory opinion, said lease became operative between said petitioner and this respondent and binding on said respondent at the time of its execution on or about March 17, 1905. This respondent denies that the binding of said Eliza R. P. Christian wtih respect to her interest in said lands by the terms and provisions of said lease was an improvident or injurious transaction, from the point of view of the welfare of said petitioner or from any point of view whatever, or was in any sense other than beneficial, and in this respect alleges that the execution of said lease and the binding of said Eliza R. P. Christian with respect to her interest in said lands by reason of her execution thereof was beneficial in all respects to said Eliza R. P. Christian; that said lease was entered into not only by the said petitioner but also by other persons as lessors, whose interest in the said properties was of the same character as hers and who agreed to the same terms and conditions after protracted consideration and negotiations; that at the time of the execution of said lease the said lands had been running to waste for a period of many years prior thereto and were covered with rocks, lantana, guava bushes and klu and that the only practical method whereby the said properties could have been prudently operated and made to yield a reasonable income was by the joinder, on the part of all persons having an interest therein, in a lease to a solvent lessee, as was actually done; that the taxes on said lands, at the date of

said lease were delinquent and unpaid for a period of four years preceding said lease; and that the terms [518] and provisions of said lease and the rental thereby reserved were, as of the date of the execution of said lease, in all respects adequate and reasonable and constituted a beneficial and prudent transaction from the point of view of the said Eliza R. P. Christian and of all the other persons having an interest in said lands. This respondent denies that said lease was at any time wholly or at all inoperative or ineffective or lacking in binding force or effect, with respect to the rights or interests of the petitioner, and in this respect alleges that, as found by the Supreme Court of Hawaii in its interlocutory decision herein, the said lease was in all respects operative and binding upon the petitioner with respect to her interest in said lands.

With respect to the allegation contained in paragraph XXII, relating to the time when this respondent first asserted a right to the possession of said premises as against the petitioner by reason of her execution of said lease, this respondent alleges that it has always claimed that said lease of March 17, 1905 was in all respects valid and binding and that, as held by the Supreme Court of the Territory of Hawaii by its decision herein, this respondent had and has a perfect right, in the event that the said deed of May 2, 1910, is set aside, to claim that its possession was justified by said lease.

This respondent denies the following allegation contained in Paragraph XXII of the second amended petition:

"Petitioner alleges that, full and complete justice and equity in the premises can only be done through and by the order of this court in these proceedings in cancelling and annulling said lease of March 17, 1905, as to her, the said Eliza R. P. Christian, and cancelling and annulling as to her any and all affects of her signature appearing as an assenting party thereto."

and in this respect alleges that neither justice nor equity [519] requires the cancellation of said lease as to said petitioner or otherwise.

FOR A THIRD AND SEPARATE DEFENSE to the second cause of action contained in the second amended petition, this respondent alleges that at the time of the execution of said lease of March 17, 1905, and at all other times, the said respondent had no notice or knowledge, actual or constructive, of any incompetence or mental impairment of said Eliza R. P. Christian, and that it took the said lease in good faith and for valuable consideration.

FOR A FOURTH AND SEPARATE DEFENSE to the second cause of action set forth in the second amended petition, this respondent alleges that the said lease of March 17, 1905, was beneficial and advantageous to the petitioner Eliza R. P. Christian.

FOR A FIFTH AND SEPARATE DEFENSE to the second cause of action set forth in the

second amended petition, this respondent alleges that the petitioner Eliza R. P. Christian actually received the benefit of said lease of March 17, 1905.

FOR A SIXTH AND SEPARATE DEFENSE

to the second cause of action set forth in the second amended petition, this respondent alleges that it is impossible to restore the status quo existing prior to the execution of said lease of March 17, 1905; that said lease has been fully executed; that the term of said lease has fully expired; that this respondent would not [520] have made the said lease if all of the other executing parties thereto, including the said petitioner, had not joined therein, and that after the execution of said lease and during the term thereof this respondent constructed valuable and permanent improvements upon said premises.

FOR A SEVENTH AND SEPARATE DEFENSE

to the second cause of action set forth in the second amended petition, this respondent alleges that the claim of said petitioner, with respect to said lease of March 17, 1905, is barred by her laches and unreasonable delay in the prosecution of said claim and in seeking to set aside or cancel the said lease; that said lease was executed as aforesaid on March 17, 1905, but that no proceeding was ever brought, nor were any steps ever taken, to cancel or disaffirm said lease, or to assert any claim with respect thereto, until the filing of the second amended petition herein on May 23, 1931, over

twenty-six years after the execution of said lease and over one year after the expiration of the term thereof; that the petitioner was living with her cousin Annie Holt Kentwell, her cousin's husband, Lawrence Kentwell, and her father John Dominis Holt at the time of the execution of said lease on or about March 17, 1905; that said petitioner continued, except for temporary absences, to live with her said cousin Annie Holt Kentwell and her said father until the time of his death as aforesaid and has continued, except for temporary absences, to live with Annie Holt Kentwell until the present time; that on or about March 25, 1924, said Annie Holt Kentwell, purporting to act on behalf of said petitioner, employed the present attorneys of record for petitioner herein for the purpose of investigating the claims of the petitioner to said lands, as well as other [521] claims of the petitioner; that said attorneys thereupon immediately proceeded to and did investigate said claims and on September 14, 1925, said attorneys stated in writing that they were ready for court action on behalf of said petitioner with respect to the claim of said petitioner to the lands described in the petition herein; that on or about the 22nd day of June, 1926, in further pursuance of the action theretofore taken by said Annie Holt Kentwell and said attorneys, the said Annie Holt Kentwell was appointed receiver for said petitioner Eliza R. P. Christian under the terms of the British Lunacy Act; That on February 1, 1927, said George Holt was appointed guardian

of said petitioner Eliza R. P. Christian by the Circuit Court of the First Circuit, Territory of Hawaii; that said George H. Holt, as such guardian of the petitioner, has had ever since his appointment on February 1, 1927, the power to lease the property of the petitioner; that for over two years after his appointment the said guardian allowed the respondent to continue to make, and the respondent did make, expenditures for permanent improvements upon the said property so leased and that during all of such time said guardian made no effort to disaffirm the said lease or to notify the respondent with respect to any claim to said lands; that during the interval between the execution of said lease of March 17, 1905, and the expiration of the term of said lease on April 1, 1930, (all before the first assertion of any claim of a right to rescind the said lease, now made for the first time by said second amended petition), this respondent expended large sums for permanent improvements upon said lands amounting to more than the sum of $600,000; that said improvements have enhanced the value of said lands in at least the said sum of $600,000 and that the value of [522] said improvements to said lands is at the present time more than the said sum of $600,000; that during the period between the execution of said lease and the filing of the second amended petition herein said lands have increased tremendously in value; that many of the witnesses who were familiar with the circumstances surrounding the execution of said lease and the participation

therein of the petitioner and her representatives and the mental condition of the petitioner at the time of the execution of said lease and other facts bearing upon the right of the petitioner to obtain such cancellation, have died or become unable to testify; that of said witnesses, W. W. Goodale and W. A. Greenwell have died since the filing of the first amended petition herein; that by reason of the aforesaid facts and circumstances and the long and unreasonable delay which has occurred before petitioner attempted to disaffirm or have cancelled the said lease, the second cause of action is barred.

FOR AN EIGHTH AND SEPARATE DEFENSE

to the second cause of action set forth in the second amended petition, this respondent alleges that the parties to this action did, prior to the filing of said second amended petition enter into a stipulation to the effect that relief could not be had in these proceedings with respect to the said lease; that said stipulation was relied upon by this respondent and in reliance thereon this respondent failed to take the testimony of witnesses who have since died, to-wit, the said W. W. Goodale and W. A. Greenwell. That said stipulation has not been and cannot equitably be set aside and constitutes a bar to the present claim of the petitioner for cancellation of said lease. [523]

FOR A NINTH AND SEPARATE DEFENSE to the second cause of action set forth in the second amended petition, this respondent alleges that the petitioner Eliza R. P. Christian has not, and never has had at any time since August 31, 1906, any interest in the rents, issues or profits of said lands, or the possession or reversion thereof or any interest whatever in having cancelled the said lease; that on August 31, 1906, the said petitioner, by deed and assignment executed on that date, transferred by Annie Holt Kentwell all of the rents, issues and profits to which she might thereafter be entitled or which might be due and payable to her by, through or under the said lease of March 17, 1905, or by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to take, receive, collect and receipt for all such rents, issues and profits, from whomsoever due, during the term of her natural life and whereby also she conveyed to the said Annie Holt Kentwell an estate in said lands for and during the term of the natural life of said petitioner, as more fully appears by said Exhibit "G" attached to said amended petition; that thereafter the interest acquired by said Annie Holt Kentwell under said deed and assignment of August 31, 1906, passed by mesne conveyances to this respondent, as hereinbefore more particularly alleged and that this respondent is now the owner of all of said rents, issues, profits and life estate which passed from the

petitioner to Annie Holt Kentwell by said deed and assignment of August 31, 1906, and that said deed and assignment constitute a bar to the maintenance of any claim or suit by the said petitioner to set aside or disaffirm [524] or cancel the said lease of March 17, 1905; and that this respondent alleges that she, the said petitioner by virtue of said deed and assignment of August 31, 1906, has actually received her support and maintenance from the time of the execution of said instrument until the expiration of said lease on April 1, 1930.

FOR A TENTH AND SEPARATE DEFENSE to the second cause of action set forth in the second amended petition, this respondent alleges that there is a defect of a necessary party in that Carlos A. Long is a necessary party hereto and is not joined herein. [525]

ANSWER TO THIRD CAUSE OF ACTION.

And for answer to the new and separate and third cause of action set forth in the second amended petition herein in Paragraphs XXIII and part of XXIV thereof, relating to the deed and assignment of August 31, 1906, this respondent admits, denies and alleges as follows:

FOR A FIRST DEFENSE,

this respondent alleges that this cause came regularly on for hearing upon the first amended petition herein before the Circuit Court of the First Judicial Circuit, Territory of Hawaii; that none of the

matters or things referred to in the third cause of action contained in the second amended petition herein were mentioned or referred to at all in either the original or first amended petition, nor were said matters or things made an issue between the parties upon either the original or first amended petition herein; that thereafter and on October 16, 1929, the said Circuit Court duly made its decree upon said first amended petition; that thereafter an appeal was taken to the Supreme Court of the Territory of Hawaii, which court, on April 18, 1931, duly rendered its decision and thereafter and on May 21, 1931, made its interlocutory order herein, and thereafter and on May 23, 1931, the petitioner filed her second amended petition herein, whereby, for the first time, she asserted the said third cause of action; that none of the facts stated in the third cause of action were newly discovered, but that on the contrary the petitioner and her guardian and attorneys had, at the time of the filing of the original petition herein, or could have had with reasonable diligence at that time, all the knowledge with respect to the allegations contained in said third cause of action that they now have; that said third cause of action is not separately stated [526] in said second amended petition; that said third cause of action constitutes extraneous matter wholly foreign to the subject matter of the original petition herein and the first amended petition herein and constitutes an attempt to institute for the first time, as part of these proceedings, a claim and cause of

action separate and distinct from that originally asserted and litigated herein which separate and distinct claim the petitioner is not entitled to have considered in these proceedings.

FOR A SECOND DEFENSE,

this respondent admits, denies and alleges as follows:

It denies the allegations contained in Paragraph XXIII of the second amended petition, except as expressly admitted; admits that a certain instrument in writing, dated August 31, 1906, a copy of which is attached to the second amended petition and marked Exhibit "G" thereto and which is hereby expressly referred to and made a part hereof, was executed by said Eliza R. P. Christian and respondent Annie Holt Kentwell, and in this respect alleges that said instrument dated August 31, 1906, constituted and was a conveyance and assignment whereby the said petitioner Eliza R. P. Christian conveyed to the said Annie Holt Kentwell all of the rents, issues and profits to which she might thereafter be entitled or which might be due and payable to her by, through or under the said lease of March 17, 1905, or by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to take, receive, collect and receipt during the term of her natural life and whereby also the [527] said petitioner conveyed to the said Annie Holt Kentwell an estate in said lands for and during the term of the natural life of said petitioner; that thereafter and on May 2, 1910, said

Annie Holt Kentwell conveyed to James L. Holt all of her interest, whether present, prospective or in remainder, vested or contingent, of every name and description, in and to said lands, including the said rents, issues and profits of the life estate acquired from said petitioner by Annie Holt Kentwell; and that thereafter the said interests and said rents, issues and profits passed by mesne conveyances to this respondent, which thereby acquired, and is now the owner of, all of said rents, issues, profits and life estate.

This respondent denies that at the time of the execution of said document on August 31, 1906, or at any other time, the said Eliza R. P. Christian was wholly or utterly or at all incompetent, mentally or otherwise, to bind herself in any manner or to any extent, and in this respect this respondent alleges that at the time of executing the said instrument of August 31, 1906, and at all other times the said Eliza R. P. Christian was entirely competent, mentally and otherwise, to bind herself by executing said instrument or by any other legal act. This respondent denies that Annie Holt Kentwell, named as grantee and assignee in said instrument of August 31, 1906, had any knowledge or notice, either actual or constructive, of any alleged mental incompetence or impairment of said Eliza R. P. Christian at the time of the execution of said instrument or at any other time. This respondent denies that no consideration was paid to said Eliza R. P. Christian or to anyone on her behalf for the execution by her

of said indenture or instrument dated August [528] 31, 1906, and in this respect alleges that said Eliza R. P. Christian received as consideration for her execution of said instrument dated August 31, 1906, first, the undertaking and promise of said Annie Holt Kentwell to support and maintain the said Eliza R. P. Christian for and during the natural life of said Eliza R. P. Christian, and, second, the actual support and maintenance of said Eliza R. P. Christian from the time of the execution of said instrument until the present time. This respondent denies that the petitioner Eliza R. P. Christian received no benefit by virtue of the provisions of said instrument dated August 31, 1906, and in this respect alleges that she, the said petitioner, Eliza R. P. Christian, has actually received, by virtue of the provisions of said instrument, her support and maintenance from the time of the execution thereof until the present time, as well as the promise and undertaking of said Annie Holt Kentwell to maintain her, the said Eliza R. P. Christian, for the whole of her natural life. This respondent denies that the provisions of said instrument dated August 31, 1906, were not beneficial as to said petitioner and in this respect alleges that said provisions were highly beneficial to said petitioner and that, as found by the Supreme Court of Hawaii in its said interlocutory decision, the said petitioner had secured by said instrument of August 31, 1906, the undertaking of said Annie Holt Kentwell to support

her, the said petitioner, during her life; that at the time of the execution of said instrument the petitioner was living apart from her husband and had no means of support and no property other than a contingent interest in said lands which might never have vested and which did not in [529] fact vest until sixteen years thereafter; that said instrument assured her of support of life upon her transfer of a life estate in said contingent interest, without affecting the right of her heirs or devisees to succeed thereto upon her death, and that said instrument was one which provided her with the necessities of life. This respondent denies that said indenture or instrument dated August 31, 1906, was at any time wholly or completely or at all void or of no effect or binding force and in this respect alleges that said indenture or instrument dated August 31, 1906, was at all times and now is wholly and completely valid and effective and of binding force. This respondent denies that said Annie Holt Kentwell ever knew of the alleged incompetency of Eliza R. P. Christian or ever knew that she was or had been an alleged congenital imbecile or imbecile at all, and denies that said Annie Holt Kentwell has not claimed nor does not claim rights by virtue of said indenture or instrument, and in this respect alleges that said Annie Holt Kentwell did claim the rights acquired by her under said indenture or instrument as aforesaid at all times until she conveyed such rights as aforesaid on May 2, 1910.

This respondent admits and alleges that said Annie Holt Kentwell joined in and executed that certain deed of May 2, 1910, being Exhibit "B" to the second amended petition herein, and thereby conveyed and transferred to James L. Holt all of her right and interest in the lands in question, including all of the said rents, issues, profits and life estate. This respondent denies that said Annie Holt Kentwell thereby in no sense purported to convey, or that said Annie Holt Kentwell failed in any respect to convey, [530] the rights claimed by her and actually acquired by her by virtue of said instrument of August 31, 1906, and in this respect alleges that said Annie Holt Kentwell did in fact convey all of the rights acquired by her by virtue of said instrument, including the said rents, issues, profits and life estate. This respondent denies that it in no sense purported to purchase or in any respect failed to purchase, through James L. Holt and its other mesne grantors, any of such rights, and in this respect alleges that through said James L. Holt and its other mesne grantors it did purchase all of the rights acquired by said Annie Holt Kentwell under said instrument of August 31, 1906, including all of said rents, issues, profits and life estate. This respondent denies that it paid no consideration for such rights, coming under and by virtue of said instrument, being the said rents, issues, profits and life estate, and in this respect alleges that it paid to Annie Holt Kentwell, on behalf of said James L. Holt, the sum of $5,000.00 as consideration for the said rights, including all of said rents, issues, profits and life estate, as well as for any other rights which

the said Annie Holt Kentwell might have in the said lands, and in this respect this respondent alleges that the said instrument of August 31, 1906, appeared of record at the time said $5,000.00 was paid, and was known to the persons investigating the title to said lands for this respondent at that time, and that the said sum of $5,000.00 would not have been paid to said Annie Holt Kentwell by this respondent for said James L. Holt if she had not conveyed to said James L. Holt all of her right, title and interest in and to said property, including the rights acquired by [531] her under said instrument of August 31, 1906, being the said rents issues, profits and life estate. This respondent denies that it did not, prior to the commencement of these proceedings, claim any rights under or by virtue of said indenture and in this respect alleges that it has always claimed and does now claim that it has acquired by mesne conveyances and is now the owner of, all of the rights of said Annie Holt Kentwell under and by virtue of said indenture or instrument, including the rents, issues, profits and life estate. This respondent denies that the petitioner is without adequate or complete relief otherwise than through an order directing that said indenture or instrument dated August 31, 1906, be cancelled or annulled or that adequate relief can be had by petitioner only through the cancellation of said indenture or instrument in these proceedings, or that any other instrument or instruments whatever should or must

be cancelled, in the granting of complete relief or otherwise, or that any accounting by this respondent must or should be ordered or taken or that any form of equitable relief should or must be granted, and in this respect alleges that the petitioner is not entitled to any relief by way of cancellation, accounting or otherwise with respect to said indenture or instrument of August 31, 1906, or to any relief whatever.

FOR A THIRD AND SEPARATE DEFENSE to the third cause of action contained in the second amended petition, this respondent alleges that at the time of the execution of said instrument of August 31, 1906, and at the time of its acquisition by mesne conveyance of the rights and interest thereby granted, and at all other times, the said respondent [532] had no notice or knowledge, actual or constructive, of any alleged incompetence or mental impairment of said Eliza R. P. Christian and that it took the rights granted by said instrument, including the said rents, issues, profits and life estate, in good faith and for valuable consideration as a subsequent purchaser and not as a party to said instrument of August 31, 1906.

FOR A FOURTH AND SEPARATE DEFENSE to the third cause of action set forth in the second amended petition, this respondent alleges that said instrument of August 31, 1906, was beneficial and advantageous to the petitioner, Eliza R. P. Christian, as found by the Supreme Court of Hawaii in its said interlocutory decision.

FOR A FIFTH AND SEPARATE DEFENSE to the third cause of action set forth in the second amended petition, this respondent alleges that the petitioner Eliza R. P. Christian has actually received up to the present time the benefit of said instrument of August 31, 1906, in that she has received support and maintenance from the time of its execution until the present time and has also received the undertaking and promise of said Annie Holt Kentwell to support and maintain her during the whole of her natural life.

FOR A SIXTH AND SEPARATE DEFENSE to the third cause of action set forth in the second amended petition, this respondent alleges that it is impossible to restore the status quo existing prior to the execution of the same instrument dated August 31, 1906; that the covenant therein contained, with respect to the support and maintenance of [533] the petitioner, has been performed from the time of the execution of said instrument until the present time; that the rights and estate thereby granted to Annie Holt Kentwell have been conveyed by said Annie Holt Kentwell by mesne conveyances to this respondent; that this respondent would not have acquired the title to said lands, nor would it have paid the sum of $5,000.00 on behalf of James L. Holt, as aforesaid, nor would it have purchased from James L. Holt, if it had not believed and known that the said Annie Holt Kentwell was conveying all of said rights and estate by said deed of

May 2, 1910, and that after the acquisition of title to said lands, including said rights acquired by Annie Holt Kentwell and her said instrument of August 31, 1906, and by her transferred by mesne conveyances to this respondent, this respondent constructed valuable and permanent improvements upon said premises.

FOR A SEVENTH AND SEPARATE DEFENSE to the third cause of action set forth in the second amended petition, this respondent alleges that the said claim of said petitioner with respect to the said instrument of August 31, 1906, is barred by her laches and unreasonable delay in the prosecution of said claim and in seeking to set aside or cancel the said instrument; that said instrument was executed as aforesaid, on August 31, 1906, but that no proceeding was ever brought, nor were any steps ever taken, to cancel or disaffirm said instrument, or to assert any claim with respect thereto, until the filing of the second amended petition herein on May 23, 1931, nearly twenty-five years after the execution of said instrument; that the petitioner was living with her cousin Annie Holt Kentwell, [534] her cousin's husband, Lawrence Kentwell, and her father John Dominis Holt, at the time of the execution of said instrument on or about August 31, 1906; that said petitioner continued, except for temporary absences, to live with her said cousin Annie Holt Kentwell and her said father until the time of his death as aforesaid and has continued, except for temporary absences, to live with Annie Holt

Kentwell until the present time; that on or about March 25, 1924, said Annie Holt Kentwell, purporting to act on behalf of said petitioner, employed the present attorneys of record for petitioner herein for the purpose of investigating the claims of the petitioner to said lands, as well as other claims of the petitioner; that said attorneys thereupon immediately proceeded to and did investigate said claims and on September 14, 1925, said attorneys stated in writing that they were ready for court action on behalf of said petitioner with respect to the claim of said petitioner to the lands described in the petition herein; that on or about the 22nd day of June, 1926, in further pursuance of the action theretofore taken by said Annie Holt Kentwell and said attorneys, the said Annie Holt Kentwell was appointed receiver for said petitioner Eliza R. P. Christian under the terms of the British Lunacy Act; that on February 1, 1927, said George Holt was appointed guardian of said petitioner Eliza R. P. Christian by the Circuit Court of the First Circuit, Territory of Hawaii; that for over two years after his appointment the said guardian allowed the respondent to continue to make, and the respondent did make, expenditures for permanent improvements upon the said land and that during all of such time said guardian made no effort to [535] disaffirm the said instrument or to notify the respondent with respect to any claim to said lands; that since the acquisition of title to said lands by

this respondent and before any assertion of any claim of a right to rescind the said instrument, now made for the first time by said second amended petition, this respondent has expended large sums for permanent improvements upon said lands amounting to more than the sum of $600,000; that said improvements have enhanced the value of said lands in at least the sum of $600,000, and that the value of said improvements to said lands is at the present time more than the said sum of $600,000; that many of the witnesses who were familiar with the circumstances surrounding the execution of said instrument and the participation therein of the petitioner and her representatives and the mental condition of the petitioner at the time of the execution of said deed and assignment and other facts bearing upon the right of the petitioner to obtain such cancellation, have died or become unable to testify; that of said witnesses, W. W. Goodale and W. A. Greenwell, who could also have testified with respect to the search of title by respondent corporation in 1910 and its desire to obtain all interests appearing of record affecting said one-third part of said lands, have died since the filing of the original petition herein; that by reason of the aforesaid facts and circumstances and the long and unreasonable delay which has occurred before petitioner attempted to disaffirm or have cancelled the said instrument, the third cause of action is barred.

And this respondent further alleges that each of the three causes of action set forth in the second

amended petition is barred by the statute of limitations and par- [536] ticularly by the provisions of Section 2639 Revised Laws of Hawaii, 1925.

WHEREFORE, this respondent prays:

FIRST, that the petitioner take nothing by this suit but that her petition be dismissed with costs to this respondent;

SECOND, that in any decree entered herein full and complete equity be done as between the parties to this suit.

Dated: Honolulu, T. H., this 24th day of December, 1931.

BROBECK, PHLEGER & HARRISON,
and
ROBERTSON & CASTLE,
By ALFRED L. CASTLE,
Attorneys for Respondent, Waialua Agricultural Company, Limited.

Served ~~Receipt of a copy of~~ the foregoing Answer ~~is hereby acknowledged~~ this 24th day of December, 1931, by leaving a copy at the office of

ULRICH and HITE,
Attorneys for Petitioner, and on
JOHN R. DESHA,

Attorney for James L. Holt, one of the Respondents, by leaving a copy at his office.

CHAS. M. AWANA. [537]

[Title of Court and Cause.]

REPLICATION OF PETITIONER TO ANSWER OF WAIALUA AGRICULTURAL COMPANY, LIMITED TO SECOND AMENDED PETITION.

Filed at 3:15 o'clock P.M., Jan. 4, 1932, John Lee Kwai, Clerk. [538]

Comes now ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. von HOLT, her guardian, and, reserving unto herself all manner of exceptions to and without waiving her right to take advantage of the manifold insufficiencies and errors in the answer of WAIALUA AGRICULTURAL COMPANY, LIMITED, respondent herein, to petitioner's second amended petition, by way of replication to said answer doth say:

Petitioner re-alleges, re-avers and re-asserts all of [539] the allegations contained and set forth in her second amended petition herein, and denies each and every, all and singular the allegations contained in the answer of said Waialua Agricultural Company, Limited, respondent, to said second amended petition, excepting such allegations in said answer contained as admit and are in affirmance of allegations contained in said second amended petition.

WHEREFORE IT IS PRAYED as in said second amended petition set forth.

Dated: Honolulu, T. H., January 4, 1932.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. von HOLT, her guardian,
By ULRICH & HITE,
By BARRY L. ULRICH,
Her Attorneys.

Certify served on Respondent Waialua Agricultural Co., Ltd. by mailing true copy in U. S. mail. Jan. 4, 1932. Addressed to its attorneys, ROBERTSON & CASTLE, Honolulu, T. H.

True copy also mailed same time and manner to respondent James L. Holt, his attorney being JOHN R. DESHA.

CHAS. M. HITE. [540]

[Title of Court and Cause.]

MOTION FOR COMMISSION TO TAKE DEPOSITIONS.

Filed at 9:50 o'clock A. M., Jan. 7, 1932. John Lee Kwai, Clerk. [541]

Comes now the WAIALUA AGRICULTURAL COMPANY, LIMITED, one of the respondents above named, and without waiving any of its objections heretofore made in the proceedings herein, including all objections, pleas or otherwise to the second amended petition herein, and moves that this Honorable Court do make and issue its order directing that a commission or commissions do issue from and out of this Court directed to any American Con-

sul or Consular Agent in England, and/or to any Commissioner of Oaths or any person authorized to administer oaths in England, and to any notary public in the City of New York, New York, authorizing and directing said American Consul or Consular Agent, or said Commissioner of Oaths or any person authorized to administer oaths in England and to any notary public in the City of New York, New York, acting as the Commissioners of this Court to summon and take the testimony upon oath of the following persons as witnesses herein, that is to say: [542]

Eliza R. P. Christian
159 Woodstock Road, Oxford, England;
Annie Holt Kentwell,
159 Woodstock Road, Oxford, England;
Dr. Cyril Burt,
London County Hospital, England;
Dr. Alfred Frank Tregold,
London, England;
Dr. Smith Ely Jeliffe,
Huletts Landing, Washington Co., New York;
Martin Alfred Baker,
care John Sainsbury Limited, London, England;
A. W. H. Taylor,
3 Woodstock Road, Oxford. England;
C. Goldsworthy,
25 Oakthorpe Road, Oxford, England;

Frank Hudson Jenkins,
Oxford, England;
Mrs. Frank Hudson Jenkins,
Oxford, England;
Bessie Alice White,
763 Romford Road, Manor Road, Manor Park, England;
Kate Nixey,
42 East Street, Stamford, England;
Sophia Pacey,
57 Hayfield Road, Oxford, England;

and any other witnesses who may be called by any party hereto on such reasonable notice as may be prescribed by this Court in its order directing that commissions issue, upon oral interrogatories to be propounded by the attorneys of the respective parties hereto; that the said named witnesses all reside out of the Territory of Hawaii; that said named witnesses are necessary and material witnesses and respondent can not safely go to trial without the testimony of said witnesses; that an examination of the said Eliza R. P. Christian, including her own testimony, is necessary and material for an intelligent consideration of the issues now presented under the second [543] amended petition herein, including both her mental condition and the facts and circumstances surrounding the execution of a certain lease dated March 17, 1905, Exhibit A-8 herein, and a certain deed and assignment dated August 31, 1906, Exhibit 2-G herein, and the performance of

the terms and conditions of said deed and assignment; that testimony of said Annie Holt Kentwell is necessary as showing the facts and circumstances surrounding said lease Exhibit A-8 and said deed and assignment Exhibit 2-G, and of the performance of the terms and conditions of said deed and assignment; that the other named witnesses will testify on behalf of this respondent, as to facts showing that said Eliza R. P. Christian was competent at the time to have executed that certain lease dated March 17, 1905, Exhibit A-8 herein, and that certain deed and assignment dated August 31, 1906, Exhibit 2-G herein;

That other witnesses who may be called by respondent herein, under authority of the Commissions to be issued hereunder, will testify as to like facts regarding the mental competency of said Eliza R. P. Christian, but that respondent is unable at this time to give further names of witnesses.

This motion is based upon all of the records and files herein, and upon the affidavit of Alfred L. Castle attached hereto and upon the affidavits of Alfred L. Castle and Ella Wight Stephens attached to the Motion for Commissions filed herein on November 18, 1931, and the counter-affidavit of Alfred L. Castle filed herein on December 24, 1931.

Dated, Honolulu, T. H., January 7, 1932.

WAIALUA AGRICULTURAL COMPANY, LIMITED,

By BROBECK, PHLEGER & HARRISON and ROBERTSON & CASTLE, its attorneys,

By ALFRED L. CASTLE. [544]

AFFIDAVIT OF ALFRED L. CASTLE

Territory of Hawaii,
City and County of Honolulu—ss.

ALFRED L. CASTLE, being first duly sworn on oath deposes and says that he is a member of the firm of Robertson & Castle, one of the attorneys for respondent Waialua Agricultural Company, Limited, herein; that Eliza R. P. Christian was one of the parties to and executed a certain lease dated March 17, 1905, Exhibit A-8 herein, and was a party to a certain deed and assignment from herself to one Annie Holt Kentwell dated August 31, 1906, Exhibit 2-G herein; that said Annie Holt Kentwell was a party to said deed and assignment of August 31, 1906, and her interest in the lands in question in this proceeding was leased under said lease of March 17, 1905, and represented by the Hawaiian Realty & Maturity Company, Limited, a party to said lease; that in the former proceedings herein it was admitted that no relief from said lease could be obtained, nor was the said deed of August 31, 1906, mentioned anywhere in the pleadings, but both documents were offered in evidence by the petitioner, and received as valid documents; and that for the first time it is now sought to cancel said documents;

That the testimony of said Eliza R. P. Christian and that of Annie Holt Kentwell is necessary as showing the facts and circumstances surrounding the execution and delivery of said lease Exhibit A-8

and said deed assignment Exhibit 2-G, and the performance of the terms and conditions of said deed and assignment;

That the testimony of said Annie Holt Kentwell cannot [545] be safely taken on written deposition because as found by this Court and the Supreme Court of Hawaii said Annie Holt Kentwell is unreliable and has been discredited as a witness;

That affiant alleges from statements procured by affiant's representative in London, England, the following witnesses will testify in substance as follows:

Bessie Alice White, of 763 Romford Road, Manor Road, Manor Park, that she formerly lived at No. 29 Leckford Road, Oxford, where she kept a boarding house; that when John D. Holt, his daughter, Eliza Holt (as she knew said Eliza R. P. Christian), and the Kentwells first arrived in Oxford in 1909 they resided at her boarding house until they moved to 159 Woodstock Road; that during the whole period of their stay at 29 Leckford Road she never once observed anything wrong with Miss Holt; she is positive that Miss Holt well knew what she was doing; she (said Eliza R. P. Christian) was no fool and was capable of looking after herself and the children properly, waiting on them, attending to their wants, dressing them in the morning and putting them to bed, and was capable of keeping house for herself and her father, to whom she was devoted, and doing it properly; Mrs. Kentwell often sent Miss Holt out for errands, and she, said Bessie

Alice White, never heard of any complaint regarding money matters; she never saw Miss Holt in a temper, but on the other hand was jolly and laughing; she often discussed the topics of the day with Miss Holt and has often seen her sitting on the end of the bed reading.

Kate Nixey, 42 East Street, Stamford, that she went to work for Mrs. Kentwell shortly before Mrs. Kentwell's daughter Ailene was born; Miss Holt, as she knew Eliza R. P. Christian, was so happy when newspapers came from home; she would take [546] them to her father's room and she, said Kate Nixey, has seen Miss Holt reading them to her father; Miss Holt would say she had to write a letter for her father, and she, said Kate Nixey, has seen Miss Holt at a table writing; she went with Miss Holt to the Catholic Church when Miss Holt followed the prayers from the book, and she, Kate Nixey, watched Miss Holt and her book because she was not familiar with such service; Miss Holt told her she had been to a convent school, and often described things at her home in Hawaii, describing for instance such fruits as breadfruit, mangoes and water lemons; Miss Holt sang Hawaiian songs and would say that such were Hawaiian songs; Mrs. Kentwell would send Miss Holt out on errands, Miss Holt first writing out the list and reading it over to Mrs. Kentwell; Miss Holt would be given money for the purpose of such errands and would bring back the right change; that one day George Kentwell came

to visit and Miss Holt told her he was Lawrence Kentwell's brother;

That said Kate Nixey will testify as to entire normality in household duties, habits, affairs, ability to cook and do housework and the like;

Sophia Pacey, 57 Hayfield Road, Oxford, England, that she lives with her son at the foregoing address, who carries on business as a dairyman; that she has known Mrs. Christian as Miss Holt for the past seven years calling at the house for milk and butter, though she has not seen her for the past twelve months; that she has conversed with Mrs. Christian who told her she had been married but that her husband used to knock her about, which was the reason she left him; that she, said Mrs. Christian, had a girl at a home in Cowley Road, Oxford, (Nazareth Home); that Mrs. Christian stated she was very fond of the girl and called to see her; that Mrs. Christian used to bring her picture papers for her granddaughter which came from [547] Honolulu; that Mrs. Christian stated she had plenty of money where the papers came from, but couldn't have it yet; that when Mrs. Christian came for the milk and butter she always understood the money and counted the change when given her that she noticed Mrs. Christian's hands which showed she had done lots of hard work;

That affiant reaffirms his statements in his affidavit attached to a motion for commission to take depositions filed November 18, 1931 and in his counter-affidavit filed December 24, 1931.

ALFRED L. CASTLE.

Subscribed and sworn to before me this 7th day of January, 1932.

[Seal] ELSIE HIORTH,

Notary Public, First Judicial Circuit, Territory of Hawaii. [548]

NOTICE.

To ELIZA R. P. CHRISTIAN, an incompetent Person, by HERMAN V. von HOLT, her Guardian, and ULRICH & HITE, her attorneys, and

To JAMES L. HOLT, a respondent named herein, and to J. L. DESHA, his attorney:

Please take notice that the foregoing Motion will be presented to his Honorable A. M. Cristy, at his court room in the Judiciary Building at Honolulu, Friday, January 8, 1932, at the hour of 10:00 o'clock, A. M. or as soon thereafter as counsel will be heard.

WAIALUA AGRICULTURAL COMPANY, LIMITED,

By BROBECK, PHLEGER & HARRISON and ROBERTSON & CASTLE, its attorneys,

By ALFRED L. CASTLE.

Receipt of a copy of the foregoing Motion is hereby acknowledged this 7th day of January, 1922.

ULRICH & HITE,

Attorneys for Petitioner.

JOHN R. DESHA,

Attorneys for James L. Holt, one of the Respondents. [549]

[Title of Court and Cause.]

Filed at 2:40 o'clock P. M., Jan. 15, 1932. John Lee Kwai, Clerk.

ANSWER OF ANNIE HOLT KENTWELL.

Comes now ANNIE HOLT KENTWELL, respondent above named, and, for answer to the second amended petition on file herein, shows unto this Honorable Court as follows:

I.

Referring to all of the allegations in said second amended petition contained which are the same as the allegations contained in the first amended petition herein, your respondent alleges that she did heretofore and on, to-wit, August 1, 1929, duly enter her appearance in the [550] above entitled cause, prior to the entry of any decree or judgment therein, and did submit to the jurisdiction of the Court in said cause upon the issues raised and presented by the allegations contained in said first amended petition, together with all other pleadings then in said cause, and did then and there undertake to be bound by such decision and judgment as might be entered in said cause, leaving petitioner herein to such proof as she had made or might make of and concerning the allegations of said first amended petition, and that thereafter upon such proof as petitioner did make of and concerning said allegations, and under the law in the premises, and upon facts duly found, the judgment and decree of this Court was duly

entered, and upon appeal therefrom by decision of the Supreme Court of the Territory of Hawaii, binding on your respondent in the premises, all matters of fact and law having to do with and bearing upon the question of the validity of that certain deed dated May 2, 1910, and concerning the mental incompetence and incapacity at all times of said Eliza R. P. Christian, were determined, and therefore your respondent at this time makes no further answer to any of said allegations in said second amended petition, which were likewise the allegations of said first amended petition, but herewith abides by her submission to the jurisdiction of the Court and abides by the decrees, orders and decisions which have been entered or may yet be entered herein upon proof heretofore adduced upon said first amended petition; but with respect to the allegations in said second amended petition contained which are different [551] from and in amendment of said amended petition and which new allegations have been introduced into said second amended petition in compliance with the order and direction of the Supreme Court of the Territory of Hawaii, and with the subsequent order of this Court, and which concern themselves with the validity as to petitioner of that certain lease dated March 17, 1905 and that certain written instrument dated August 31, 1906, your respondent answers and avers as follows:

II.

Answering the allegations contained in paragraph XXII of said second amended petition, your respondent admits the allegations in said paragraph contained, excepting the allegation to the effect that the respondent corporation, lessee named in said lease, at the time of the affixing of the signature of said mental incompetent to said lease had notice, actual or constructive, of the fact of said incompetence, and as to such allegation she leaves petitioner to her proof thereof, and further replying to the allegations in said paragraph contained, your respondent alleges that on March 17, 1905, and at the time of the affixing of the signature of said incompetent to said lease, as at all other times in her life, the said Eliza R. P. Christian was wholly and utterly incapable of understandingly engaging in the transaction of executing said lease as an assenting party thereto, or of engaging in any business transaction, and respondent further alleges that said mental incompetent was living with her at the time of the affixing of her signature to said lease, and [552] that she had lived with her, the respondent, almost continuously ever since said time, and that it is true, as in said paragraph alleged, that said Eliza R. P. Christian never received nor did anyone acting on her behalf ever receive any consideration whatever for the execution of said document, and, further, that she never received any rent from said respondent corporation pursuant to the provisions of

said lease or at all, and that said lease never became operative in any manner as to her, the said Eliza R. P. Christian.

III.

Answering the allegations contained in paragraph XXIII of said second amended petition, your respondent admits the allegations in said paragraph contained, and in this connection further particularly alleges as follows: That on August 31, 1906, as at all other times in her life, the said Eliza R. P. Christian was wholly and utterly mentally incompetent, and that she was incompetent mentally to have understandingly engaged in a transaction such as the execution of said indenture, or to have so engaged in any business transaction of any kind or character, and your respondent alleges that the fact of the mental incompetence of said Eliza R. P. Christian at the time of the execution of the said instrument of August 31, 1906 was well known to your respondent, as it was at all other times in her life, and that your respondent has never claimed and does not now claim any rights or interests of any kind by virtue of said indenture of August 31, 1906, and respondent further alleges that the said Eliza R. P. Christian received and has received no consideration of any kind for the execution [553] of said document, or for any purported transfer of rights or interests thereunder, and respondent further alleges that she, respondent, has at no time purported to transfer or convey any rights claimed by

her by virtue of said indenture of August 31, 1906 to James L. Holt or to the respondent Waialua Agricultural Company or to any other person, and that she has at no time received from said respondent or from any other person any consideration for any such purported transfer or conveyance, and respondent further alleges in this connection, that her joinder in that certain deed dated May 2, 1910 and the payment of the sum of $5,000.00 claimed to have been paid by respondent for and in consideration of such joinder, was made solely for the purpose, as was then well known to and understood by said respondent corporation, of conveying to said respondent corporation through James L. Holt such right as she might have in and to the life interest, or right to income accruing from the properties in question, of John Dominis Holt, the said John Dominis Holt's life estate or right to income having been at said time in part claimed by her, and respondent alleges that by virtue of the affixing of the signature of the said Eliza R. P. Christian to said indenture of August 31, 1906, said Eliza R. P. Christian being then well known to her, your respondent named as assignee therein, to be wholly and utterly mentally incompetent, no rights of any kind have ever passed to or vested in her, no rights or interests have ever at any time been claimed by her, and that she has at no time purported to convey or conveyed any such supposed rights or interest to any other person; that said mental incompetent has never received any benefit of any [554] kind by

virtue of the execution of said indenture; that such care or support as she, your respondent, may have given to the said incompetent, Eliza R. P. Christian, since the execution of said indenture of August 31, 1906, has been and was in no sense induced by the provisions of said indenture, and was in no sense furnished in compliance with or in performance of the conditions or provisions thereof, but was voluntarily furnished; that your respondent was not even aware of the terms and provisions of said instrument and of the nature thereof, until at or about the time that her evidence was taken under commission issued in the above entitled proceedings, notwithstanding that her signature to said instrument had been procured, as she believes, by her husband, Lawrence Kentwell, just prior to her departure from Hawaii in 1906 and without any knowledge or understanding on her part as to the real nature thereof; that she, the respondent, now claims no rights of any kind by virtue thereof, and that she, your respondent, submits to the jurisdiction of this Court for such judicial action as to the Court may seem just and proper, upon such evidence as has been or may be adduced herein, with respect to said instrument and with respect to any and all rights, interests or obligations arising in or having to do with your respondent, by virtue of the execution thereof, as such rights, interests or obligations may be determined by this Court.

IV.

Referring to the allegations contained in paragraph XXIV of said second amended petition having to do with the disaffirmance by petitioner, acting through her guardian, of her purported [555] assent to said lease of 1905, and her disaffirmance of said indenture of August 31, 1906, and concerning petitioner's offer to do full and complete equity in the premises as to the Court may seem just and proper, respondent leaves said allegations for the consideration of the Court and for such action with respect thereto as to the Court may seem just and proper, consistent with the facts and the law in the premises.

AND RESPONDENT makes no further or other answer herein, other than to aver that she does herewith submit herself to the jurisdiction of the Court herein fully in the premises, and does agree to be bound by such order or judgment as may be entered herein, and further does agree and offer to do full and complete equity in the premises as to the Court may seem just and proper.

Dated: London, England, Twenty-first December, 1931.

ANNIE HOLT KENTWELL.

Great Britain and Ireland,
London, England,
Consulate General of the United States of
America—ss.

ANNIE HOLT KENTWELL, being first duly sworn, on oath deposes and says: That she is the Annie Holt Kentwell named in and who signed the

foregoing Answer: that she has read the said Answer, knows the contents thereof, and that the allegations therein contained are true, excepting as to those matters therein alleged upon information and belief, and that as to them she believes them to be true.

ANNIE HOLT KENTWELL.

Subscribed and sworn to before me this 21st day of December, 1931.

[Seal] JOHN F. CLAFFEY,
Vice Consul of the United States of America at London, England.

(Fee Stamp)
Service No. 12665.
Fee $2—1210*d* [556]

[Title of Court and Cause.]

MOTION FOR COMMISSION TO TAKE DEPOSITION.

Filed at 10:46 o'clock A. M. Feb. 29, 1932. John Lee Kwai, Clerk.

Receipt of a copy acknowledged this 29th day of Feb. 1932.

ULRICH & HITE,
Attorneys for Petitioner. [557]

Comes now the WAIALUA AGRICULTURAL COMPANY, LIMITED one of the respondents above named, and without waiving any of its objections heretofore made in the proceedings herein, including all objections, pleas or otherwise to the second amended petition herein, and moves that this Honorable Court do make and issue its order directing that a commission or commissions do issue from and out of this Court directed to any American Consul or Consular Agent in England, and/or to any Commissioner of Oaths or any person authorized to administer oaths in England, authorizing and directing said American Consul or Consular Agent, or said Commissioner of Oaths or any person authorized to administer oaths in England, acting as the Commissioner of this Court to summon and take the testimony upon oath of the following persons as witnesses herein, that is to say: [558]

Mrs. Phyllis Colley,
16 St. Nicholas Street
Droitwich,
Birmingham, England,

and

Mr. Charles Richard Fox
Chief Constable,
City Police Station,
Oxford, England,

on such reasonable notice as may be prescribed by this Court in its order directing that commissions issue, upon oral interrogatories to be propounded

by the attorneys of the respective parties hereto or otherwise as the Court may direct; that the said named witnesses all reside out of the Territory of Hawaii; that said named witnesses are necessary and material witnesses and respondent can not safely go to trial without the testimony of said witnesses; that an examination of the said witnesses is necessary and material for an intelligent consideration of the issues now presented under the second amended petition herein; that the said named witnesses will testify on behalf of this respondent, as to facts showing that said Eliza R. P. Christian was competent at the time to have executed that certain lease dated March 17, 1905, Exhibit A-8 herein, and that certain deed and assignment dated August 31, 1906, Exhibit 2-G herein;

This motion is based upon all of the records and files herein, and upon the affidavit of Alfred L. Castle attached hereto, upon the affidavits of Alfred L. Castle and Ella Wight Stephens attached to the Motion for Commissions filed herein on November 18, 1931, the counter-affidavit of Alfred L. Castle filed herein on December 24, 1931 and upon the affidavit of Alfred L. Castle attached to the Motion for Commissions filed January 7, 1932.

Dated, Honolulu, T. H. Feb. 29, 1932.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
By BROBECK, PHLEGER & HARRISON and
ROBERTSON & CASTLE,
its attorneys.
By ALFRED L. CASTLE [559]

AFFIDAVIT OF ALFRED L. CASTLE.

Territory of Hawaii
City and County of Honolulu—ss.

ALFRED L. CASTLE, being first duly sworn on oath deposes and says that he is a member of the firm of Robertson & Castle, one of the attorneys for respondent Waialua Agricultural Company, Limited, herein; that Eliza R. P. Christian was one of the parties to and executed a certain lease dated March 17, 1905, Exhibit A-8 herein, and was a party to a certain deed and assignment from herself to one Annie Holt Kentwell dated August 31, 1906, Exhibit 2-G herein; that said Annie Holt Kentwell was a party to said deed and assignment of August 31, 1906, and her interest in the lands in question in this proceeding was leased under said lease of March 17, 1905, and represented by the Hawaiian Realty & Maturity Company, Limited, a party to said lease; that in the former proceedings herein it was admitted that no relief from said lease could be obtained, nor was the said deed of August 31, 1906, mentioned anywhere in the pleadings, but both documents were offered in evidence by the petitioner, and received as valid documents; and that for the first time it is now sought to cancel said documents.

That affiant alleges that subsequent to the filing of the Motion for Commission to take Depositions filed herein on January 7, 1932, statements have been procured by affiant's representatives in Lon-

don from the following witnesses who will testify in substance as follows:

Mrs. Phyllis Colley, 16 St. Nicholas Street, Droitwich, Birmingham, England. That she is an attendant at St. Andrew's Brine Baths, Droitwich; that she remembers Mrs. Eliza Christian [560] who had reclining baths during the month of October 1931; that she had the baths alone, but was often accompanied by a lady who witness did not know, who waited in the hall while Mrs. Christian had her baths; that she, Mrs. Phyllis Colley, used to talk to Mrs. Christian and Mrs. Christian with her. That witness looked upon Mrs. Christian as normal; that Mrs. Christian talked rationally about herself, her ailments and the weather, and never gave any impression of being other than a normal person. Witness remembers her because she was of a rather distinctive appearance, and unlike the usual type of patient at the baths. When Mrs. Christian left she thanked the witness for looking after her and said she was very much better. Mrs. Christian was away during one weekend and told witness that she had been to London on business, but did not describe the nature of the business.

Charles Richard Fox, Chief Constable, City Police Station, Oxford, England. That he is Chief Constable of Oxford with his office at the City Police Station, Oxford, England; that Mrs. Christian and Mrs. Kentwell appeared recently at the City Police Station at Oxford, England, where Mrs. Christian registered as an alien in connection with a passport proposed to be issued; that a Police Constable filled in the form on information

supplied by Mrs. Kentwell and Mrs. Christian; that Mrs. Kentwell questioned Mrs. Christian in the Constable's presence, and that Mrs. Christian gave perfectly intelligent answers to all questions, and that the form was signed by Mrs. Christian.

That affiant reaffirms the statements in his affidavits attached to the several motions for commissions to take Depositions heretofore filed in this cause.

ALFRED L. CASTLE

Subscribed and sworn to before me this 29 day of February, 1932.

[Seal] CHARLES Y. AWANA

Notary Public, First Judicial Circuit, Territory of Hawaii. [561]

[Title of Court and Cause.]

DECISION ON REMAND.

Filed at 8:50 o'clock a. m. Aug. 18, 1932. John Lee Kwai, Clerk. [562]

PRELIMINARY STATEMENT.

On May 9, 1928, Eliza R. P. Christian by her Guardian filed suit in Equity against Waialua Agricultural Company, Limited, and James L. Holt, praying cancellation and incidental relief as to a deed of May 2, 1910, which purported to convey in fee simple her contingent remainder of a one-third interest in the so-called Holt lands at Waialua, Oahu. (Said deed was, also, executed by her father,

John D. Holt, conveying his life interest; Annie Holt Kentwell conveying certain interests in said life estate and otherwise; but of the Thirty-Five Thousand ($35,000.00 Dollars paid for this [563] conveyance, Thirty Thousand ($30,000.00) Dollars has always been claimed as paid for Eliza Christian's expectancy). It was nominally a deed to James L. Holt, but he was simply an instrument in the securing of title by Waialua Company. During the same month (May 1910), James L. Holt and others conveyed an additional one-third (1/3) interest in fee to Waialua Company. Only Eliza Christian's interest in one-third (1/3) in remainder since April 10, 1922 is at stake herein.

After hearing before the same Judge presiding as at present, this Court filed a decision on May 11, 1929, finding that the Petitioner "HAS NEVER BEEN COMPETENT MENTALLY, TO EXECUTE A CONVEYANCE OF PROPERTY"; that she was NOT competent to execute the deed of May 2, 1910; that this proceeding was not barred by laches; that "the evidence does not clearly show that the Respondent, Waialua Company, knew of such mental incompetency"; that Lawrence Kentwell and the Respondent James Lawrence Holt did know of the incompetency; that James Lawrence Holt and another, WITH KNOWLEDGE OF WAIALUA COMPANY, handled the preliminary negotiations for the conveyance in question and obtained a secret profit therefrom; that "Waialua Company with knowl-

edge (of such secret profit) took over the control and completion of such negotiations"; and (among other things) that the [564] deed of May 2, 1910, should be cancelled.

On August 9, 1929, after supplemental hearing this Court further decreed an accounting of rents by way of reasonable compensation to the Petitioner for the use of her undivided interest in the lands in controversy from April 10, 1922, (the date when Petitioner's interest vested), to the date of final decree, less the consideration for the cancelled deed. (For further detail as to the original decisions, as to the mental incompeteney of the Petitioner and as to the basis of accounting, reference is specifically hereby made to the file of the decisions herein of May 11, 1929, and August 9, 1929, heretofore noted.)

Thereafter, an appeal was taken by the Respondent Waialua Agricultural Company, Limited, to the Supreme Court of the Territory of Hawaii. A decision was rendered by the Supreme Court on said appeal dated April 18, 1931, which decision is reported in 31 Hawaii, 817-912 inclusive. As a result of said decision and within the powers provided in Section 2511, Revised Laws of Hawaii 1925, an order was entered in the Appellate Court remanding said cause IN PART to the Circuit Court for further proceedings consistent with said opinion of April 18, 1931. The Circuit Judge was expressly instructed to permit suitable amendments

of the pleadings "to put in issue the validity of a certain lease dated March 17, 1905, being [565] Exhibit 'A-8' in said cause, INSOFAR AS IT MAY BE EFFECTED BY THE MENTAL CONDITION OF THE SAID ELIZA R. P. CHRISTIAN"; also amendments "to put in issue the validity of that certain instrument in writing of August 31, 1906, being Exhibit '2-G' in said cause insofar as it may be effected by the mental condition of the said Eliza R. P. Christian; and said Circuit Judge is further instructed to receive such further evidence as may be offered bearing upon or relating to any questions of fact AS TO WHICH FINDINGS OF FACT HAVE NOT HERETOFORE BEEN MADE BY THIS COURT, * * *". The Circuit Judge was further instructed "consistently with the conclusions of law and findings of fact to be made by said Circuit Judge not inconsistent with findings heretofore made by this Court, to determine the question of the validity of said lease of March 17, 1905, and of said instrument in writing of August 31, 1906, and the question of Petitioner's right to cancellation of said instruments herein"; and further to determine the question of rents and damages if any. The order of remand also specifically set out the terms on which the deed of May 2, 1910, should be cancelled.

Thereafter amendments to the pleadings were permitted seeking cancellation as to Petitioner, Eliza Christian, of said lease of 1905, and of said instrument of 1906, which amendments definitely in-

cluded Annie [566] Holt Kentwell as a party respondent. She, by answer, has submitted herself to the Court. Hearings were had in which it was ruled that the CONGENITAL IMBECILITY of Petitioner had been found heretofore both by this Court and the Supreme Court and would not be reopened. The only questions, amplified by the evidence, concerned the issue as to whether equity should grant affirmative relief to Eliza Christian against said instruments of 1905 and 1906.

THE DECISION OF THE SUPREME COURT. (31 Haw. 817)

In its decision the Supreme Court independently, (as it should be), reviewed the evidence as to the mental competency of Eliza Christian. THE EVIDENCE COVERED THE ENTIRE HISTORY OF ELIZA CHRISTIAN FROM HER BIRTH IN 1885 TO THE DATE OF THE HEARING IN 1929.

In reviewing the evidence affecting her mental condition immediately prior to 1905 (see pages 826-870), the decision states (page 870) "she was simple-minded". The decision goes on relative to the testimony bearing on her mental condition through the later periods of her life in connection with the earlier testimony and concludes that such testimony "tends so strongly to establish the fact that she (Eliza) was mentally impotent as to exclude any other reasonable hypothesis". [567]

On page 871, the decision continues: "The overwhelming weight of the evidence requires us to find, that on May 2, 1910, Eliza Christian was and at all times has been mentally incompetent to execute a deed or to understand its purpose or effect, or to engage in any business transaction of consequence. She was feeble-minded. Born in 1885, in May 1910 she had the mentality of a child of not more than five or six * * * she was utterly incapable of grasping the significance of a transaction involving the purchase or the sale of land or of valuing property or of determining the wisdom or lack of wisdom of making a sale. In short we find that at the date of the deed she was a congenital imbecile." (Underscoring ours.)

The Court then proceeded to determine the effect of mental incompetency on the part of the Grantor. The Court discussed the case of Dexter vs. Hall, 82 U. S. (15 Wall) 9, 20, 21, wherein the Supreme Court of the United States in comparing a lunatic with an infant said "but as a lunatic cannot avoid a contract, for want of mental capacity, he has no protection if his contract is only voidable." (pages 875-877.) The Territorial Supreme Court also indicated that if mental incompetency had been adjudicated in a proper proceeding before the execution [568] of the deed "we think there can be no doubt that the deed would be entirely void." (page 873).

The case of Luhrs vs. Hancock 181, U. S. 567, 574, was also discussed, without calling attention to the fact that it was not a suit brought by or for the alleged incompetent herself. It was also pointed out in discussing Kendall vs. Ewart 259 U. S. 139, 146, THAT THE GRANTEE'S PERSONAL KNOWLEDGE OF THE GRANTOR'S MENTAL DEFICIENCY IS CONSIDERED AS RENDERING THE CONVEYANCE, OBTAINED, VOID.

After some further discussion the decision of the local Supreme Court proceeded to adopt the rule that the deed of an insane person is not void but voidable. (page 882.) And then the Supreme Court proceeded to indicate the confusion arising in the law in attempting to apply this principle. (For comparison, reference is hereby made to the review of authorities in the decision of this Court of May 11, 1910, (1929) especially pp. 23-27 thereof.)

After a discussion of the equities involved, the Supreme Court of the Territory came to the conclusion that the DEED OF MAY 2, 1910, SHOULD BE CANCELLED so far as Eliza Christian was concerned, on the repayment or giving security by her of Thirty Thousand ($30,000.00) Dollars, of the consideration named therein WITH INTEREST. Then the question of rents [569] claimed by her for use and occupation since April 10, 1922, (date of her father's death), was considered.

This trial Court had originally granted damages by way of rent or for exclusive use and occupation by a co-tenant (Waialua Company) on the theory that the assent of Eliza Christian to the so-called "1905 lease" HAD BEEN ABANDONED IN FACT since the purchase of the other interests and attempted purchase of Eliza Christian's interest on May 2, 1910. (See decision of this Court, pg. 43, of May 11, 1929.) The Supreme Court remanded the cause to permit amendments and a direct attack against said "lease" as well as against the indenture of 1906 to Annie Kentwell purporting to assign rents.

Hence, the present questions are:

(1) Should Eliza Christian's signature to the 1906 indenture to Annie Kentwell stand so as to avail the Waialua Company in connection with its transactions of May 2, 1910, with Annie Kentwell, et al?

(2) Should a Court of Equity give relief to Eliza Christian in connection with her signature in assent to the 1905 lease?

(3) If affirmative relief be given in this proceeding against these two documents in [570] addition to the deed of May 2, 1910, what conditions in equitable adjustment should be imposed on the parties, if any?

THE INDENTURE OF AUGUST 31, 1906.
(Ex. 2-G, 1929 Hearing—
Ex. R-2, 1932 Hearing.)

This Indenture is by the Petitioner, Eliza R. P. Christian, to Annie Holt Kentwell, one of the Respondents herein. It recites that Annie Kentwell has been supporting Eliza Christian; that the latter, as the only child and heir of John Dominis Holt, is entitled to an expectancy in land at Waialua, leased to Waialua Agricultural Company by lease of March 17, 1905; that if Eliza Christian survives her father, John Dominis Holt, she will be entitled to rents reserved in the lease to the amount presently enjoyed by her father. By this indenture Eliza Christian purports to set over to Annie Kentwell, her heirs, executors and administrators all her (Eliza Christian's) "Title and interest in and to any and all rents, issues and profits to which she may hereafter be entitled or which may be due and payable to her by, thru or under the lease to the Waialua Agricultural Company, Limited, dated the 17th day of March 1905 * * * or by virtue of being the only child of John Dominis Holt, the Elder, a devisee under the will of R. W. Holt, deceased, together with all and every her right to demand, receive, [571] collect and receipt for all such rents, issues and profits from whomsoever due during the term of the natural life of her, the said Eliza R. P. Christian".

It was expressly agreed and understood that Annie Kentwell should support and maintain the said Eliza Christian for and during her natural life; and the HEIRS of Annie Kentwell WERE GIVEN THE RIGHT TO PERFORM the covenant and agreement on the part of Annie Kentwell to be kept and performed and to receive the benefits in connection with such performance. This indenture dated August 31, 1906, was recorded June 17, 1907.

Approach this indenture from (1) the fact that it is a personal contract between Annie Kentwell and Eliza Christian, with the privilege of performance by Annie Kentwell's heirs but no provision for other assignment nor is there any evidence that Waialua has ever sought to see to it that performance was had; from (2) the fact that Annie Kentwell transferred, (if it could be transferred) to James L. Holt, a purchaser with knowledge of its infirmity; (3) from the further standpoint that Eliza Christian has been found by this Court and the Supreme Court to have been a congenital imbecile; (4) from the further fact that the original [572] grantee, Annie Kentwell knew the facts as to her imbecility; (5) from the further facts that the Kentwells were in charge of Eliza's father through and for who they were receiving a stipend for his support by arrangement with James L. Holt and with John D. Holt himself, out of the life interest rents; (6) and from the further fact

that Waialua Company, in the 1910 transaction, with Annie Kentwell and James L. Holt, occupied no higher status than it did with Eliza Christian direct. The conclusion inevitably follows that Annie Kentwell got nothing by virtue of such a document from such a person. She took with knowledge of incompetency under a personal covenant. Waialua Company got no more thru Annie Kentwell and James L. Holt as to this phase than it got thru Eliza and James L. Holt direct.

That is, the May 2, 1910 transaction must always be considered with the fact that Waialua Company took over and completed, AS THEIR OWN, the negotiations of James Lawrence Holt to purchase outright Eliza's entire expectancy knowing and concealing a secret profit to James L. Holt and John L. Colburn, while these two, at the same time, knew of the mental condition of Eliza Christian. (See Decision of this Court of May 11, 1929.) Such facts [573] do not create any equities in favor of Waialua Company nor put it in the "bona fide purchaser" class, so as to prevent a Court of Equity from exercising AFFIRMATIVE POWER OF RELIEF to an incompetent against this indirect attempt to accomplish what has been refused directly by the cancellation of the deed of May 2, 1910, as to Eliza Christian.

Would it not be the height of absurdity for this Court to return to this imbecile the title to her land and then say that she should have no benefit from it during her lifetime because her void personal

indenture to her cousin sprang to life as a minor incident in the hands of a stranger to its covenants in connection with the same May 2, 1910 transaction as to which she must return Thirty Thousand ($30,000.00) Dollars with interest? If Waialua Company were to be given any consideration as to this document it would have more reason behind it in connection with refusing to give relief against the deed of 1910 itself. But, the fact is that Annie Kentwell got nothing by her attempt to deal with a known incompetent cousin and could therefore convey nothing from her. Nor can the Company justify indirectly what it could not justify directly. [574]

THE "LEASE" OF MARCH 17, 1905.

(Ex. A-8 in 1929 Hearing;
Ex. R-1 in 1932 Hearing)

(Underscoring ours.)*

1. TERMS OF LEASE:

Under date of March 17, 1905, Carlos A. Long "as administrator of the Estate of Robert William Holt, deceased, Robert L. Colburn; R. William Holt; George H. Holt, Edward S. Holt; Helen A. Holt, individually, and also in her capacity as Guardian of each and all of the minor children of

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*Printer's Note: Full capitals are used herein to denote underscoring in typewritten transcript of record.

James R. Holt, the Younger, Deceased,—said children being by name, Valentine S. Holt, Wattie R. Holt, Amelia A. Holt, Helen A. Holt, James R. Holt, and Irene N. Holt; Elizabeth K. Richardson, wife of Edward Vivian Richardson, and Hawaiian Realty and Maturity Company, Limited, an Hawaiian corporation, hereinafter NAMED THE LESSORS, parties of the first part; and—Waiahu Agricultural Company, Limited, an Hawaiian Corporation, party of the second part; AND—JOHN F. COLBURN, JAMES LAWRENCE HOLT, AND ELIZA R. P. CHRISTIAN, WIFE OF ALBERT CHRISTIAN, PARTIES OF THE THIRD PART;" all executed the document referred to in the pleadings and hearing as the "Lease of 1905", in the respective capacities hereinbefore quoted. This document expressly recites that nothing in said document shall be "construed to either limit, extend, or otherwise effect the real [575] title or interest in or to any of the lands or property herein described and demised as now existing in or on the part of any party or parties to this instrument". Then is recited for the purposes of the instrument, the agreed proportion of interest in each of the parties of the first part named as lessors as they should be construed to exist for the purposes of the instrument.

Then it is recited that "it has been agreed by the parties hereto, that SAID LESSORS SHALL DEMISE, and said PARTIES OF THE THIRD PART SHALL ASSENT TO THE DEMISE by

said Lessors, of said lands to said Lessee, for the term, and upon the covenants and condition hereinafter more particularly set forth". Then follows the provisions of the lease proper.

The Lessors (see recitation hereinabove) lease and demise unto the Lessee by particular description all of the Waialua lands, as to which Mrs. Christian's ultimate one-third (1/3d) interest is involved in this suit, for a term of twenty-five (25) years from April 1, 1905. The Lessee covenanted to pay a total rent of Nine Thousand ($9,000.00) Dollars per annum PLUS "taxes and other imposts, from year to year and from time to time COMMENCING with the levy and assessment IN AND FOR THE YEAR 1905" [576] which might be levied by any and every competent authority upon said land. Six Thousand ($6,000.00) Dollars of said gross rental was to be paid "to said administrator, and to his successor and successors in said trust, if any, and to his successor and successors in title, * * *". The balance of said rental was divided in specific sums for interests as set forth, none of which included specifically Eliza Christian. (The John D. Holt life interest in one-third (1/3d), as to which Eliza Christian's expectancy was to succeed, was included in the two-thirds (2/3ds) of the rent payable to the administrator.)

The Lessee further covenanted "to pay said Lessors respectively and their respective (?) heirs, executors, administrators and assigns, the actual aggregate sums hereinabove expressed as being pay-

able to them respectively". The Lessee further covenanted "with said Lessors, and to and with each of them, and to and with their respective successors in trust, heirs, executors, administrators and assigns, as the case may be * * *" that the Lessee AT THE END OR THE EARLIER TERMINATION of the term WOULD PEACEABLY DELIVER POSSESSION OF THE PREMISES "TOGETHER WITH ALL AND SINGULAR THE BUILDINGS AND IMPROVEMENTS THAT SHALL THEN BE UPON SAID DEMISED PREMISES * * * EXCEPT AS [577] the same, or any part thereof, shall, in the interval, be definitely partitioned between said Lessors and said Lessee, as owners thereof in fee". It was further provided "that said LESSEE SHALL NOT in any event BE PERMITTED TO DEMOLISH, DESTROY, OR REMOVE ANY PERMANENT IMPROVEMENTS of the general character of ditches, sluices, embankments, dams, runways, trestles, bridges, culverts, houses, fences, or other similar structures or excavations which shall be dug into, or built into or upon the earth, in a manner calculated and intended to be permanent, or which shall be built upon foundations or piers of cement, masonry, or other similarly durable and permanent foundations. But Provided Further that nothing herein contained shall operate to prevent the Lessee from making such changes and alterations in the improvements, and in the

method of development of the resources of the demised premises as it shall from time to time elect, and excepting perishable structures such as laborers houses and similar wooden buildings".

THE LESSORS AND THE PARTIES OF THE THIRD part covenants with the Lessee that while the Lessee paid rent including taxes and other imposts as provided and while the Lessee observed and performed all other conditions and covenants on the Lessee's [578] part to be observed and performed THAT THE LESSEE "SHALL PEACEABLY AND QUIETLY HOLD AND ENJOY THE USE AND POSSESSION OF SAID DEMISED PREMISES.

And it was further provided that IF THE LESSEE DEFAULTED IN THE PAYMENT OF RENT" to said Lessors, or to any or either of them, or their respective successors in trust, heirs, executors, administrators and assigns as the case may be * * * and further, if such failure or neglect to pay rent shall continue for and during ten (10) days after any installment thereof by the terms of this lease shall become and be due and payable", then the person concerning whom such default might exist might either in person or by agent make entry and terminate the lease according to the undivided portion so represented. Or such person either with or without entry MAY PROCEED IN ANY COURT to avoid, terminate and have forfeited this lease in the proportion effected. And any person acting in connection with such

forfeiture "shall be entitled to a restitution of th possession of such undivided (or divided, as th case may be) part, portion, and interest, of and i said demised premises as shall then belong an pertain to the person or persons so proceeding; o to the possession of which, he, she, it or they shal then be legally entitled". In the event [579] of suc forfeiture of said Lease it "shall be considered termination of this lease to the extent and for th purpose of thereupon absolutely terminating th right of said Lessee to demolish, impair, or re move from said premises, any of the fixtures, in cluding buildings, machinery, pumps, mills an milling, and (or) pumping plant which shall the be upon said premises,—THE INTENT THERE OF BEING TO EXPRESSLY NEGATIVE THI RIGHT OF SAID LESSEE AND ITS AS SIGNS, TO DEMOLISH, IMPAIR, OR RE MOVE SUCH FIXTURES, BUILDINGS MILLS, PUMPS, ETC., ETC., FROM SAI PREMISES DURING ANY INTERVAL THAT MAY ELAPSE, between such Declaration, Decre or Judgment of Forfeiture, and the date whereon final judgment concerning the same may or migh be obtained in any Appellate Court or Courts" It was further provided that the ten-day perio of default should not begin to run until demand was made at the office of the Lessee at Honolulu (Compare Ex. Ac-F and pp. 244-245 of Accountin Transcript under date of Aug. 1, 1929, as to de

mand of April 5, 1928, in connection with general offer in 1932 hearing.)

This lease was signed in behalf of the respective Lessors as recited and by the respective assenting third parties as recited: Eliza Christian's signature being as third party assenting to the lease. [580] The lease was recorded April 6, 1905.

2. WAIALUA COMPANY'S PURCHASE OF LESSOR'S INTEREST IN 1910:

In connection with this lease of 1905 it must also be borne in mind that on May 2, 1910 (the date of the deed which has been decreed to be set aside as to Eliza Christian) THE WAIALUA COMPANY WAS THE OWNER IN FEE SIMPLE of two-ninths (2/9ths) undivided interest in said land; James Lawrence Holt, thru and with John F. Colburn Trustee, claimed ownership of the LIFE INTERESTS of James R. Holt and John D. Holt in two-thirds (2/3ds) of said lands; James Lawrence Holt also owned in expectancy a remainder in fee in one-third (1/3d), which expectancy happened in favor of James Lawrence Holt by the death of James R. Holt on April 18, 1916; Annie Kentwell also claimed an interest in rents due for the John D. Holt life interest and was personally in charge of Eliza Christian. It should also be remembered that the deed of May 2, 1910, which has been ordered cancelled as to Eliza R. P. Christian, remains in full force and effect as a conveyance for the benefit of Waialua Company from the

other parties, to-wit: John D. Holt (father of Eliza), Annie Holt Kentwell and her husband, Lawrence K. Kentwell, and Albert Christian (husband of Eliza Christian). It should also be remembered that, by deed of May 28, [581] 1910, there was conveyed to and/or for the benefit of Waialua Company all the interest of James Lawrence Holt and John F. Colburn Trustee, together with a quitclaim from James R. Holt (father of James Lawrence Holt) together with releases of dower from respective wives.

THAT IS TO SAY, AT THE CONCLUSION OF THE CONVEYANCES OF MAY 1910, TO AND/OR FOR WAIALUA COMPANY, THE LATTER HAD ACQUIRED IN FEE SIMPLE, IN ADDITION TO ITS OWN TWO-NINTHS (2/9THS) INTEREST IN FEE, THE ENTIRE ONE-THIRD (1/3D) INTEREST IN FEE OF JAMES R. HOLT, JAMES LAWRENCE HOLT AND JOHN F. COLBURN TRUSTEE, TOGETHER WITH THE ONE-THIRD (1/3D) INTEREST FOR LIFE AS REPRESENTED BY JOHN D. HOLT'S SHARE, BOTH OF WHICH WERE INCLUDED IN THE 1905 LEASE IN THE RENTS PAYABLE TO JOHN F. COLBURN. In other words, all the original parties-lessors—in the 1905 lease, with the exception of less than a one-ninth (1/9th) interest, conveyed to or for Waialua Company in 1910. The Company thought it had, also, acquired Eliza Christian's interest, claiming that it had no suspicion of

any defect there until 1928. This should be borne in mind in connection with the argument that it then, (1910 onward), began to expand its extensive improvements "in reliance upon the lease". Eliza Christian's expectancy had nothing to do with the one-ninth (1/9th) [582] interest not obtained by the Waialua Company, but was contingent upon her surviving her father, John D. Holt who died April 10, 1922.

As to the "lease of 1905", this Court is proceeding upon the following findings on the whole record:

1. Eliza Christian was not an original party-lessor;

2. She was merely a party assenting to continued possession by the Waialua Company for such balance of the term of the lease as might remain, if and when her interest as heir to one-third (1/3d) of the Holt estate should vest on the death of her father;

3. Eliza Christian was at all times a congenital imbecile, incompetent to enter into a contract of such a character and was a resident of Honolulu in 1905;

4. Waialua Company, in 1905, is not shown to have had any knowledge of this incompetency;

5. Annie Kentwell, Lawrence Kentwell, James L. Holt and John Colburn did know of her incompetency, as did many others in Honolulu;

6. Waialua Company has had possession and use of the property for the full term of the lease;

7. Waialua Company has never paid Eliza Christian any consideration under sa lease, or [583] attempted to indicate what improvements were divisible at the termination of the lease, if the same were to stand;

8. In May 1910, Waialua Company bought out the interests of all the original LESSORS with the exception of a two-twenty-sevenths (2/27ths) interest (which latter had nothing to do with Eliza Christian's expectancy).

9. Also in May 1910, Waialua Company thought it had purchased Eliza Christian's expectancy, and in so doing took over and adopted the negotiations of James L. Holt, who knew of Eliza's incompetency, and granted said James L. Holt and John Colburn a secret profit on such purchase; (and paid Annie Kentwell for what?);

10. More than two-thirds (2/3ds) of the "improvements" made by the Company ON the Holt lands, were constructed after the Company had bought out the Lessors in May 1910, (more than one-third (1/3d) being made from 1926 on);

11. The improvements for unit operation of the sugar lands made *off* the Holt lands can be approximately 95% effective, regardless of Eliza Christian's "tenancy-in-common", were undistrubed during the term of the lease and still exist, subject to being dealt with in this suit;

12. The lease to Hawaiian Pineapple Company of [584] 1923, and prior pineapple leases, were made on the then assumption of Waialua Company

owning in fee simple twenty-five-twenty-sevenths (25/27th) of the Holt area, including Eliza Christian's one-third (1/3d) interest.

3. QUESTION OF CANCELLING ELIZA CHRISTIAN'S ASSENT TO LEASE:

The question in this hearing, therefore, in CONNECTION WITH THE SO-CALLED 1905 LEASE, is as to whether or not equity should affirmatively aid a congenital imbecile TO AVOID HER ASSENT IN 1905 TO THIS LEASE so as to entitle her to reasonable rental for the continued exclusive use by her co-tenant; or whether equity should merely enforce the proportionate rent under the lease, plus decreeing her right to a proportionate interest in improvements existing at its termination.

There is no evidence that any money consideration was ever paid to or for Eliza Christian's assent to this lease. There is no evidence that any rent for use after April 10, 1922, was ever tendered to Eliza Christian. She had no personal interest in taxes prior to 1922; and since that time ALL evidence as to reasonable rental value has been based upon values NET ABOVE TAXES.

If Eliza Christian, the imbecile, is to be [585] denied the relief of cancellation prayed for by reason merely of her assent to a covenant of quiet enjoyment, then she would be entitled, as proportionate successor lessor, not only to the proportionate rent under the lease from April 10, 1922,

to April 1, 1930, (one-third (1/3d) of the term on one-third (1/3d) of the Holt area), but she would also be entitled to consideration as to a claim for a proportionate interest in the improvements placed on the land prior to April 1, 1930, as well as rents since said April 1, 1930. (This might also involve the question of the improvements which have been abandoned, where the abandonment might not be clearly justified under the lease.)

In resisting the petition for cancellation of Eliza Christian's assent to the lease, the Waialua Company introduced detailed evidence as to the character of improvements made from time to time by Waialua Company ON THE THEORY OF UNITY OF PLANTATION DEVELOPMENT AND OPERATION over areas including both Holt and other lands. One of the largest items of plantation improvement made off the Holt areas, (except as to a main ditch and siphon carried across, the Holt areas now dividing the cane lands from the pineapple lands), was and is the Wahiawa Dam and Ditch. The Wahiawa Water Company a separate [586] corporation owned and controlled by Waialua Company, expended from the years 1902 to 1931 inclusive, (see Exhbits S-7 and S-8) upwards of a half million dollars in connection with its dam and spillway and the ditch TO THE BOUNDARY OF THE HOLT LANDS. This system of irrigation waters NOT ONLY affects the so-called Holt area below the ditch, but also su

stantially all other cane areas owned and controlled by Waialua Company.

It becomes pertinent in connection with the consideration of such an irrigation improvement to have in mind the total cane areas owned or controlled by the Waialua Company. The evidence showed that the entire sugar cane area owned and controlled by Waialua Company was 9,904 acres which included 1,622.95 acres of Holt lands used for cane, roads, etc., in connection with cane cultivation. The evidence showed that the entire Holt cane lands were only 15.5% of the total cane area of the Company. This would make the Eliza Christian interest (540.75 acres) represent approximately 5.4% of the total cane area, (9,904 acres). Hence it is a fair inference from all the testimony that the Wahiawa reservoir system, (and also all general plantation improvements not especially constructed for the Holt area itself), roughly speaking is 90% to 95% effective to the [587] Company exclusive of what should be done with Eliza Christian's contended rights; providing the connecting links are preserved to the Company.

(It might also be indicated here that the testimony shows that upwards of 11,000 acres of lands above the cane elevations, owned and controlled by Waialua Company, are leased for pineapple purposes. This includes upwards of 6,000 acres of Holt lands. It was computed at this last hearing, that Holt areas affected by pineapple leases were 55.7%

of the total area given over to pineapple cultivation; or ABOUT 18.5% OF THE TOTAL ACREAGE DEVOTED TO PINEAPPLES WOULD BE AFFECTED BY THE CLAIMS OF ELIZA CHRISTIAN. The computation in connection with the paid-up lease of Hawaiian Pineapple Company was slightly different, see August 1929 decision.)

By Exhibit S-5, the Respondents purport to show that improvements such as railroads, reservoirs, siphons, ditches, pumps, clearing, etc., were placed UPON THE GENERAL HOLT AREA under totals of original COST claimed by the Company as follows:

A. UNDER LEASE:

Prior to May 2, 1910 GROSS COST of improvements $182,525.07

[588]

B. AFTER BUYING OUT THE LESSORS:

1. From May 2, 1910 to Apr. 10, 1922 ..... $203,513.43
2. From Apr. 10, 1922 to Apr. 5, 1928 ..... 244,683.62
3. From Apr. 5, 1928 to Mar. 31, 1930 ..... 8,876.66
4. From Mar. 31, 1930 to Dec. 31, 1931 ..... 7,306.69

Making a grand total of $646,905.47

Of this gross, the Company shows under Exhibit S-6, that sundry improvements on the Holt land

have been abandoned FROM TIME TO TIME totaling Ninety-Three Thousand Four Hundred Sixty and 95/100 Dollars (93,460.95); (as to which only one-third (1/3d) of the abandonments actually necessary for releasing pineapple areas figured for one-third (1/3d) of the term would have even the most remote bearing on any present issue. Such factors belong to the issue as to profits of the Company, which respondents objected to entering upon.)

(In connection with the above totals, it may be of interest to note a claim included for cost of original clearing of land PRIOR to May 2, 1910, of Forty-Three Thousand Four Hundred Ninety-Three and 89/100 Dollars ($43,493.89), which was necessary in order to operate under the lease at all. Also prior to May 2, 1910, Thirty-Two Thousand Seven Hundred Fifty-Eight and 02/100 Dollars ($32,758.02) is claimed to have been spent on railroads on the Holt area; AND [589] THEREAFTER up to April 10, 1922, a sum of Fifty Thousand Six and 92/100 Dollars ($50,006.92) additional for such railroads,—a total of Eighty-Two Thousand Seven Hundred Sixty-Four and 94/100 Dollars ($82,764.94). Also in connection with pumps Nos. 10 and 10-A, improvements were made by the Company for well-irrigation and domestic water supply AFTER 1926 and before April 5, 1928, in excess of Two Hundred and Thirteen Thousand Dollars ($213,000.00), which are part of this grand total above. This

Court would hesitate to believe that the Respondents seriously contend that these last permanent improvements, finished less than two years before expiration of the lease term, were really made in reliance upon Elisa Christian's consent to peaceable enjoyment which would terminate in 1930 with a right to proportionate interest in such improvements. See testimony of Mr. Bischoff re locating this pump on FEE SIMPLE LAND.)

While on this subject let us go back to the above figures for a moment. Prior to May 2, 1910 (A PERIOD IN WHICH THERE WAS ONLY A LEASE), less than one-third (1/3d) of the alleged development improvements had been made. All of the improvements so listed were necessary to the Company in order to gain any operative return under the original lease. The [590] Company amortized most of these up to 1922 for purposes of obtaining tax reductions. After 1922 it considered itself fee-simple-owner, and so as to approximately two-thirds (2/3ds) of the Holt area.

In May, 1910, Waialua Company secured for itself a definitely assured position as to approximately two-thirds (2/3ds) interest in the Holt area, plus a life interest in the remaining third (the John D. Holt life estate). After being so assured, and between 1910 and 1922, additional development improvements were made amounting to a little less than one-third (1/3d) of the grand total. AFTER APRIL 10, 1922, more than a third of

the gross cost of internal development improvements of the Holt land was added; and this within a short time of the date for the termination of the original term of the 1905 lease.

It should be remembered, in connection with the claim of "reliance on the lease", that Eliza Christian's claims could only affect one-third (1/3d) of the Holt area for one-third (1/3d) of the term. Or, in other words, only one-ninth (1/9th) of the cost of such improvements, as could seriously BE CONTENDED TO HAVE BEEN MADE IN RELIANCE UPON THE LEASE, as against her claim for one-third [591] (1/3d) of the improvements existing at the termination of the lease, if the lease should be left uncancelled. Moreover as has been pointed out, the improvements which were made off the Holt area as part of the unified development of the plantation affected, a unified sugar area which can be approximately 95% effective, regardless of what should be done about Eliza Christian's claims in the instant case. See, Mr. Bischoff's estimate that about one-third (1/3d) of irrigation water was used on Holt lands, making about one-ninth (1/9th) referable to Eliza's interest for one-third (1/3d) the lease term.

It is not the intention of this Court to illustrate, by an examination in detail of every item of expenditure by Waialua Company, the difficulty which the Court has in inferring that the development of the Holt area AS A PART OF THE

PLANTATION really and in fact was based upon alleged reliance ON THE ASSENT OF ELIZA CHRISTIAN in 1905 as to a lease which was practically absorbed as to approximately two-thirds (2/3ds) fee simple interest in 1910, plus the acquisition of the life interest on the remaining one-third (1/3d), plus the attempted purchase of Eliza's own interest in fee. It is sufficient to add that an examination of the maps introduced as Exhibits S-3 and S-4 will show further [592] facts bearing upon the equities involved in this suit.

For instance, these maps show that the physical location of reservoirs on the Holt area are in the main so placed with other connecting main ditches that there should be no great difficulty, in a proper partition suit between tenants in common, based upon principles of equity which can be settled in this proceeding, that their existence could be substantially continued and maintained by the Waialua Company, much of this being usable in connection with the Wahiawa system. The intakes and five of the reservoirs in connection with the Helemano System are situate above the Wahiawa extension ditch so as to be available in connection with the system. Another reservoir known as Helemano 9-C, was built after May 2, 1910, at a cost of less than Three Thousand ($3,000.00) Dollars, and is situated on the NORTHERLY SIDE of Helemano Stream. It is used in connection with the 1926-1928 pump system, as well as to conserve unused

irrigation water flowing over higher levels between it and Helemano Reservoir No. 11. There are three other small reservoirs on the cane land south of Helemano Stream. All of these reservoir improvements are minor items in connection with a problem which a Court of Equity would have in hand in a question involving whether or not (1) a partition [593] in kind could preserve to the Company the sites of such improvements; or (2) if such sites were found to be "permanent" rather than "operative" improvements, whether an allowance should be made in case Eliza Christian as a cotenant were granted a partition which included such site or sites. Also, the question of preserving to Waialua Company a thru right-of-way for the Wahiawa extension ditch would be before such a Court in such a partition so as not only to preserve to the Company its present 95% effectiveness for the Wahiawa System itself, but also to preserve to the Company the major part of the Helemano development of irrigation water; thus leaving the whole irrigation system PRACTICAAL undisturbed, except as to utilizing the water on the 5% area represented by Eliza Christian's interest in sugar areas.

Similar observations as to adjustment are pertinent as to the Poamoho Pump developments. These improvements are so located on a separate parcel of Holt land as to yield to quite equitable treatment in connection with any partition. Also, in

view of the fact that this development came between approximately the years 1926-928, it is particularly within the reasoning of the Supreme Court in connection with its determination that the [594] deed of 1910 could be cancelled without any injustice, on the ground that the mutual equities of the co-tenants were completely protected by the laws applicable to personal allocation to the improving co-tenant in partition, IF AND WHEN the co-tenants might desire a severance of interests.

It could also be observed that the location of the main railroad system, so as to preserve a right-of-way which would preserve the essential unity of the present plantation, could and is adequately protected by the rules applicable to partition. This becomes more apparent by examining the actual location of such main railroad as disclosed on the maps. What would happen to the feeder or branch tracks would be dependent upon whether partition in kind could be had on the northerly side of Helemano Stream or should be looked for on the southerly side. (And in that connection, the evidence shows that the natural features of the whole area places about one-third (1/3d) of the Holt area north of the Helemano Stream and two-thirds (2/3ds) of the area south of Helemano Stream.) The disposition of camp sites, roads, etc., would depend upon the solution of "permanent" versus "operation" improvements in a like partition in kind, coupled with the question as to whether camps should be removable [595] or whether a cash

allowance after appraisal should be the method of adjustment. (In this connection, it is to be remembered that the 1905 lease itself contemplated that "laborers' houses and similar wooden buildings" were to be regarded as "perishable structures," thus showing the general classifiation.)

Right at this point it must be observed that the Respondents have attempted to insist that they be given complete equity in this suit. In the briefs they demand PARTITION in this suit in the event of cancellation. It is difficult to understand the bearing of such insistence in view of the fact that all parties requisite to a partition suit are not before this Court; nor are pleadings so framed as to permit of partition.

While Respondents' Attorneys' have repeatedly stated in their brief "give us complete equity", they still continue to insist that what has been attempted by cancelling the deed of May 2, 1910, and what is presently attempted in connection with cancelling the assent to the 1906 instrument and the lease of 1905 are basically all wrong. In this connection, is it a fair paraphrase of these contentions to say for the Respondent's attorneys: "If and when we (Waialua Company) get ready to do equity to Eliza Christian, a congenital imbecile, (altho not [596] admitting her imbecility until we have to), tell us now what we shall have to do when we can no longer avoid doing it."

Would it not be more in conformity with the principles of equity to confine the issues, (as the

Supreme Court has done), to the petition for cancellation, accounting to date, and the present settlement of equities incident thereto? If this be done, is it not also a well-settled principle of equity that performance of a decree on such issues will of necessity be part of the subject-matter before a Court of Equity if and when either co-tenant demands partition?

Suppose we examine this insistence by Respondents (that complete equity be done) from a different angle, in conformity with the pleadings actually before this Court. The term of the 1905 lease has in fact expired pending this case. The Waialua Company has in fact had possession and use of all the sugar areas in question and has collected rentals on pineapple areas, ON THE THEORY OF EXCLUSIVE OWNERSHIP. The issues really simmer down to the question: Shall the 1905 lease be somehow revived after the gap occurring by purchase of the life estate in 1910, and shall the Waialua Company be held accountable for proportionate rent net above taxes [597] under the lease, and subsequent thereto, and for a one-third (1/3d) interest in improvements on the Holt lands at the termination of the lease (April 1, 1930), or shall Waialua Company be confirmed in its right to personal allocation where possible as to permanent improvements and equitable adjustment in its favor as to the rest in the event of partition and merely account for reasonable value of exclusive

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Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 15

WAIALUA AGRICULTURAL COMPANY, LIMITED, PETITIONER,

vs.

ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON, BY HERMAN V. VON HOLT, HER GUARDIAN, ET AL.

No. 17

ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON, BY HERMAN V. VON HOLT, HER GUARDIAN, PETITIONER,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FOR CERTIORARI FILED { MARCH 30, 1938. MARCH 31, 1938.

CERTIORARI GRANTED MAY 2, 1938.

No. 8329

United States

Circuit Court of Appeals

For the Ninth Circuit.

ELIZA R. P. CHRISTIAN, an incompetent person by HERMAN V. VON HOLT, her guardian,

Appellant,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation, JAMES L. HOLT, and ANNIE HOLT KENTWELL,

Appellees.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation,

Cross-Appellant,

vs.

ELIZA R. P. CHRISTIAN, an Incompetent person, by HERMAN V. VON HOLT, her guardian, JAMES L. HOLT and ANNIE HOLT KENTWELL,

Cross-Appellees.

Transcript of Record

In Three Volumes

VOLUME II

Pages 565 to 1032

Upon Appeal and Cross-Appeal From the Supreme Court of the Territory of Hawaii.

Parker Printing Company, 543 Sansome Street, San Francisco

use and occupation from April 10, 1922, net above taxes.

From the attitude taken by the parties in this case, this Court can well see that considerable difficulty might be left if this Court refused to cancel the assent to the 1905 lease and left the question open for the future "if-and-when-partition-suit" as to what constituted one-third (1/3d) of the improvements existing as of April 1, 1930. Hence, it appears to be far more in harmony with Respondent's desire for complete equity within the issues of this case, (as well as in harmony with the reasoning of the Supreme Court affirming the cancellation of the 1910 deed), to solve the equities as between Eliza Christian and Waialua Company by (1) TERMINATING AS TO ELIZA CHRISTIAN all rights of whatever kind under said lease, (2) placing Waialua Company's accountability to Eliza Christian, imbecile, on the [598] basis merely of reasonable net rental value for exclusive use and occupation, and (3) at the same time settling the equities, so far as the essential unity of plantation is bound up with existing improvements, by appropriate conditions.

PINEAPPLE AREAS OF HOLT ESTATE LANDS.

On July 28, 1932, attorneys for Waialua Company filed a memorandum supplemental to their brief of April 7, 1932, in relation to the effect of the lease by Waialua Company to Hawaiian Pine-

apple Company of January 1, 1923, (Exhibit Ac-B1 of 1929 Accounting Hearing) on the question of cancellation of Petitioner's assent to the 1905 lease. In this memorandum Counsel for Waialua Company call attention to the fact that Petitioner, thru Counsel, unequivocally in the 1929 hearing elected to affirm this 1923 pineapple lease and accept the benefits thereunder as co-tenant, lessor. In order to understand the situation IT IS NECESSARY TO REFER TO THE CONDITIONS EXISTING IN 1923 at the time of the lease in question, as distinct from arguments advanced in 1932.

Under the entire evidence available to the Court at this hearing, it is conclusively shown that (1) after the deeds of May 1910, Waialua Company considered itself THE OWNER of the John D. Holt life interest and the Eliza Christian expectancy; and (2) [599] after the death of John D. Holt in 1922, Waialua Company believed that it was finally confirmed as the owner in fee simple of twenty-five twenty-sevenths (25/27ths) of the Holt Estate lands, and Waialua Company acted on that basis. One-twenty-seventh (1/27th) still belonged to Gussie Holt, from whom Waialua Company had an extension of lease expiring in 1949. An additional one-twenty-seventh (1/27th) belonged to Elizabeth K. Richardson, from whom Waialua Company still had its rights under the 1905 lease, and from whom an extension has since been obtained by Hawaiian Pineapple Company. As far as Eliza

Christian was concerned her right as inheritance had been definitely determined by the death of her father in 1922, and Waialua Company then had the deed of 1910 from her. (see summary, Ex. Ac-B5.)

In the supplemental decision of this Court of August 9, 1929, it is pointed out that, under schedules attached to the Hawaiian Pineapple lease in 1923, Waialua Company owned or controlled in its own right Ninety-Nine Hundred Ninety-One and Eighteen One-Hundredths (9,991.18) acres of lands described in these schedules, exclusive of Petitioner's claims. The interest of the Petitioner, Eliza Christian, would affect an additional Twenty-One Hundred Fifty-Eight and Eighty-Two One Hundredths (2,158.82) acres (total [600] Twelve Thousand One Hundred Fifty (12,150) Acres) covered in the schedules of the lease. However, it must continually be kept in mind that up to 1928 there was no attack upon the Eliza Christian conveyances. No question of a defect in this respect entered into the FACTS of the negotiations between Waialua Company and Hawaiian Pineapple Company.

With these facts in mind let us consider the 1923 lease itself. This 1923 lease acknowledges payment to Waialua Company by Hawaiian Pineapple Company of Two Million One Hundred Nine Thousand One Hundred Seventy-Nine and 25/100 ($2,109,179.25) Dollars, RENT IN FULL IN ADVANCE FOR THE ENTIRE TERM (17½ YEARS) OF THIS LEASE ON A COMBINED ACREAGE

OF TWELVE THOUSAND ONE HUNDRED FIFTY (12,150) ACRES. (The testimony showed that this rental represented the 1923 present cash value of rents on said acreage of Fifteen ($15.00) Dollars per acre per annum, net above taxes, over a period of seventeen and one-half (17½) years, discounted at five (5) percent.)

The lease made certain exceptions and reservations in favor of Waialua Company which included among other things all water rights including the use of the same; all existing bridges, roads, railroads, utilities in connection with water systems, wires and poles; and the rights of ingress and egress to maintain [601] and repair the foregoing.

The lease then provides: "to have and to hold, FREE OF RENT OTHER THAN THE AFORESAID PAID UP rent, such of the demised premises as are owned by the lessor in fee simple and also such of the demised premises in and to which the estate of the Lessor is held as Lessee of others over periods having more than seventeen and a half (17½) years yet to run, for and during the term of seventeen and a half (17½) years from the 1st day of January, 1923, to the 30th day of June, 1940, both days inclusive, and such of the demised premises in and to which the estate of the Lessor is held as Lessee of others over periods having less than seventeen and a half (17½) years yet to run, for and during the unexpired terms of said periods respectively and for and during the terms of any renewals or extensions of the respect-

ive leases thereof up to and including June 30th, 1940."

The Lessor then covenants with the Lessee that "the Lessee shall peaceably hold and enjoy the demised premises for the term * * * created, without hindrance or molestation by the Lessor * * * except as herein expressly provided".

Then follows covenants BY THE LESSEE which include (1) a covenant to pay taxes, etc.; (2) a covenant to repair fences; (3) a covenant against [602] assignment without prior written consent of the Lessor; a number of other covenants intervene and then the Lessee covenants, (11) "That it will, in so far as applicable to the land hereby demised, in all respects keep, observe and perform all the terms, covenants, conditions, stipulations and agreements on the part of the tenant to be kept, observed and performed (except as to the payment of rent reserved thereby which shall be paid by the Lessor) as set out and contained in the following leases, to wit: * * * (b) Carlos A. Long et al. to Waialua Agricultural Company, Limited, made March 17, 1905, recorded in Book 263, page 365, said Registry * * *".

In connection with this last covenant BY THE LESSEE (Hawaiian Pineapple Co.) it must again be emphasized and kept in mind that the only outstanding interests (from the standpoint of facts considered as of 1923), affected by the 1905 lease were a one-twenty-seventh (1/27th) interest owned by Elizabeth K. Richardson, and a one-twenty-

seventh (1/27th) interest owned by Gussie Holt from whom an extension had already been obtained running to March 31, 1949. Or, in other words, the complete record of this case indicates that in 1923 this 11th covenant by the Lessee referring to the 1905 lease had then no present bearing upon the Eliza Christian inheritance and was not so considered [603] in any of the negotiations with the Pineapple Company.

This latter conclusion of fact from the record is so emphasized because of the present argument of Counsel that this reference is, by some "legerdemain", to be considered as a confirmation of the 1905 lease by Petitioner when she elected to ratify the 1923 lease, in connection with the present question of cancellation of the effect of the 1905 assent as to Eliza Christian. Neither the facts considered by the parties in 1923 nor the position taken by Waialua Company in the hearings of 1929, justify any such fallacious reasoning or inference. It is an assumption of the very point in issue: the effect of Petitioner's imbecility in 1905. This sort of argument is purely a creation of Counsel after it became apparent in the hearings of 1929 to 1932 that the 1910 deed was to be cancelled as to Eliza Christian and that there was some necessity to attempt to revive the efficacy of the 1905 lease as to Petitioner, or rather to prevent Petitioner from presenting her incompetency in 1905 as a ground for relief. This recitation of the existence of the 1905

lease was obviously included in the Hawaiian Pineapple lease of 1923, under the testimony before this Court, solely in connection with the fact relating to the two-twenty-sevenths (2/27ths) interests [604] in which Waialua Company had and claimed only a lessees's interest.

The lease then provides a "mutual" covenant and agreement: "(a) that from time to time and as often as the estate hereby created in the Lessee IN THE LANDS IN OR TO WHICH THE ESTATE OF THE LESSOR HEREIN IS THAT OF LESSEE, shall cease by limitation of time OR BECAUSE OF THE INTERVENTION OF a paramount title holder and/or FOR ANY OTHER REASON SAID LANDS PASS OUT OF THE CONTROL OF THE LESSOR prior to the expiration of the term of this lease, or as the estate hereby created in the Lessee in any other lands demised by this lease shall cease because of the intervention of a paramount title holder and/or for any other reason said lands shall pass out of the control of the Lessor except as herein provided, THE LESSOR WILL so often as the same shall happen forthwith AS TO EACH AND EVERY ACRE OF PINEAPPLE LAND SO LOST secure to and place the Lessee in the possession of equal areas of pineapple land for the remainder of the term of this lease, provided it then has them, and IF IT cannot then so provide them, then the LESSEE MAY upon the expiration of the term of seventeen

and a half (17½) years hereby created continue in the possession of similar land free and under the terms [605] and provisions of this lease to be carved out of the other land covered by this lease * * *", according to a method prescribed. (Underscoring ours.) The balance of this covenant gives further rights and privileges to the Lessee. There are also further provisions looking toward the possibility of renewal of the lease, etc., under prescribed and expressed terms.

The foregoing covenant is quoted by Counsel for Waialua Company in connection with an argument that this is "A VALUABLE RIGHT" to Waialua Company which cannot be taken away by a cancellation and accounting method in this proceeding. Again, this Court is compelled to emphasize that, in 1922 and 1923 when this pineapple lease was negotiated, the Eliza Christian one-third (1/3d) interest in the Holt Estate lands had vested by the death of her father in 1922 and was in fact considered at that time as belonging to Waialua Company under the 1910 deed. The existence of any defect in this 1910 deed was not a part of the negotiations and formed no part of the background, IN FACT, underlying this specific provision of the 1923 lease. It may, also, be noted that this covenant could only be read as a protection to Waialua Company (1) if the 1905 assent were not cancelled [606] herein; or (2) if Petitioner refused to elect to ratify the lease.

Morevoer, it must be remembered, that the 1923 lease was a paid-up lease in which the Pineapple Company was parting with the equivalent of cash in the sur of over Two Million Dollars. Hence, with this in mind and construing the express language of the covenant referred to, it is clear that THIS PROVISION IS AN OBLIGATION ON THE PART OF WAIALUA COMPANY BY WHICH THE LATTER COMPANY COULD BE COMPELLED BY THE PINEAPPLE COMPANY TO SECURE TO THE PINEAPPLE COMPANY THE CONSIDERATION FOR WHICH IT WAS CONTRACTING IN THE PAYMENT OF THIS CASH. The attempt at the present time by Counsel for the Waialua Company to construe this covenant as a "right" is again a creation by the attorneys after the fact was emphasized by the Supreme Court that the continued efficacy of the 1905 lease must be adjudicated in connection with Eliza Christian's congenital imbecility after it was determined in this proceeding that the 1910 deed should be cancelled.

In view of the foregoing terms of the 1923 lease to Hawaiian Pineapple Company and in view of the facts existing at the time it was negotiated the question now is: "What would be [607] the status of Waialua Company if Eliza Christian's assent to the 1905 lease were now cancelled?"

The Petitioner has elected to ratify and affirm the lease of 1923. By so doing her undivided share and acreage of the Holt Estate lands remains un-

disturbed so far as the use thereof by Hawaiian Pineapple Company since 1923 and to 1940 is concerned. Moreover, there is no evidence whatsoever in this case that either Waialua Company or Hawaiian Pineapple Company have ever recognized Eliza Christian as even a possible paramount title holder; nor is there any evidence that Hawaiian Pineapple Company (even if possible) has ever requested or consented to the construction of this covenant in its favor so as to permit Waialua Company to decide to vary the POSSESSION by letting Eliza Christian into physical possession of an undivided interest. In fact Waialua Company through the Pineapple Company and others, HAS BEEN AND STILL IS in exclusive possession of all this area since April 10, 1922. There is no evidence to the contrary. Further, Eliza Christian thru her attorneys is not intervening AGAINST HAWAIIAN PINEAPPLE COMPANY but is leaving that Company undisturbed by reason of the unequivocal election to ratify and affirm the lease. [608]

To refuse to cancel the assent of Eliza Christian to the 1905 lease to Waialua Company would mean that Waialua Company would thereby be permitted to retain in its own hands and control both the land and the reasonable value of property rights belonging to an imbecile, MERELY on the basis that the imbecile's signature appeared without consideration on the document executed by her predecessors in title nearly twenty (20) years before. No other hardship is indicated than is always present

when a co-tenant receives value for property that did not belong to it. There is no evidence that the basic value of Waialua Company's own interest in the pineapple area was or would be in any way affected by the determination of co-tenancy, other than by accounting for what it did not own.

If the 1905 and 1906 instruments be cancelled as to Eliza Christian, then Waialua Company would have had no right in equity in 1923, to lease to Hawaiian Pineapple Company the undivided interest of the imbecile unless she ratified this action by her co-tenant. However, by the election on behalf of the imbecile to ratify this lease, no right of Hawaiian Pineapple Company, Lessee, is interfered with so that no new obligations are or [609] would be created against Waialua Company in favor of Hawaiian Pineapple Company. The only result would be that Waialua Company would have to disgorge the reasonable value received by it for property rights belonging to the imbecile. That is to say equity would only be granting the imbecile the fair proportionate value of what belonged to her as a co-tenant. Without cancellation, equity would be giving away as of 1922, the property rights of the imbecile merely because in 1905 she was not intelligent enough to protect herself. By exercising the right of election to affirm the lease, Petitioner has made it possible to restore status quo as it would have been if Waialua Company as a co-tenant, had, without any documentary basis whatsoever, mistakenly or otherwise, leased to Hawaiian Pineapple

Company property which did not belong to Waialua Company. Upon discovery of the fact Waialua Company has been put in a position to cause no detriment to the Pineapple Company, affecting the cash parted with by the Pineapple Company, upon condition that Waialua Company merely transfer to the rightful owner the proportionate value received by it for the undivided interest which it did not own. The Hawaiian Pineapple Company, as Lessee, is confirmed in any possession and rights under [610] the lease of 1923, so that it is in no way concerned with the issues of this proceeding. Cancellation simply informs Waialua Company that cash received by it for what it did not in equity own must be transferred over to the rightful owner. In no way are its own rights interfered with. This sort of result is a necessary factor in every cancellation involving cash substitution for rights erroneously attempted to be transferred.

Approximately six thousand four hundred seventy-six and 43/100 (6,476.43) acres of Holt estate lands were available for pineapple cultivation. A cancellation of the documents involved in this proceeding so far as Eliza Christian's interest is concerned, leaves Waialua Company still the owner in fee of sixteen twenty-sevenths (16/27ths) undivided interest in this area, and Lessee of two-twenty-sevenths (2/27ths), or a total of two-thirds (2/3ds). In the decision of August 9, 1929, it was indicated that Petitioner's share in the paid-up rentals was a matter of pure mathematical computation, to-wit:

Three Hundred Seventy Four Thousand Seven Hundred Sixty and 36/100 Dollars ($374,760.36). In addition to the foregoing paid-up [611] rentals from the Hawaiian Pineapple Company referable to Petitioner's undivided interest, the record shows that Waialua Company had received further cash rentals between the date of the death of John D. Holt in 1922, and the Hawaiian Pineapple lease on January 1, 1923, in the proportionate sum of Twelve Thousand Three Hundred Thirty Three ($12,333.00) Dollars. In other words Waialua Company had in cash ON JANUARY 1, 1923, Three Hundred Eighty Seven Thousand Ninety Three and 36/100 ($387,093.36), representing a proportionate share of cash referable to the Eliza Christian one-third (1/3d) interest to and including June 30, 1940. The Court has looked in vain in the record for any equitable reason why an imbecile should be denied this compensation as the uncontradicted reasonable value for the use of her lands under the ratified lease. The only fact in the record is, when the testimony is really sifted, that the imbecile without any competent ability to protect herself, assented in 1905 without any present consideration, to a transfer to Waialua Company of the right to deal with lands until 1930. The Waialua Company released this portion of the lands under a lease protecting its improvements. Petitioner has elected to ratify [612] this 1923 lease.

In view of the facts (1) that the foregoing reasonable value of Petitioner's interest is a mere

matter of mathematical division according to proportionate interests; (2) that the major part of said sum was the present cash value in 1923 at five (5%) percent discount of rentals spread over seventeen and one-half (17½) years; (3) and the provision of the mandate that Petitioner return the original consideration of the 1910 deed (which she never received) at six (6%) percent interest, this Court is of the opinion and so finds, that six (6%) percent interest for the use of said cash is a reasonable equivalent for the method of attempting to compute the annual rental value up to the demand of April 5, 1928, plus, the present value of the remaining installments of the annual rental covered by the ratified lease and the total at eight (8%) percent legal interest. (All of the foregoing values of pineapple rentals are based on computations net above taxes.).

In the testimony at the 1929 hearing it appeared that Waialua Company immediately invested these cash rentals (under the 1923 paid-up lease) in Hawaiian Pineapple Company stock. Peti- [613] tioner sought to obtain a proportionate share of this investment. Waialua Company objected on the ground that this was personal to it. This objection was sustained. But the fact remained that the testimony showed that the cash rentals WERE INVESTED and were not lying idle. Money so used has a reasonable "use" value, even though the personal earnings of the investor over and above such reasonable "use" value should not be inter-

fered with. It is difficult, therefore, under the evidence before the Court to see how six (6%) percent interest under the circumstances can be construed in any way as a "a penalty". There is no showing that the investor received less than six (6%) percent and the Court refused to consider whether the Company secured a larger return by reason of its own business ability.

As to the question of "ouster", the position taken by Waialua Company in 1923, and still persisted in, as exclusive owner of a "unified plantation" is a sufficient answer. It has never acknowledged Eliza as a lessor or in any other capacity. The law applicable is sufficiently analyzed in the former opinions of this Court. [614]

SUGAR LANDS.

Another argument against cancellation of the assent to the 1905 lease and the attempted assignment to Annie Kentwell of 1906, is based upon numerous details of improvements erected and maintained by Waialua Company in connection with the alleged unity of the sugar plantation development. This has been already referred to in part. It is further argued that rights under partition would leave in abeyance controversies as to the complete protection of Waialua Company in connection with improvements made in good faith. Most of the weight of such argument was originally directed against cancellation of the 1910 deed.

If by virtue of appropriate conditions imposed in this proceeding, reasonable and substantial pro-

tection can be secured to Waialua Company in connection with such improvements as are essentially tied up with the operation of the sugar plantation as a unit, then the obstacle to cancellation raised by Counsel for Waialua Company involving such improvements would disappear. If such conditions can be imposed in connection with a decree in this case, then any future partition suit, if the co-tenants desired severance of [615] interest, would be subject to the rights decreed in this proceeding. This Court is of the opinion that such conditions can be imposed herein, based upon the evidence.

On that assumption the question should be settled as to reasonable rental value of the proportionate interest of sugar lands used by Waialua Company but belonging to the Petitioner. This determination is not a mere mathematical computation but depends first on a determination in this proceeding of a basic reasonable rental value, net above taxes, per acre of sugar lands.

Throughout the hearings of 1929 and 1932 Waialua Company has strenuously objected to opening up its books in order to determine whether or not it operated the Holt sugar areas at a profit or a loss, taking into consideration all the alleged expenditures for development and including the question of the bearing of the cost of abandoned improvements on this question of actual profit or loss. Certainly, if investigation of the cost of operating the sugar lands would have shown that the use of the sugar lands resulted in a loss, those

factors would have been pertinent in connection with the determination of a reasonable rental value of sugar lands pertaining to the Eliza Christian one-third (1/3d) interest. [616] However, the Company objected to this line of investigation. In view of this objection, the Court sustained it and confined the evidence to the reasonable rental value of land suitable for sugar cultivation, net above taxes.

In view of the fact that the evidence was so confined at the instigation of the Company itself, it is a fair assumption and inference from the testimony and the position taken by the Company that it was able to operate Eliza Christian's undivided share in the sugar lands at a reasonable profit to itself, net above taxes, even on the basis of a reasonable ground rental chargeable to the Company. It must be kept in mind also, that a cancellation of the assent to the lease relieves the Company from any accounting for division of permanent improvements of buildings and fixtures placed by it on the lands prior to 1930. The testimony also showed that one of the reasons for the pineapple lease of 1923, whereby the areas above the Wahiawa Extension Ditch were leased to that Company on the basis of Fifteen ($15.00) Dollars per acre per year, net above taxes, was because such a ground rental for such upper areas would be more profitable than to continue operation of any of the same in the sugar plantation. [617]

In 1929 this Court found under all the evidence, that for the years 1922 to 1929 inclusive, a net

rental of Fourteen ($14.00) Dollars per acre per annum was a reasonable rental value of this land as cane land, (this did not include any value for rental of improvements or any interest in improvements, except as the land itself considered as cane area was cleared, ditched and made accessible). In arriving at this figure the Court, also, weighed the evidence relating to the original cost of clearing the land and making it accessible. Under the evidence added in the recent hearing, the continuance of this acre value is also in conformity with reasonable value. No additional evidence to vary this 1929 figure was offered by Waialua Company in the 1932 hearing.

That is to say the proportionate acreage used by the Waialua Company for sugar plantation purposes is hereby found to have a reasonable rental value as to Eliza Christian's interest in the sum of Seven Thousand Five Hundred Seventy-four ($7,574.00) Dollars per annum, net above taxes, for each of the years from April 10, 1922, to the date of this decree. By eliminating interest [618] with annual stops, this Court feels that a simple annual computation will result in adequate adjustment of the equities of Waialua Company in connection with the original bringing in of this area to productivity, including dirt ditches and dirt roads. Conditions hereinafter imposed will, also, substantially protect the remaining equities of the Company by confirming to it the continuance in unified control, operation and maintenance of the major improve-

ments involved in connection with the essential unity of its sugar plantation.

A DIGRESSION RE "VOIDABLE" AND "VOID".

Before summarizing, in conclusion, the foregoing reasoning which has been based upon the Supreme Court's ruling that a deed of an imbecile is "voidable and not void", I desire, respectfully, to indicate for further reflection a logical difficulty that has presented itself in connection with such a ruling. In doing so this Court is mindful that its earlier decisions agreed with the Supreme Court of the Territory.

Does not logic suggest: Given an imbecile or insane person, his (or her) act which requires mental concurrence is VOID-IN-FACT for want of a contracting "mind"? Such a defect, [619] HOWEVER, DOES NOT APPEAR UPON THE FACE OF THE DOCUMENT OF CONTRACT OR CONVEYANCE. Therefore, so far as is apparent from legal record, the transaction proceeds as though legal-in-fact, unless and UNTIL a Court of Equity is induced to interfere by affirmative remedy. No proper person may ever come forward to disturb the legal appearances of the record; or the legal appearances may ripen into an impregnable position by limitation or laches.

When such affirmative interference is sought TO CORRECT LEGAL APPEARANCES TO CONFORM TO THE ACTUAL FACTS,—imbecility,

—insanity,—voidity,—the Court, appealed to, first asks: "Who is the person asking for relief?" If the imbecile in person (thru proper guardian or legal representatives) is asking for the remedy and no laches prevents the further inquiry, then questions affecting the respondent arise.

If the respondent is the substantial, original contracting party, the investigation is simplified. Was such party in a position to be apprised of the defect: (1) by the existence of a prior adjudication of insanity; (2) by actual knowledge of insanity, or of facts from which such could reasonably be inferred, or by actual [620] knowledge of the situation in some agent, used by said other contracting party? If either (1) or (2) is found to have existed, Courts of Equity have not hesitated to afford an immediate, affirmative remedy. If such facts do not CLEARLY appear, then the Courts have demanded further information to determine whether or not affirmative correction by decree (remedy) can be had and at the same time substantial justice result. This investigation involves the weighing of equities, restoration to status quo, etc., etc.

If this treatment is what is involved in a Court of Equity by the use of the terms "voidable" and "void", the result can be understood. Yet, even then, such terms so used lead to innumerable confusions. If "voidable" means "good until avoided", then "merger" of a lesser estate with a greater would seem to be a logical consequence, if the greater is an existing legal fact until avoided. If

"merger" does not result, THEN IT MUST BE BECAUSE THE GREATER NEVER WAS,—was void ab initio,—and the REMEDY or equity in announcing that fact faces the necessity of recognizing THAT NO VALID ACT EVER EXISTED WITH WHICH A FORMER contract could ever have merged. This, then, results in a further necessity to examine the [621] transaction out of which the earlier lesser estate arose, so far as the APPARENT legality is connected with the ACTUAL facts. The whole inquiry is immediately transferred to examine the earlier event, taking into consideration all that has happened in the meantime to intervening legal estates.

The earlier event is also a "voidity" in a factual sense, if imbecility existed in fact. But, do the circumstances affecting it justify PRESENT EQUITABLE INTERFERENCE, (remedy to correct the appearance of legality), so as to bring about substantial justice? If the continuing, actual, legal, factual rights of the imbecile are NOW to be decreed, what would be the effect upon the other contracting party? Is there an overbalance of equitable reasons to JUSTIFY A DENIAL of relief to an imbecile, who BY THE VERY PREMISE OF IMBECILITY, could not and cannot be protected except by the aid of others? Can conditions be imposed in connection with relief so as to accomplish substantial justice? This unprejudiced play of human judgment is exactly the province of the Chancellor. [622]

CONCLUSION.

Whether or not a discussion of the documents in the case at bar should proceed from a rule of "voidity" or "voidability", it is the conclusion of this Court as expressed hereinbefore more fully, that the equities in the case at bar are in favor of ordering a cancellation of Eliza Christian's assent to the lease of 1905, of terminating the rights of bot Waialua Company and Eliza Christian thereunder, and cancelling Eliza Christian's execution of a purported assignment of rents to Annie Kentwell in 1906. Substantial adjustment of the status quo is possible under the facts.

The Court therefore finds in conformity with the foregoing reasons that in addition to the cancellation as to Petitioner, Eliza Christian of the May 2, 1910, deed, that:

(1) The instrument of August 31, 1906 and the assent of Eliza Christian to the lease of March 17, 1905, should be cancelled and annulled as to the Petitioner, Eliza Christian;

(2) In accordance with the election on behalf of Petitioner, the lease of Waialua Company to Hawaiian Pineapple Company, [623] Ltd., of January 1, 1923, should be and is ratified and confirmed insofar as it affects the undivided interest of Eliza Christian, Petitioner;

(3) The Respondent Waialua Company should account with the Petitioner for the sum of Three Hundred Eighty Seven Thousand

Ninety Three and 36/00 ($387,093.36) Dollars, plus interest at six (6%) per cent per annum from January 1, 1923, as and for the reasonable value of rentals for use and occupation of pineapple areas to and including June 30, 1940; (from which should be deducted Thirty Thousand ($30,000.00) Dollars plus interest at six (6%) per cent per annum from May 2, 1910);

(4) Waialua Company should account with Petitioner in the sum of Seven Thousand Five Hundred Seventy Four Dollars ($7,574.00) per annum, (without interest up to the date of the decree of this Court), as and for the reasonable annual value for use and occupation of proportionate sugar areas commencing with April 10, 1922, to the date of the [624] final decree herein.

In connection with the foregoing cancellation and further, IN CONNECTION WITH PERFORMANCE OF SAID ACCOUNTING BY RESPONDENT Waialua Company, and for the purpose of setting at rest equities of the parties in connection with restoration of status quo, it is further found that such performance by Respondent, Waialua Company, should be and is hereby conditioned upon the requirement that the Petitioner through her guardian and for herself, her heirs and assigns, be taken thereby, to acquiesce in and insure to her co-tenant, Waialua Agricultural Company, Limited, its successors and assigns:

"A": The right, until partition or other severance be sought and decreed, to continue in the exclusive use and occupation so far as Holt areas are concerned:

(1) Of the existing site and improvement of the right-of-way of the Wahiawa Extension Ditch, (including tunnels, flumes, siphons in connection therewith), with a reasonable width for the maintenance of the same in and acros the entire Holt area;

(2) The sites and improvements of all [625] existing reservoirs located at and above said Wahiawa Extension Ditch in connection with the Helémano irrigation system including therewith the sites of the intakes, main ditches, tunnels, flumes and siphons from said intakes to connect with the Wahiawa system as presently located, (or as reasonably adjusted to continue its substantial unity), and including MAIN outlet ditches to conduct irrigation waters over and across Holt areas;

(3) The existing sites and improvements of the Poamoho Pumps Nos. 10 and 10-A, together with the sites and improvements of main outlet pipe lines, main ditches, flumes, siphons and reservoirs now existing in connection therewith;

(4) The site and improvements of the existing MAIN plantation railroad and switches with the reasonable width in connection therewith so far as the same affects the Holt area;

(5) Rights of way and improvements for main power lines and transmission lines and for main pipe lines for domestic water [626] supplies;

(6) Sites and improvements of branch railroads now existing upon Holt areas;

(7) Plantation camp sites and improvements; (Petitioner's rights to rentals or joint occupation as tenant in common being confined to area basis without reference to the value of the foregoing improvements).

"B": That, upon partition and/or other severance of interest between Petitioner and Respondent Waialua Company, the said Waialua Company, its successors and assigns as against Petitioner, her heirs and assigns, be likewise insured, BY PERFORMANCE OF THE WITHIN DECREE, of the right in it or them of an election to have allocated to it or them, in its share of areas any or all of the sites of the improvements listed in subparagraphs (1), (2), (3), (4), and (5) hereinabove, said allocation to be adjusted with Petitioner, her heirs and assigns, solely on an equivalent area basis without any right in or reference to the value of the improvements so located; and where such division to Petitioner, her heirs or assigns may affect structures on fixtures in connection wtih [627] improvements listed under sub-paragraphs (6) and (7), the adjustment of the same to be made on the basis of a right in Respondent Waialua Company, its successors or assigns to remove the same or

to be compensated on the then fair appraisal, (allowing for the then condition of deterioration as may then appear equitable), wherever any of the same be necessarily located on any areas allocated to Petitioner, her heirs and assigns.

"C": In connection with such exclusive use of such improvements and election as hereinbefore provided and conditioned, the Petitioner, her heirs and assigns shall retain the privilege of having reasonable rights of way for access and egress over, across or under any sites reserved to Waialua Company, its successors and assigns.

"D": All other matters of adjustment, not specifically dealt with herein, shall in the event of future partition and/or severance be left to equitable adjustment on the plain intent of this decision and a decree hereunder that Petitioner is hereby found to be entitled to restoration to an undivided fee simple interest in one-third (1/3d) of the area of the [628] lands as described in these proceedings, according to the proper agricultural or other appropriate classification of said areas, but without right in the Petitioner, her heirs or assigns to any claim for special value in connection with the improvements hereinabove listed under sub-paragraphs (1) to (7) inclusive.

This is not "making a new contract" between the parties. In reality it is the necessary result of affording equitable protection to the Respondent, Waialua Company, in connection with its activities resulting from dependence on supposed contractual rights which this Court is compelled to find against

said Company by reason of the necessity to afford protection to a person found to have been at all times hereunder a "congenital imbecile."

By such a final determination of the issues between Petitioner and Respondent Waialua Company, (so far as is possible under pending pleadings), substantial protection will be accorded to the Petitioner by restoration of her undivided one-third (1/3d) interest in the lands in question and by a reasonable [629] compensation for exclusive use of the same by her co-tenant. At the same time the rights of the Waialua Company wil be substantially protected as to the Petitioner, since the equitable principles affecting its co-tenancy will be substantially settled. Waialua Company will have assured to it:

(1) A substantial protection of the unity of its sugar plantation;

(2) Undisturbed possession and usefulness of approximately One Million Dollars ($1,000,000.00) of investment claimed by it in connection with the improvements affecting the continued operation of ninety-five percent (95%) of its sugar plantation until severance;

(3) The retention by it of such profits as it may have created in connection with the use of sugar areas over and above a reasonable ground rental for Petitioner's undivided interest;

(4) Protection in its investments in Hawaiian Pineapple Company which are dependent upon the continuance of the 1923 lease; [630]

(5) A settlement herein of the equitable principles applicable to the Petitioner as a co-tenant so as to preserve to Waialua Company the continued substantial unity and effectiveness of such permanent improvements as have been developed by it in connection with its sugar plantation in the event that a future severance of proportionate areas should be found desirable between the co-tenants.

All of the foregoing adjustments between Petitioner and Respondent Waialua Company are without prejudice to the rights of said Company as against the Respondents Annie Holt Kentwell and James L. Holt, or their heirs.

In conformity with the foregoing decision a decree will be signed upon presentation in favor of said Petitioner as to cancellation of the documents in question and for an accounting computed as herein determined subject to the conditions of settlement of the equities between the Petitioner and Respondent Waialua Company as herein set forth.

Dated at Honolulu, Hawaii, this 18th day of August, 1932.

[Seal] A. M. CRISTY,
Second Judge, First Judicial Circuit, Territory of Hawaii. [631]

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii.

Eq. 1915 R. ..... P. .....
At Chambers In Equity

Bill for Cancellation, Accounting and Incidental Relief.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. von HOLT, her Guardian,
Petitioner,

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation, JAMES L. HOLT, and ANNIE HOLT KENTWELL,
Respondents.

DECREE.

1st Circuit Court, Territory of Hawaii, filed 1932, Sept. 6, P. M. 1:53 D. K. Sherwood, Clerk. [632]

Pursuant to and confirming the Decision on Remand of this Court heretofore made and entered herein on, to-wit, August 18, 1932,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That that certain deed dated May 2, 1910, by and between John Dominis Holt, Eliza R. P. Christian, Annie Holt Kentwell and Lawrence K. Kentwell, therein named as Grantors, and James L. Holt, therein named as Grantee, said deed being described and referred to in the Amended Petitions

on file herein, a copy of which deed being annexed to said Amended Petitions and made a part thereof, and marked [633] "Exhibit B," be and it is hereby declared and adjudged canceled, annulled, and void and of no effect as to Eliza R. P. Christian named as Grantor therein, being the same Eliza R. P. Christian petitioner herein.

2. That, as against all parties personally appearing herein and submitting to the jurisdiction of this Court herein, to-wit, Waialua Agricultural Company, Limited, James L. Holt, and Annie Holt Kentwell, the said Eliza R. P. Christian is and has been since April 10, 1922 the owner in fee simple of an undivided one-third (1/3) interest in and to the following described property:

(a) A portion of the Ahupuaa of Paalaa being a portion of Apana 34, L. C. A. 7713, Royal Patent 4475, containing an area of 12018.81 acres more or less;

(b) The lands described in Royal Patent 973 to Robinson et al, containing an area of 1902 acres;

(c) The lands described in Royal Patent 431 to Kanohanui, containing an area of 100 acres;

(d) The lands described in Royal Patent 235 to Jerome and Louis Johnson, and Topliff, containing an area of 36 acres;

(e) The lands described in Royal Patent 238 to J. F. Anderson and F. Davis, containing an area of 25.8 acres;

(f) All kuleanas or grants lying within the above described land.

3. That Petitioner herein, as tenant in common of said land with Waialua Agricultural Company, Limited, since April 10, 1922, do have and recover from said respondent, Waialua Agricultural Company, Limited, (1) as past and future rentals for Petitioner's interest in the pineapple lands described [634] in that certain lease (dated January 10, 1923) by and between Waialua Agricultural Company, Limited and Hawaiian Pineapple Company, Limited (being Exhibit AcB1, in this case), said lease expiring July 1, 1940, and, (2) as and for rentals upon all other lands hereinabove described, as of the date of this decree, the total sum of $606,785.75; payment of the foregoing sum together with any other sums included in this decree, to be made to the duly appointed and acting guardian of the Petitioner herein;

4. That, better to effectuate this decree, the Respondent, Waialua Agricultural Company, Limited, do deliver up to the Clerk of this Court, for cancellation as to Petitioner herein, the original of that certain deed of May 2, 1910, hereinabove referred to, and for endorsement thereon by said Clerk,

"The above and foregoing deed of May 2, 1910, is hereby canceled, annulled and void as to Eliza R. P. Christian named as Grantor therein, by reason of the incompetency of said Eliza R. P. Christian, By Order of the Court under

Decree in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in Equity 2915, said Decree being dated.....

.....

Clerk."

And, further, that Respondent, Waialua Agricultural Company, Limited, by appropriate indenture do release and forever quitclaim unto the said Eliza R. P. Christian, Petitioner, herein, all of the right, title and interest in an undivided one-third (1/3) interest in fee in the said lands, referred to in paragraphs 2-a, b, c, d, e, and f, hereinabove, purported to have been conveyed and granted by [635] the Petitioner herein by virtue of said deed of May 2, 1910;

5. That Petitioner herein, having accepted, ratified and adopted that certain lease by and between Waialua Agricultural Company, Limited, and Hawaiian Pineapple Company, Limited, dated January 10, 1923, as above referred to in paragraph 3 hereof, the rights of said Hawaiian Pineapple Company, Limited under and by virtue of said lease are in all respects confirmed as to Petitioner's interest in said lands;

6. That that certain lease dated March 17, 1905 by and between Carlos A. Long et al and Waialua Agricultural Company, Limited, et al, said lease being described and referred to in the Second Amended Petition on file herein, a copy of which lease being annexed to said Second Amended Petition

and made a part hereof and marked "Exhibit F," is hereby declared and adjudged cancelled, annulled, and void and of no effect as to said Eliza R. P. Christian, and the assent of Eliza R. P. Christian thereto is hereby annulled and decreed of no force or effect;

7. That that certain instrument of August 31, 1906, by and between Eliza R. P. Christian and Annie Holt Kentwell, said instrument being described and referred to in the Second Amended Petition on file herein, a copy of which instrument being annexed to said Second Amended Petition, made a part thereof, and marked "Exhibit G," be and it is hereby declared and adjudged canceled, annulled, and void and of no effect.

8. That Respondent Waialua Agricultural Company, Ltd., subject to its performance of this decree, be and it is [636] hereby decreed the right, until partition or other severance be sought and decreed, to continue in the exclusive use and occupation so far as said lands are concerned:

(1) Of the existing site and improvement of the right-of-way of the Wahiawa Extension Ditch, (including tunnels, flumes, siphons in connection therewith), with a reasonable width for the maintenance of the same in and across the entire Holt area;

(2) The sites and improvements of all existing reservoirs located at and above said Wahiawa Extension Ditch in connection with the Helemano irrigation system including there-

with the sites of the intakes, main ditches, tunnels, flumes and siphons from said intakes to connect with the Wahiawa system as presently located, (or as reasonably adjusted to continue its substantial unity), and including main outlet ditches to conduct irrigation waters over and across the Holt areas;

(3) The existing sites and improvements of the Poamoho pumps Nos. 10 and 10-A, together with the sites, and improvements of main outlet pipe lines, main ditches, flumes, siphons, and reservoirs now existing in connection therewith;

(4) The site and improvements of the existing main plantation railroad and switches with the reasonable width in connection therewith so far as the same affects the Holt area;

(5) Rights of way and improvements for main power lines [637] and transmission lines and for main pipe lines for domestic water supplies;

(6) Sites and improvements of branch railroads now existing upon Holt areas;

(7) Plantation camp sites and improvements; (petitioner's rights to rentals or joint occupation as tenant in common being confined to area basis without reference to the value of the foregoing improvements.)

That, upon partition and/or other severance of interest between Petitioner and Respondent Wainlua

Company, the said Waialua Company, its successors and assigns as against Petitioner, her heirs and assigns, be likewise insured, by performance of the within decree of the right in it or them of an election to have allocated to it or them in its share of areas any or all of the sites of the improvements listed in sub-paragraphs (1), (2), (3), (4), and (5) hereinabove, said allocation to be adjusted with Petitioner, her heirs and assigns, solely on an equivalent area basis without any right in or reference to the value of the improvements so located; and where such division to Petitioner, her heirs or assigns may affect structures or fixtures in connection with improvements listed under sub-paragraphs (6) and (7), the adjustment of the same to be made on the basis of a right in Respondent Waialua Company, its successors or assigns, to remove the same or to be compensated on the then fair appraisal, (allowing for the then condition of deterioration as may then appear equitable), wherever any of the same be [638] necessarily located on any areas allocated to Petitioner, her heirs and assigns.

In connection with such exclusive use of such improvements and election as hereinbefore provided and conditioned, the Petitioner, her heirs and assigns shall retain the privilege of having reasonable rights of way for access and egress over, across or under any sites reserved to Waialua Company, its successors and assigns.

All other matters of adjustment, not specifically dealt with herein, shall in the event of future partition and/or severance be left to equitable adjustment on the plain intent of the decision and of this decree hereunder that Petitioner is hereby found to be entitled to restoration to an undivided fee simple interest in one-third of the area of the lands as described in these proceedings, according to the proper agricultural or other appropriate classification of said areas, but without right in the Petitioner, her heirs or assigns to any claim for special value in connection with the improvements hereinabove listed under sub-paragraphs (1) to (7) inclusive.

9. That this decree is granted without prejudice to such rights, if any, as said Respondent Waialua Agricultural Company, Limited may have against any persons other than said Eliza R. P. Christian, including Respondents Annie Holt Kentwell and James L. Holt, or their heirs.

10. The foregoing decree being without prejudice also to the right of the petitioner to any further or subsequent accounting arising out of facts subsequent to [639] the date of this decree relating to any exclusive occupation on an area basis, without right of any accounting for the improvements herein allocated to the Respondents.

11. That Petitioner do further have and recover of and from the Waialua Agricultural Company, Limited the sum of $862.70 as per Order taxing costs herein.

Dated at Honolulu this 6th day of September, A. D. 1932.

BY THE COURT,

[Court Seal] DOROTHY M. FEDER,
Clerk.

Approved:

[Seal] A. M. CRISTY,
Presiding Judge [640]

SATURDAY, OCTOBER 31, 1931.

At Chambers—10:00 o'clock a. m.

Present:

The Court—Olaf Oswald, Reporter.

Counsel:

C. M. Hite, Esq., (UH), for Petitioner.

B. S. Ulrich, Esq., (UH), for Petitioner.

A. L. Castle, Esq., (RC), for Waialua Agricultural Co., Ltd.

J. G. Anthony, Esq., (RC), for Waialua Agricultural Co., Ltd.

A. Withington, Esq., (RC), for Waialua Agricultural Co., Ltd.

John R. Desha, Esq., for James L. Holt.

MOTION FOR ALLOWANCE OF AMENDMENTS TO PLEADINGS.

Mr. Castle presented to the Court and counsel written objections to the allowance of the proposed amendment and to the allowance of the proposed

second amended bill and further stated that any appearance in the future would have to be subject to the objections which were filed with the Court.

ELIZA R. P. CHRISTIAN vs. WAIALUA AGRI. CO., LTD.—E-2915—Page #3.

Mr. Ulrich informed the Court that he wished to present at this time the allowance of an amended petition pursuant to the direction or authorization given by the Supreme Court in a decision recently rendered in this case.

Mr. Castle renewed his objections.

The Court, after reading the mandate, overruled the objections of counsel for respondent, Waialua Agricultural Company, Ltd., and allowed the amended bill. The Court allowed the respondents ten (10) days within which time to plead by way of answer, demurrer or any other pleading.

BY THE COURT

L. R. HOLT

Clerk [641]

FRIDAY, NOVEMBER 6, 1931.

At Chambers—10:00 o'clock a. m.

Present:

The Court.

Counsel:

C. M. Hite, Esq., (UH), for Petitioner.

MOTION FOR ORDER OF SERVICE OF PROCESS ON ANNE HOLT KENTWELL.

On ex parte motion by the petitioner thru her attorneys for an Order of Service of Process on

the respondent Anne Holt Kentwell, a non-resident, the Court granted the motion and order in the form presented with the understanding that this fixing of a day for trial in response to the statute for notice shall and will not prejudice the rights of the Waialua Agricultural Company, Ltd. but is for the purpose of fixing a specific date on which Anne Holt Kentwell must appear or be in default and that the date set—December 17th, 1931—shall be the date of trial on the matter upon the proper motion of parties interested.

BY THE COURT

L. R. HOLT

Clerk. [642]

ELIZA R. P. CHRISTIAN vs. WAIALUA AGRICULTURAL CO., LTD.—E-2915 Page #4 Cont.

TUESDAY, NOVEMBER 17, 1931.

At Chambers—2:00 p. m.

Present:

The Court:

Counsel:

Same.

SPECIAL DEMURRER—OVERRULED.

2:00 p. m. Counsel Anthony argued.

2:31 p. m. Counsel Ulrich argued.

2:53 p. m. Counsel Anthony argued.

3:05 p. m. the Court made a statement.

The Court after hearing the argument of Counsel overruled the Special Demurrer, giving Counsel for

Respondent up to and including the 17th of December to answer; and further stated that any other pleadings other than by way of answer be filed in this Court not later than the 28th of November, and the time for answer be the 17th of December.

Counsel for Respondent, Waialua Agricultural Co. Ltd., took exception to the Court's ruling.

BY THE COURT

D. M. FEDER

Clerk. [643]

MONDAY, NOVEMBER 23, 1931.

At Chambers—10:00 a. m.

Present:

The Court.

Counsel:

Same.

MOTION FOR COMMISSION TO TAKE DEPOSITIONS—DENIED.

10:00 a. m. Counsel Castle argued.

10:00 a. m. Counsel Ulrich argued.

10:34 a. m. the Court questioned Counsel Ulrich.

10:40 a. m. Counsel Castle made his closing argument.

The Court after hearing argument of Counsel denied the Motion. The Court made a definite ruling stating that the ruling was binding upon further hearings of the Court, to the effect that the issue of Eliza Christian's competency or incom-

petency is not before this Court at this stage of the hearing, and the Court would have to deny examination of any witnesses appearing upon her alleged competency or incompetency.

The Court allowed Counsel for Petitioner a week to file such affidavits as they may deem necessary in answer to Mr. Castle's affidavit.

Counsel for Respondent was given until noon of the 24th of December, 1931, to complete the records in connection with his (Mr. Castle's) motion and affidavits.

BY THE COURT.
D. M. FEDER
Clerk [644]

ELIZA R. P. CHRISTIAN vs. WAIALUA AGRI. CO. LTD.—E-2915—Page #5.

FRIDAY, JANUARY 8, 1932.
At Chambers—10:00 a. m.

Present:

The Court. (H. R. Jordan—Reporter)

Counsel:

Messrs.—Ulrich, Hite, Castle and Anthony.

MOTION FOR COMMISSION TO TAKE DEPOSITIONS.

Upon hearing the statements of Counsel the Court denied the Motion for Commission to Take Depositions, with the exception of that of Annie Kentwell which matter the Court stated, would be taken up

when Mrs. Kentwell's answer is before the Court; Counsel Ulrich having stated to the Court that Mrs. Kentwell's answer had been executed personally in England and is now in the mails.

Counsel for Respondent took exception to the Court's ruling.

BY THE COURT:

D. M. FEDER

Clerk. [645]

THURSDAY, JANUARY 21, 1932.

At Chambers—1:35 p. m.

Present:

Hon. A. M. Christy, Second Judge, presiding.

D. M. Feder, Clerk.

J. R. Jordan, Reporter.

[Title of Cause.]

ARGUMENT ON THE TAKING OF DEPOSITIONS.

Counsel:

B. Ulrich, Esq., (U&H) and C. M. Hite, Esq., (U&H) for Petitioner.

A. L. Castle, (R&C) for Respondent Waialua Agri. Co., Ltd.

Counsel Ulrich and Counsel Castle argued on the taking of deposition of Annie Kentwell; Counsel Ulrich arguing for a closed deposition, and Counsel Castle arguing against such a deposition and in favor of an open deposition.

After hearing the argument of Counsel, the Court stated that a closed deposition would be permitted under proper interrogatories, and allowed Mr. Castle a week's time in which to decide upon the matter.

BY THE COURT:
D. M. FEDER
Clerk. [646]

[Title of Court and Cause.]

OPINION OF THE COURT.

Filed May 3, 1934 at 10:25 o'clock a. m. (s) Robert Parker, Jr., Clerk Supreme Court. [647]

Argued April 28, 29, 1933. Decided May 3, 1934.

PERRY, C. J., BANKS AND PARSONS, JJ.

EVIDENCE — ADMISSIBILITY — AMENDMENTS TO PLEADINGS—NEW ISSUES.

Amendments to a bill and to an answer having been permitted after the close of the evidence, held, that these amendments presented new and distinct issues not raised by the original pleadings and that, under the circumstances it was error to exclude evidence offered by the respondent in support of the averments of the amendments to its answer.

DEEDS—VALIDITY—MENTAL INCOMPETENCY—EQUITIES.

The deed or contract of a mentally incompetent person, who has not been judicially declared insane and whose incompetency is unknown to the other party to the transaction, is not absolutely void but is voidable only; and in determining whether it should be canceled the [648] nature of the transaction in all its aspects and the good or bad faith of those dealing with the grantor in respect to such transaction should be carefully considered.

SAME—CONSIDERATION OF EQUITIES.

A deed, lease or other instrument executed by one mentally incompetent is not to be canceled solely because the person was incompetent but in determining whether it should be canceled all of the equities must be considered, including those in favor of the grantee or lessee as well as those in favor of the grantor or lessor.

INSANE PERSONS—LEASE CANCELLATION—EQUITIES—RESTORATION TO STATUS QUO.

A lease made by an incompetent, who has not been judicially declared insane, to a lessee without knowledge of the incompentency, for an adequate rental and upon other terms that are reasonable and fair, which is beneficial to the incompetent and is in effect a provision in

favor of the incompetent for necessaries for his sustenance and comfort,—a lease which has been fully performed and is accompanied by no fraud or other circumstances of inequity to the incompetent—should not be canceled, even though the lessee can be restored to the status quo ante.

DEEDS—CONSTRUCTION.

If an instrument is susceptible of two constructions, one leading to validity and the other leading to invalidity, it should be given the construction which leads to [649] validity,—in order thereby to carry out the intention of the parties.

DEEDS—GIFT OF INCOME—CONSTRUCTION—EXCEPTION.

The rule that a gift of income of property is to be construed as a gift of the property itself is subject to the exception that if in the instrument under consideration it appears that the testator or grantor did not intend a conveyance of the land or of an interest in it there is no such conveyance.

SAME—INSANE GRANTORS—REMOTE GRANTEES—VALIDITY.

When an incompetent conveys or assigns to one who has knowledge of the incompetency and subsequently the grantee or assignee conveys or assigns to a third person who has no knowledge of the incompetency of the first grantor or assignor, the property passes to the inno-

cent third person freed from the taint which it received by reason of the guilty knowledge of the first grantee or assignee.

SAME—INSANE PERSONS—CANCELLATION—RESTORATION TO STATUS QUO.

Upon decreeing cancellation of a deed executed by a mentally incompetent grantor, restoration to the status quo should be accomplished in the same suit, if practicable, and should not be left for consideration and treatment in a possible future partition suit. [650]

OPINION OF THE COURT BY PERRY, C. J.
(Banks, J., dissenting.)

For earlier history of this case see Christian v. Waialua Agricultural Co., 31 Haw. 817-912.

Subsequent to the order of this court remanding the case to the circuit judge for further proceedings, application was made by the petitioner before the circuit judge for leave to amend the petition by adding allegations to the effect that at the time when Eliza Christian executed the lease of March 17, 1905, and the instrument of August 31, 1906, she was mentally incompetent to execute those instruments, received no consideration for either of them and was not in any way benefited by their execution; and that both instruments were wholly void and should be set aside. Objections to the allowance of these amendments were presented by the respondent, the Waialua Agricultural Company, Limited, hereinafter referred to as the W. A. Co., and were over-

ruled. The W. A. Co. (it was the only one of the respondents which offered any resistance to the granting of the prayer of the petition) demurred to the petition as amended and subsequently filed an answer in which it claimed in effect that neither on March 17, 1905, nor on August 31, 1906, was Eliza mentally incompetent to execute those instruments, that she received adequate consideration for each of them, that they were beneficial to her and in her interest and that they ought not to be canceled. Subsequently the W. A. Co. offered to produce evidence tending to show that on March 17, 1905, on August 31, 1906, and on May 2, 1910, the latter being the date of the deed which by former order of this court was to be cancelled, Eliza was mentally competent to execute each such instrument. In various ways it made [651] this offer and there can be no doubt that it presented to the lower court and preserved for the consideration of this court the question whether it was entitled to produce further evidence on the subject of the mental competency of Eliza to execute each of the three instruments referred to.

In so far as the deed of May 2, 1910, is concerned, it is clear that no error was committed by the trial judge, in these proceedings on remand, in refusing to admit further testimony or other evidence on the subject of Eliza's mental competency on the date of the execution of that deed. At the original trial about 116 witnesses testified, pro and con, on this issue. At that time both parties had their day in court on that subject and made very extensive use

of the opportunity thus afforded them for presenting evidence in support of their respective claims. That evidence received very careful consideration at the hands of this court on the first appeal and a finding was then made with reference to the mental condition of Eliza, to-wit, that she was a congenital imbecile. There must be an end to litigation. The respondent, as well as the petitioner, had ample opportunity to procure and present its evidence of mental competency with reference to the execution of the deed of May 2, 1910, and no reason, either of law or of justice, occurs to us why a second opportunity, with reference to that deed, should be given to the respondent. The finding that on May 2, 1910, Eliza was a congenital imbecile and incompetent to execute the deed of that day is reaffirmed.

The question of the admissibility of the testimony of mental competency, when considered with reference to the lease of 1905, and to the instrument of 1906, did not stand upon precisely the same state of facts. If there was error in the exclusion of [652] the offered testimony in so far as it related to Eliza's mental condition on March 17, 1905, and on August 31, 1906, it was not the error of the trial judge. He construed correctly the order of remand made by this court. It was our understanding and intention in making that order that the finding of mental incompetency, of congenital imbecility, was not to be reopened or disturbed by the circuit judge upon the proceedings on remand even when considering whether those two earlier

instruments or either of them should be cancelled. If there was error, it was the error of this court in thus restricting the issues for the trial on remand. We think that we did err in that respect. As expressly held in the former opinion, neither the lease of 1905 nor the instrument of 1906 was a subject of contention between the parties at the original trial. It is true that there was an allegation in the petition that on March 17, 1905, Eliza was mentally incompetent to execute the lease of that day but that was followed by an express statement that "relief in equity against said lease need not be and cannot be herein prayed for, respondent's sole claim of right to the said lands being now based upon the said deed of May 2, 1910", and in its answer the respondent expressly accepted that statement as correct, that relief in equity against the lease could not be prayed for or had. It cannot correctly be said that the lease of 1905 was in issue at the original trial when both parties expressly represented to the court and to each other in their pleadings that that lease was not in issue. The prayer was for the cancellation of either the lease or the instrument of 1906. When, therefore, under these circumstances, the petitioner was permitted by amendment to put the two earlier instruments in issue, [653] it followed as a correlative and necessary right on the part of the respondent that it should be permitted not only to file an answer with respect to the new allegations but also to defend with evidence against the new prayer for the cancellation

of the two instruments and the new charge that Eliza was mentally incompetent at their respective dates to execute them. It is true that a very large number of witnesses, as above stated, had already testified on the subject of Eliza's condition of mind but her condition on March 17, 1905, and on August 31, 1906, not being among the ultimate things involved the respondent might well have been led not to make any search for evidence relating to her condition on those two particular dates. The respondent's offer was not only to introduce evidence of Eliza's mental condition on the two earlier dates but it was also to present the testimony of one or more experts to the effect that the degeneracy in congenital imbecility grows with the lapse of time. In other words, the offer was to prove that Eliza's mental condition in 1905 and 1906 was not as weak or insufficient as it was in 1910, even assuming that she was incompetent in 1910. There may be, on the part of the members of the court who examined the evidence on the original trial, a temptation to believe that in spite of any new evidence to be adduced their conclusion concerning the degree of Eliza's imbecility would not be affected thereby. Nevertheless the court should not venture any such surmise. The evidence was offered and in our opinion the respondent should have been given an opportunity to present it,—with reference only to its effect on the lease of 1905 and the instrument of 1906.

For other reasons, however, which are about to be stated, this error in the exclusion of evidence was

not prejudicial to the respondent. It may be assumed for the purpose of this phase of the case that on March 17, 1905, and on August 31, 1906, Eliza was [654] an imbecile and mentally incompetent to execute either of those instruments. In our former opinion it was held, after careful consideration, that the better view of the law is that the deed or contract of a mentally incompetent person, who has not been judicially declared insane and whose incompetency is unknown to the other party to the transaction, is not absolutely void but is voidable only and that "in determining whether it should be canceled the nature of the transaction in all its aspects and the good or bad faith of those dealing with the grantor in respect to such transaction should be carefully considered." (31 Haw. 888.) In other words, a deed, lease or other instrument of one mentally incompetent is not to be canceled solely because the person was incompetent but in determining whether it should be canceled all of the equities must be considered, including those in favor of the grantee or lessee as well as those in favor of the grantor or lessor. In the case at bar, as already held, while Eliza was an imbecile and mentally incompetent the W. A. Co. had no knowledge of that incompetency at the time that it dealt with her in 1910. The same must necessarily be true as of 1905 and 1906. Eliza had not been judicially declared incompetent. What are the other surrounding circumstances affecting the lease? Eliza was not the only lessor. Other lessors were

Carlos A. Long, as administrator of the estate of R. W. Holt, Robert L. Colburn, George H. Holt, Edward S. Holt, Helen A. Holt, individually and as guardian of her minor children, Elizabeth K. Richardson and the Hawaiian Realty & Maturity Company, a corporation, acting by its president and its secretary. Still other parties (of the third part) were John F. Colburn and James Lawrence Holt. All of these other parties to the lease, except the children of Helen Holt, were of age and in every way competent [655] to transact their own business affairs and to enter into this contract. The negotiations for the lease were instituted by John F. Colburn, a business man who had some interest in the matter in the capacity of a trustee, by Carlos A. Long, who was an attorney at law, and by C. W. Ashford, also an attorney, who served for some years as one of the judges of the circuit court of the first circuit. Mr. Ashford acted in the matter as attorney for John F. Colburn and perhaps others of the parties lessor. In the evidence there is to be found no reflection whatever upon the mental capacity, the integrity or the business ability of any of the parties lessor other than Eliza. The assumption must be that they were all competent and faithful as well, at least, as ordinarily keen business men. The lease was for a term of twenty-five years from April 1, 1905, and the total rent was at the rate of $9000 per annum for all twenty-seven twenty-sevenths undivided interests in the lands that were being demised (the W. A. Co. at that time owned a

small undivided interest in the lands). The precise terms which were incorporated in the lease were largely if not wholly of the seeking of those who negotiated on behalf of the lessors. They were satisfactory to every one of the competent lessors. Not a word of evidence has been introduced in this case tending to show that the terms secured by the lessors were not the most favorable that could have been secured in 1905. Apparently the W. A. Co. was the only entity that at that time was in a position to make profitable use of the property. The land at that time was wholly uncultivated and covered with noxious weeds, including such well-known pests as lantana and klu. The taxes at that time were four years in arrears. The Holt estate was not in a position to pay them. The lessee undertook to pay the taxes as well as the remainder of the prescribed [656] rent. The consideration that the W. A. Co. undertook to pay for the use of the lands under the lease was adequate. At the date of the lease Eliza's interest was purely contingent but it was within the possibilities that it would become vested shortly after the execution of the lease and for that reason it was important to the lessee to secure that interest, such as it was, as well as the other more definite vested interests. If her interest had vested soon after the date of the lease, Eliza had no funds with which to pay the accruing taxes. She, as well as other lessors, were in some danger of losing their title and interests through enforcement of the government's claim for taxes, past and

future. We think that Eliza's joinder in the lease was wise and beneficial. It enabled her to secure support and maintenance for herself, as will more clearly appear when the instrument of 1906 is under consideration. If, in February or March of 1905, Eliza (by guardian) had by proper petition applied to a court of equity for leave to join in the lease it seems to us that the court of equity so applied to, upon a showing of all of the surrounding circumstances as they existed and as they have been hereinabove recited, would readily have granted the application; and if this is so how can a court now, after the fact, after the lapse of the full period of the lease, after the performance by the lessee of all of the requirements of the lease on its part to be performed, with any propriety cancel the lease? To do so would be to hold in effect that there is no such thing as refusing to cancel an instrument which has been executed by a person mentally incompetent. This lease was for an adequate consideration. All of its terms were fair and reasonable to the lessee and to the lessors. It has been fully performed. It was in the best interests of Eliza and beneficial to her,—fully [657] as beneficial as it could have been if it had been secured and entered into under the careful supervision of a court of equity. There was no fraud, actual or constructive. The imbecility of the lessor did not enter into the transaction. Under these circumstances we can see no equity or justice in canceling the lease.

The only reason which can be suggested as an equity in aid of canceling the lease and the instrument of 1906 is that by doing so Eliza will now be enabled to collect as rents very much larger sums than she was entitled to under the lease. This is not a good reason nor does it constitute an equity, properly so called, in her behalf. At the time of the execution of the lease and even later, at the date of the instrument of August 31, 1906, it was not known to any of the parties or to any one else that pineapples could be successfully or profitably grown on the upper lands of the Holt estate. It was not until about fifteen years later that the W. A. Co. was able to lease the upper lands for pineapple purposes at large rentals. If Eliza had been a perfectly sane lessor and had come forward in 1928 or in 1923, with a request to set aside her lease because the lands thereby demised were of very much greater rental value than that specified in the lease, the courts would have said, in effect, "You must stand by your contract even though it has proven more profitable to the lessee than you and it supposed in 1905." Courts should not now enable her to do that which she could not have done lawfully if she had been sane. It is not an equity in her favor that she leased the land for less than its rental value of fifteen or more years later. She leased it in 1905 for all that it was then worth on the market. It would be inequitable to the lessee to permit a lessor, sane or insane, subsequently to cancel a lease on the ground of greater values sub-

sequently developed, acquired and ascertained. [658]

It is our view of the law that a lease made by an incompetent, who has not been judicially declared insane, to a lessee without knowledge of the incompetency, for an adequate rental and upon other terms that are reasonable and fair, which is beneficial to the incompetent and is in effect a provision in favor of the incompetent for necessaries for his sustenance and comfort,—a lease which has been fully performed and is accompanied by no fraud or other circumstances of inequity to the incompetent,—should not be canceled,—even though the lessee can be restored to the status quo ante.

"Where indeed a contract is entered into with good faith and is for the benefit of such persons, such as for necessaries, there courts of equity will uphold it as well as courts of law." 1 Story's Eq. Jur. (14 ed.) §318. This, inter alia, was quoted with approval in our former opinion (31 Haw. 885). We do not understand this statement of Story's to be in any way qualified by the next succeeding sentence: "And so if a purchase is made in good faith without any knowledge of the incapacity, and no advantage has been taken of the party, courts of equity will not interfere to set aside the contract if injustice will thereby be done to the other side and the parties cannot be placed in statu quo, or in the state in which they were before the purchase." The introductory "and" indicates that the succeeding sentence is not a repetition of what was said in the sentence first here

quoted but deals with a somewhat different state of facts. It is to be noted that in the second sentence no reference is made to the element of "benefit" to the incompetent or of the contract being "for necessaries;" and the second sentence adds the element of necessity of restoration to the status quo when it does not appear that the contract was for the benefit of the incompetent, as for necessaries. [659]

Judge Story (14 ed., §317), also quoted in 31 Haw. 885, further says: "The ground upon which courts of equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics, and otherwise non compos mentis, is fraud. Such persons being incapable in point of capacity to enter into any valid contract or to do any valid act, every person dealing with them, knowing their incapacity, is deemed to perpetrate a meditated fraud upon them and their rights. And surely if there be a single case in which all the ingredients proper to constitute a genuine fraud are to be found it must be a case where these unfortunate persons are the victims of the cunning, the avarice, and corrupt influence of those who would make an inhuman profit from their calamities. Even courts of law now lend an indulgent ear to cases of defense against contracts of this nature, and if the fraud is made out will declare them invalid." It is important to bear in mind that, as thus stated by Judge Storey, the ground upon which courts of equity interfere to set aside the

contract of an imbecile is FRAUD. If, therefore, the surrounding circumstances and the evidence show clearly that there was no fraud, actual or constructive, but that on the contrary the contract entered into by the imbecile and by others, all as lessors, is in every way fair, favorable and beneficial to the imbecile and is one which a court of equity, if appealed to in advance of its execution, with knowledge of all the circumstances, would advise and authorize the guardian of the imbecile to execute as being in the best interests of the ward, a cancellation of the contract would not be justified. In such a case the imbecility does not enter into or contribute to the transaction.

"The mere fact that a party to an agreement was a lunatic will not operate as a defense to its enforcement, or as ground for its cancellation. A contract executed or executory made with a [660] lunatic in good faith, without any advantage taken of his position, and FOR HIS OWN BENEFIT," (the capitals are the author's) "is valid both in equity and at law. And where a conveyance or contract is made in ignorance of the insanity, with no advantage taken, and with perfect good faith, a court of equity will not set it aside, if the parties cannot be restored to their original position, and injustice would be done." 2 Pomeroy's Eq. Jur. (4 ed.) §946. This was also quoted with approval in our former opinion (31 Haw. 887). In this instance also the second sentence, similarly introduced by "and," adds a statement of the necessity

of restoration to the status quo when the fact that the instrument was for the benefit of the incompetent is not a feature in the case. This view is further strengthened by the fact that the author capitalized the words "for his own benefit" in the first sentence. That to his mind was an important element of the circumstances stated by him which would leave the contract "valid both in equity and at law," without consideration of the status quo.

"The tendency of the modern decisions is to broaden out the rule above stated, and to refuse rescission or cancellation of any ordinary contract or conveyance of an insane person, if it is shown to be fair, reasonable, based upon an adequate consideration, and beneficial to the afflicted person, although, of course, inadequacy of consideration or any misrepresentations as to value of the subject-matter will be held fatal to such a contract." 2 Black on Rescission and Cancellation (2 ed.) §256.

"An exception to the general rule that persons of unsound mind are not bound by their contracts is to be found in contracts for necessaries for the lunatic himself." 16 A. & E. Ency. L. 625. [661]

"It has been held in many cases that even where the contracting party was shown to have been suffering from impaired mental faculties, yet if the transaction in question was fair and honest and what the party might reasonably be expected to do under all the circumstances, courts will not set aside such a transaction, for the reason that the

mental lack has not entered into the act." Rieckhoff v. Goddee, 215 Ill. App. 141, 144.

"Courts of Equity ever watch with a jealous care every contract made with persons non compos mentis, and always interfere to set aside their contracts however solemn, in all cases of fraud, or when the contract or act is not seen to be just in itself, or for the benefit of such persons; but when a purchase is made in good faith, without knowledge of the incapacity, and no advantage is taken, for a full consideration, and that consideration goes manifestly to the benefit of the lunatic, courts of equity will not interfere therewith. 1 Story Eq. §§227, 228; 1 Chitty on Contracts, 191; Molton v. Camroux, 2 Exc., 487. If a court of equity in any case sets aside the deed of a non compos, it will ordinarily administer the equity of having him to pay back to the other party the money or other thing received of him. And when it appears that the consideration is full and the lunatic is not able to put the other party in statu quo, or, if the benefit received is actual and of a durable character, in either case, the courts of equity will not be inclined to set aside the conveyance. Carr v. Holliday, 1 Dev. & Bat. Eq., 344, and same case, 5 Ired. Eq., 167." Riggan v. Green, 80 N. C. 175, 176, 177 (30 Am. Rep. 77, 79).

"When it appears that the consideration is full and the lunatic is not able to put the other party in statu quo, or if the benefit received is actual and

of a durable character, in either case, the courts of equity will not be inclined to set aside the conveyance." 18 Ency. Pl. & Pr., 767. [662]

"It does not necessarily follow, when there has been an adjudication by the probate court that a person is insane, that the insanity is of that character which disqualifies him from making a valid contract for necessaries." Stannard v. Burns' Admr., 63 Vt. 244, 246.

"The trial court went off entirely on the single question of insanity, and would consider nothing else. It misapprehended the controlling principles of law which should have governed the case. * * * The great weight of authority is, that deeds of persons in fact insane, but not so adjudged, are generally held to be voidable and not absolutely void. * * * If the transaction was fair and reasonable, and based upon a valid consideration, without fraud, and there was no circumvention, overreaching or undue advantage taken of the grantor's mental condition, and the contract was made in good faith and was fair, and was for her benefit and to her best interests, then the court ought to have sustained the deed and held it absolute under the circumstances of the case." Green v. Hulse, 57 Colo. 238, 242, 243.

"The contract of an imbecile has never been held by this court to be absolutely void but only voidable. * * * The committee for an insane person may avoid the contract of his ward if the contract be one to the disadvantage of the ward, but if the

contract be one which a court of equity regards as advantageous and of lasting benefit to the ward, no rescission or avoidance of the contract will be decreed if it is otherwise enforceable. * * * This was a most equitable and reasonable contract so far as the Casebiers" (including the incompetent) "were concerned but rather burdensome, as it appears to the court, for appellant Smith" (the grantee) "for the old folks, or one of them, may live several years, in which event his undertaking would not be a profitable one to him in a financial way. * * * The best interest of the old people is the [663] sole consideration—the only thing that concerns this court in this litigation. They are entitled to care and attention to the end of their days, and as Smith undertook to furnish this and to take pay from their estate, thus preventing them becoming a charge upon their family and their community, it was a most advantageous arrangement for them. The committee should have continued it." Casebier v. Casebier, Committee, 193 Ky. 490, 493, 494.

"It has been decided in this state and elsewhere, over and over again, that the deed of a person of unsound mind, especially before he has been adjudged a lunatic, is not void but is voidable only. * * * The mere fact of insanity, even when clearly proved is not sufficient ground upon which to authorize a court of equity to set aside a deed; but there must, in addition, exist some other equitable grounds warranting the cancellation. If the

price is adequate and the transaction fair, neither the insane grantor nor his committee has an absolute right to have the conveyance cancelled; and only when there is injustice or inequity will a court of equity be authorized or justified in interposing to annul a transaction and to restore the parties to the statu quo ante. Unless the grantor, by reason of his insanity or imbecility, has been imposed upon and has suffered some injustice, no reason exists for the cancellation of the deed; and without reason therefor the transaction cannot be disturbed. * * * The deed was not necessarily void, only voidable, and unless there was unfairness or injustice, for instance an inadequate consideration, the deed should not be set aside." Clay v. Clay's Committee, 179 Ky. 494, 495, 496 (also referred to with approval in 31 Haw. 886).

Concerning contracts that have been fully performed it is said in 24 A. & E. Ency. L. 612, 613; "Where the contract has [664] been fully and voluntarily performed before relief by rescission is sought, it is only where the most forceful reasons exist for granting equitable relief that a court of equity or a court exercising equitable powers will interpose to decree the rescission of the contract; and this is true even though the circumstances of the case are such that were the contract unperformed, the court would not decree the specific performance on behalf of the other party. Indeed, it has been frequently held that nothing short of actual fraud or mistake will justify the

court in granting rescission of an executed contract. This rule is especially applicable where intervening rights of innocent third persons would be impaired by granting rescission."

The instrument of 1906 was not signed by Eliza's husband. Under section 2993, R. L. 1925, which was in effect in 1906, "no sale or mortgage of" a wife's "real estate shall be valid without the written consent of her husband." If the instrument of 1906 was a conveyance of any interest of Eliza's in the land, it was invalid for lack of her husband's written consent. If that instrument was susceptible of two constructions, one leading to invalidity and the other to validity, it should be given the construction which leads to validity—in order thereby to carry out the intention of the parties. The instrument contains no apt words of conveyance of an interest in land. It can only be thought to have that effect because of the rule that "a gift of the income of property is to be construed as a gift of the property itself." In re Makaka, 29 Haw. 815. But this is a general rule. It does not necessarily follow that because there is a gift or transfer of income from lands there is implied or results therefrom by operation of law a gift or transfer of the title to the land. The ex- [665] ception is as well settled as the rule itself, that if in the instrument under consideration it appears that the testator or grantor did not intend a conveyance of the land or of an interest in it there is no such conveyance. In re Makaka,

supra, 815, 818, citing earlier Hawaiian cases and other authorities; Rawlins v. Harbottle, 13 Haw. 297, 300, 301. There is no indication in the instrument of 1906 of any desire or intention to convey an interest in the land. The language is clear that what is sold and transferred by Eliza is "all her title and interest in and to any and all rents, issues and profits to which she may hereafter be entitled or which may be due and payable to her by, through or under the lease to the Waialua Agricultural Company, Limited, dated the 17th day of March, 1905. *** Or by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to demand, receive, collect and receipt for all such rents, issues and profits from whomsoever due during the term of the natural life of her, the said Eliza R. P. Christian." This language is unambiguous. There is no provision made in the instrument for the joinder therein, in any capacity, of Eliza's husband. The exception, therefore, and not the rule, applies in this instance. The assignment and transfer was of the rents only and not of the reversion or of any interest in the land. In so far as appears from the evidence, on August 31, 1906, as well as on March 17, 1905, Eliza had no income or other means of support. Her interest in the land was purely contingent. It might prove to be, upon vesting, a one-third interest, or it might prove to be an interest much smaller than one-third, or it might

never vest at all. For two or three years prior to March, 1905, Eliza had lived with and had been supported by Annie Holt Kentwell, who [666] was her cousin. By the express terms of the instrument of 1906 Annie Kentwell undertook to support and maintain Eliza for and during the remainder of her, Eliza's, natural life. In entering into this contract (1906) neither of the parties below knew or could know how long a period of time would elapse before Eliza would become entitled to a share of the rents under the lease or how much of the rents Eliza would become entitled to if she ever became entitled to any, or that she would, in fact, ever become entitled to any. Annie took those chances. As events subsequently happened, a period of seventeen years elapsed before Eliza's father died and Eliza became entitled to any of the rents. In other words, for seventeen years Annie performed her obligations under the contract of 1906, supporting and maintaining Eliza, without any compensation and without any certainty as to when her compensation would begin to accrue, if at all. It is true that after the allowance of the amendments to the petition, Annie filed an answer in which she says that she "now claims no rights of any kind by virtue" of the instrument, but neither her answer nor her present attitude can in anywise affect the nature or the status of the instrument of 1906 or the rights of the W. A. Co. thereunder. By the deed of May 2, 1910, Annie Kentwell, a mentally competent person, transferred all of her

rights under the instrument of 1906 to the W. A. Co. She cannot now, by her answer in this case, cause any diminution of the rights which she transferred by her deed.

The lease of 1905 secured to Eliza a possibility, however uncertain or dim it was, of obtaining from her contingent interest in the land the means of self-support. By the assignment of 1906 she transformed that possibility, uncertain and dim as it was, into [667] a present and real undertaking by Annie Kentwell to provide her for the rest of her days with support and maintenance. The assignment of 1906, including as it did a transfer of rents, if any, which might accrue under the lease of 1905, and transferring also the rents accruing thereafter from whatever source, was beneficial to Eliza. In effect, it was so regarded in our former opinion in this case when the assignment and Annie Kentwell's contract therein to support Eliza were referred to as being of the surrounding circumstances or elements or equities which led us to the conclusion that the deed of 1910 was not beneficial to Eliza and should be canceled. We there said: "That it was not beneficial to Eliza to dispose of her interest at the time the deed was signed is obvious. She was then living with her father and the Kentwells at the home of the latter in Oxford. Her life, because of her imbecile condition, was very restricted and her wants were accordingly simple. There was no necessity for her to have more than enough money to supply them. Annie Kentwell, by

the instrument of August 31, 1906, to which we have already referred, had undertaken to support Eliza during her life. She was in no danger, therefore, of becoming a public charge or of not being supplied with the things necessary to her sustenance and comfort. In her circumstances it would clearly be the part of wisdom to hold on to her contingent interest when by doing so she might eventually become the owner of a vested and more valuable interest. It was certainly of no benefit to her to exchange her interest for a sum of money which she did not need and which she herself did not receive." (31 Haw. 896.) But if she had not had those assurances of money and support from her lease of 1905 and her assignment of 1906, the effect on the deed of 1910 might conceivably have been different. That cannot be decided now. [668]

For the petitioner it is argued that Eliza did not receive any consideration for the lease of 1905, or for the instrument of 1906. While it is true that the rents under the lease were not paid to her even after the death of her father in 1922, that is because she had assigned them to Annie Kentwell. She was not entitled to any rent under the lease until 1922. She did, however, receive valuable consideration, both for the lease and for the assignment, in the form of support and maintenance from Annie Kentwell and is entitled, under the assignment of 1906, to continue to receive that support and maintenance during the remainder of her

life. In addition, the property was preserved from tax liens and sales and was greatly improved.

While it was held in our former opinion that a conveyance by a mentally incompetent person who has not been judicially declared insane and whose incompetency is not known to the person he deals with, is voidable and not void, no consideration was given to the question, which had not then arisen, whether, when an incompetent conveys or assigns to one who has knowledge of the incompetency and then the grantee or assignee conveys or assigns to a third person who has no knowledge of the incompetency of the first grantor or assignor, the conveyance or assignment to the innocent third person is void or is voidable. The authorities on this point are in conflict. We think that the rule better supported by reason is that the property passes to the innocent third person freed from the taint which it received by reason of the guilty knowledge of the first grantee or assignee.

"There are two special rules on the subject which have been settled since an early day; one being a mere application of the general doctrine, and the other a necessary inference from it. [669] The first is, that if a second purchaser, for value and without notice, purchases from a first purchaser, who is charged with notice, he thereby becomes a bona fide purchaser, and is entitled to protection. This statement may be generalized. If the title to land, having been passed through successive grantees, and subject in the hands of each to prior outstand-

ing equities, comes to a purchaser for value and wtihout notice, it is at once freed from these equities; he obtains a valid title, and, with a single exception, the full power of disposition. This exception is, that such a title cannot be conveyed, free from the prior equities, back to a former owner who was charged with notice." 2 Pomeroy's Eq. Jur. (4 ed.) §754.

"We have repeatedly held that the deed of a person of unsound mind is not void, but merely voidable, and this being true it will not be set aside as to a bona fide purchaser for value and without notice of the unsoundness of mind of the grantor. This is especially true as to a second purchaser of the land. * * * If a second purchaser for value and without notice purchases from a first purchaser who is charged with notice, he thereby becomes a bona fide purchaser and is entitled to protection." Campbell v. Kerrick, 142 Ky. 279, 280, 281. To the same effect is Bevins v. Lowe, 159 Ky. 439, 443.

"The contract of a person of unsound mind, like that of an infant, is not void, but voidable only, if made before inquest. * * * If a second purchaser for value and without notice purchases from a first purchaser who is charged with notice, he thereby becmes a bona fide purchaser and is entitled to protection. * * * Where a deed is not void ab initio, but only voidable, the title passes to the grantee and consequently a sale by him to [670] a bona fide purchaser without notice passes the title." Arnett's Com. v. Owens, 23 Ky. L. R. 1409 (65 S. W. 151, 152).

"Had the defendants purchased directly from Oliver Odom for value, and without notice of his mental incapacity to make a deed, a court of equity would not ordinarily set aside the deed. * * * We do not see that the condition of the defendants is any worse because they bought mediately and not immediately. * * * If the title of an innocent purchaser for value, and without notice, can be upset for the alleged mental incapacity of one grantor, it can be done though the grantor may have been a very remote one." Odom v. Riddick, 7 L. R. A. (N. C. 1890) 118, 119.

In view of the rule which we have already adopted in this case that, when the deed of an incompetent is to a person not having knowledge of the incompetency requires that an innocent third person in the position above described should not be placed in a worse position than he would have been in if he had been an innocent, direct taker from the hands of the incompetent. When the W. A. Co. received the deed of Annie Kentwell, of May 2, 1910, it did so, as we have already held, without knowledge of the incompetency of Eliza. In our opinion the deed from Annie Kentwell, a competent person, to the W. A. Co., did operate transfer to the company the right which Annie had secured from Eliza by the assignment of 1906.

No decision of the United States Supreme Court holding to the contrary has been called to our attention. Kendall v. Ewert, 259 U. S. 139, is not

on the point. In that case the conveyance was by an Indian, who was a common and habitual drunkard, to one Smith and about a year later Smith conveyed to the defendant Ewert. The latter considered himself legally incapable of purchasing direct [671] from the Indian because he (Ewert) was employed at the time by the government in Indian affairs and an existing statute prohibited all persons employed in Indian affairs from having any interest or concern in any trade with the Indians. Ewert, therefore, arranged with Smith that Smith should take the deed from the Indian and then a year later should convey to him, Ewert. This program was carried out. The evidence in the case abundantly showed that at the time of the transaction between the Indian and Smith, Ewert had complete knowledge of the habits of the Indian in the matter of drinking to excess. In other words, Ewert took his deed from Smith and procured the taking of the deed by Smith as his agent, in both instances with entire knowledge of the incompetency of the grantor. There was no occasion for the court to consider, and it did not consider, what the law would be if Ewert had been an innocent subsequent grantee taking from an earlier grantee who had knowledge of the incompetency of the grantor. Dexter v. Hall, 82 U. S. 9, has already been considered at some length, by this court in its former opinion. Hall, the grantor, had been judicially adjudged to be a lunatic and at the time of the execution of the power of attorney was in confinement in a

lunatic asylum under judicial commitment. Under this power of attorney the land was conveyed to persons who afterwards conveyed to Dexter, the defendant. Under these circumstances Dexter, the subsequent grantee, as well as the earlier grantee who took direct from Hall through the latter's attorney in fact, was legally chargeable with knowledge of the insanity of Hall. As stated by this court in its former opinion, Hall's confinement under committment in the lunatic asylum "in itself was sufficient to inform any one coming in contact with him that he was in no condition to transact business and that it would be hazardous to deal with him." (31 [672] Haw. 877.) In that case, therefore, the subsequent taker took with guilty knowledge of the grantor's incompetency, as clearly as did the earlier grantees; and there was no occasion to consider, and the court did not consider, what the law would be in a case in which the subsequent grantee took innocently from an earlier grantee who had taken with guilty knowledge. And see Luhrs v. Hancock, 181 U. S. 567, discussed in our former opinion (31 Haw. 877-879).

Another question remains to be considered, with reference to the deed of 1910. In our former opinion it was held that restoration to the status quo could be accomplished by returning Eliza and the W. A. Co. to the position of tenants in common, which they would have occupied, after 1922, if the deed of 1910 had not been executed by Eliza, on the theory that in a partition suit a court of equity,

with its wide range of powers, could secure to the W. A. Co. a continuation of the benefit of the improvements which it had erected in reliance upon the deed from Eliza. At that time no consideration was given by the court, as a careful examination of its opinion will indicate, to the fact that large and costly improvements had been constructed by the W. A. Co., in reliance upon the deed of 1910, on lands other than Holt estate lands. More specifically, no consideration was given to the fact of the reconstruction in 1921 by the W. A. Co. of the Wahiawa dam and the creation thereby of a reservoir extending back into the mountains for a distance of several miles along both the north and the south forks of the Kaukonahua stream and covering about 300 acres, the reconstruction in 1931 costing the company the sum of about $210,000. Nor was any consideration given at that time to the construction of a ditch more than four miles in length to lead the waters from the Wahiawa dam to the cane lands of the W. A. Co., including lands of the Holt estate as [673] well as other lands of the company. Similarly, no consideration was given by the court to the establishment of the Poamoho pump by the W. A. Co. on grant 235 belonging to the Holts but with ditches and pipe lines (on non-Holt lands) through which the water raised by the Poamoho pump was forced and carried to cane fields both on and off the Holt lands. It is true that a very slight reference was made to these improvements (which had been constructed away from the Holt

lands) in one of the briefs of the respondent filed on the first appeal but we can find no reference to this subject in the brief of the petitioner filed on the first appeal. In any event, the fact remains that the existence of these costly improvements away from the Holt lands was not considered in the former opinion with reference to its effect on the issue of restoration to the status quo. It should be considered now.

We think that the construction of these improvements, costly though they were, on land other than Holt lands, need not prove to be an impediment to a restoration of the status quo. They and the land on which they are situated are the property solely of the W. A. Co. Eliza has no right, title or interest in them or in the land occupied by them. She has, however, or, after the execution and delivery of the deed from the W. A. Co. to her, will have some interest in the Holt estate land (at its southeasterly corner) on which a comparatively small part of the Wahiawa reservoir is situated and also has, or will have, similar interest in the lands occupied by other reservoirs, pumps and other improvements erected by the W. A. Co. on the Holt lands. We think that there is much force in the argument presented by the W. A. Co. to the effect that such relief as the W. A. Co. is entitled to at the hands of Eliza should be afforded it in this suit and not left to consideration and treatment [674] in a future partition suit. The provisions set forth in the concluding paragraphs of

this opinion are intended to accomplish an equitable restoration to the status quo.

The W. A. Co. suggests as an impediment to the restoration to the status quo that the Wahiawa dam and reservoir and the Poamoho pump were constructed for the purpose of a "unified," larger sugar-cane plantation and that if the deed of May 2, 1910, is canceled and in consequence a part of the Holt estate cane lands is restored to Eliza, the company will lose a part of the use, benefit and efficiency of these costly instrumentalities of irrigation. The circuit judge, by means purely of mathematical calculation, found that the loss to the W. A. Co. of Eliza's share in the cane lands of the Holt estate would still leave the Wahiawa dam and reservoir "90% to 95% effective." The total area of the Holt lands under cultivation in cane by the W. A. Co. is 1622.95 acres. One-third of that area, if set apart for Eliza, would be 540.98 acres. The total net area of the W. A. Co. cane land, including the Holt lands, is 9,904 acres. All of the Holt cane lands, therefore, constitute 15½% of all of the W. A. Co. cane lands and Eliza's one-third of the Holt cane lands would be a little over 5% of the total lands in cane planted by the W. A. Co. Upon partition the W. A. Co. might be deprived of 5% of its present area of cane lands upon which it could no longer use Wahiawa waters. No witness who took the stand at the trial gave any testimony categorically as to whether the efficiency of the Wahiawa dam and reservoir would be diminished

in any degree by the deprivation of this 5% of cane lands. It does, however, clearly appear from other testimony, of engineers in the employ of the W. A. Co., that intermittent supplies of water from lands above Helemano (the Holt property) are used as [675] much as possible in order to conserve the Wahiawa supply since the latter is itself somewhat inconsistent. There are periods of time, occasionally, when the Wahiawa reservoir is very low, or becomes entirely exhausted and recourse at those times must be had to the Poamoho and other pumps. It is also clear from undisputed testimony that pumped waters are more costly to the W. A. Co. than waters originating in the mountains and flowing on the surface by gravity. Upon this state of the evidence the only finding can be that efficiency of the Wahiawa dam and reservoir will not be appreciably diminished by the loss to Eliza of one-third of the Holt estate cane lands, if such one-third in cane lands shall be awarded to her by the court in a future partition suit. Hence the possibility of the loss of one-third of the Holt cane lands is not an impediment to status quo.

Under the terms of the lease of March, 1905, all improvements made on the lands by the lessee were to revert to the lessor. Since the lease is being sustained, this provision should be complied with. Any improvements made solely in reliance upon the lease should be permitted to revert to the lessor. Ordinarily, improvements made by the W. A. Co. on the leased land prior to May 2, 1910, would be re-

garded as having been made in reliance upon the lease alone. It may be, however, that some or all of the improvements made prior to May 2, 1910, were substantially renewed or replaced after the delivery of the deed of that date. It may be, also, that some of the improvements, as for example, roads or railroads, built prior to May 2, 1910, were after that date added to in such a way as to make them essential parts of a larger system of improvements of a similar nature. All such renewals, replacements or additions made after the date of the deed cannot be regarded as having been made solely in reliance upon the lease but must be deemed to have [676] been made in reliance upon every right possessed by the W. A. Co., including its supposed title under the deed of May, 1910. Improvements, therefore, even though made prior to May 2, 1910, which have been substantially replaced, renewed or added to after that date, cannot in equity be permitted to revert to the lessor under the terms of the lease but must be treated as though wholly constructed after May 2, 1910.

Edward S. Holt, one of the nine children of Owen J. Holt, is the owner of an undivided one twenty-seventh interest in the Holt lands. The children of Elizabeth Holt Richardson, a daughter of the same Owen J. Holt, are the owners of another undivided one twenty-seventh interest in the Holt lands. It is contended by the W. A. Co. that the existence of these outstanding two twenty-sevenths interests will require in a future partition suit the

joinder of their owners as necessary parties and will place in jeopardy the rights of the W. A. Co. to secure a sufficient and just restoration to the status quo. The answer to this contention seems to us to be that the construction of improvements by the W. A. Co., whether on or off the Holt lands, was with full knowledge on its part of the existence of these two outstanding interests and that no act or omission of Eliza's, whether by deed or lease or otherwise, has operated or could operate to affect in any way any of the rights of the owners of these two outstanding interests in a future partition suit. Whatever those rights were on the part of the owners prior to the execution of the deed of May 2, 1910, by Eliza, they have remained the same so far as that particular conveyance was concerned. In other words, in constructing the improvements, the W. A. Co. did not rely and could not have relied upon Eliza's deed of May 2, 1910, for protection against the owners of either or both of the outstanding two twenty-sevenths interests. [677]

The only other entity mentioned as a necessary party to a future partition suit is the Territory of Hawaii. Just what the interest of the Territory is in the Holt lands does not clearly appear, although there is a suggestion in the appellant's reply brief that it would be a necessary party because of "lands purchased for school purposes." If the Territory purchased one or more lots of

land for school purposes from the W. A. Co., out of Holt lands, it is inconceivable that the W. A. Co.'s interest in that regard cannot be easily protected in a future partition suit. If the record now before us shows that such a sale was made by the W. A. Co. to the Territory after May 2, 1910, Eliza can be required by the decree in this suit to convey to the Territory all of her right, title and interest in such school lands.

The Territory of Hawaii, it does appear, is the owner of certain lands eastward and mauka of the Holt lands and adjoining the latter. The mere fact that the Territory is such an adjoining owner does not render it a necessary or proper party in a partition suit.

This subject of restoration to the status quo is here considered purely with reference to its effect upon the cancellation of the deed of May 2, 1910. Irrespective of the subject of status quo the lease of March, 1905, and the instrument of August 31, 1906, should be sustained. If sustained they afford a complete protection to the W. A. Co. against any award of rents or damages.

In our opinion the decree should provide:

I.

That the deed of May 2, 1910, be canceled and that the W. A. Co. reconvey to Eliza all of the interest which it has acquired from her under and by virtue of that deed upon her payment [678] to

the W. A. Co. of the sum of $30,000, with interest at six per cent per annum from May 2, 1910, to the date of the final decree herein, or upon her assuring to the W. A. Co. the payment of said sum together with interest by a mortgage upon the interest so reconveyed or in any other satisfactory manner; and that the deed of reconveyance so required of the W. A. Co. be upon the condition subsequent, that immediately after its execution and delivery Eliza shall execute and deliver to the W. A. Co. the deeds and grants which are in the next paragraph required of her.

II.

(a) That, immediately after the execution and delivery to Eliza of the W. A. Co.'s deed required by paragraph I hereof, Eliza convey to the W. A. Co. all of her right, title and interest in and to (1) the land at or near the southeastern end of the Holt lands which is occupied by the waters of the Wahiawa reservoir when the waters in that reservoir reach to the top of the spillway of the Wahiawa dam, together with additional land along the northwestern or Holt side of the Wahiawa reservoir when at its extreme height, of a sufficient width to permit of reasonable care, maintenance and use of the reservoir along that side; (2) all of that portion grant 235 which is occupied by the Poamoho pump and its accessories and as much more as may be reasonably necessary for the con-

venient and effective care, maintenance and use of that pump and its accessories; (3) each and all of those portions of the Holt lands which are occupied by reservoirs, dams and camps constructed by the W. A. Co. and as much additional land adjoining each of said reservoirs (including dams) and camps on all sides thereof as is reasonably necessary for the convenient and effective care, maintenance and use thereof; and (4) all portions of the [679] Holt lands upon which the W. A. Co. has constructed and maintains pumps and their accessories and as much land wholly around each of said pumps and accessories as is reasonably necessary for the convenient and effective care, maintenance and use of said pumps.

(b) That Eliza grant to the W. A. Co. by a good and sufficient written instrument, permanent rights of way for all ditches, flumes, syphons, pipe lines, railroads, roads, electric power lines, telephone lines and other utilities, if any, which have been constructed and are being maintained by the W. A. Co. on the Holt lands or any part or parts thereof, together, in each of the instances just recited, with additional land on each side of each such ditch, flume, syphon, pipe line, railroad, road, electric power line, telephone line and other utility above referred to, of such width as may be reasonably necessary for the convenient and effective care, maintenance and use of each such utility so referred to.

(c) That the execution and delivery by Eliza

to the W. A. Co. of the deeds and grants by this paragraph II required, immediately after the execution and delivery to her by the W. A. Co. of the deed from it by paragraph I hereof required, shall be a compliance with and performance of the condition subsequent named in paragraph I above.

III.

That the W. A. Co. by a sufficient written instrument assure to Eliza such rights of way in her behalf as may be reasonably necessary, over, under or across each ditch, flume, syphon, pipe line, railroad, road, electric power line, telephone line and other utility, if any, constructed and maintained by the [680] W. A. Co. on the Holt lands as aforesaid, and rights of way for which are now required from Eliza in favor of the W. A. Co. under paragraph marked II hereof—meaning hereby to assure to Eliza at the hands of the W. A. Co. such rights of way over, under or across the utilities mentioned above as may be reasonably necessary for access by Eliza and those acting under her, from each part of the common Holt lands which may be awarded to her on partition to each other part of the Holt lands which may be likewise awarded to her on partition, as well as access by her over, under or across each such utility from or to any nearby public highway to or from any part of the lands so awarded to her on partition.

That the instruments mentioned in this paragraph be executed and delivered last but immediately

after the delivery of the instruments required by paragraph marked II above.

IV.

(a) These provisions in the preceding paragraphs are intended to assure to the W. A. Co. restoration NOW, in this suit, to it of the improvements which it has constructed and is maintaining on the Holt lands as well as the continued use and benefit of those which it has constructed off of the Holt lands.

(b) If Eliza and the W. A. Co. cannot agree upon (1) a more specific definition or description than is herein contained of the "additional" strips of land provided for in the foregoing paragraphs for the convenient and effective care, maintenance and use of the lands, utilities and ways which are specifically described in the foregoing paragraphs, and (2) an enumeration and a description of the improvements made by the W. A. Co. prior to May 2, 1910, which, under the views in this opinion expressed, should revert to Eliza under the terms of the lease of March 17, 1905, then the case will be remanded to the circuit judge for such [681] further proceedings as may be necessary for the judicial determination of (1) the extent, definition and description of each and all of such "additional" land and (2) an enumeration and a description of the improvements made by the W. A. Co. prior to May 2, 1910, which, under the views in this opinion

expressed, should revert to Eliza under the terms of the lease of March 17, 1905.

The decree appealed from is reversed and a decree or a remanding order, as the case may be, will be entered in this court upon presentation.

ANTONIO PERRY.
CHARLES F. PARSONS.
BARRY S. ULRICH
(Ulrich & Hite on the brief) for petitioner.
H. PHLEGER and
A. L. CASTLE
(Brobeck, Phleger & Harrison and Robertson & Castle on the briefs) for respondent Waialua Agr. Co. [682]

DISSENTING OPINION OF BANKS, J.

I cannot agree with the majority of the court that it was error to cancel the lease of 1905 and the instrument of 1906.

It seems to be the opinion of the majority that the lease of 1905 is incontestable by Eliza Christian for the reason that it was taken in ignorance of her imbecility and was beneficial to her. It also seems to be the opinion of the majority that the instrument of 1906 is incontestable by Eliza Christian, so far as the Waialua company is concerned, for the reason that the Waialua company purchased

from Annie Kentwell for a valuable consideration, her interest in the rents that had been assigned to her by the instrument of 1906, in ignorance of Eliza Christian's imbecility. It is also inferable from the opinion of the majority that they consider that the instrument of 1906 is incontestable by Eliza Christian, even as to Annie Kentwell, for the reason that the consideration for the instrument was the agreement of the latter to support the former during her life. I cannot agree with any of these conclusions.

Speaking of the lease the majority stated their view of the law as follows: "It is our view of the law that a lease made by an incompetent, who has not been judicially declared insane, to a lessee without knowledge of the incompetency, for an adequate rental and upon other terms that are reasonable and fair, which is beneficial to the incompetent and is in effect a provision in favor of the incompetent for necessaries for his sustenance and comfort—a lease which has been fully performed and is accompanied by no fraud or other circumstances of inequity to the incompetent—should not be canceled—[683] even though the lessee can be restored to the status quo ante.

It is thought by the majority that the view that the lease is incontestable by Eliza Christian regardless of whether the Waialua company can be restored to its status quo is supported by the doctrine announced by Judge Story in his work on Equity Jurisprudence (Vol. 1, 14 ed.). This doctrine was

quoted in the former opinion of this court and is now requoted by the majority. I take the liberty of quoting it again (§317): "The ground upon which courts of equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics, and otherwise non compotes mentis is fraud. Such persons being incapable in point of capacity to enter into any valid contract or to do any valid act, every person dealing with them, knowing their incapacity, is deemed to perpetrate a meditated fraud upon them and their rights. And surely if there be a single case in which all the ingredients proper to constitute a genuine fraud are to be found, it must be a case where these unfortunate persons are the victims of the cunning, the avarice and corrupt influence of those who would make an inhuman profit from their calamities. Even courts of law now lend an indulgent ear to cases of defense against contracts of this nature, and if the fraud is made out will declare them invalid." I see nothing in this language which justifies the conclusion that the contract of an imbecile, fairly entered into by the other party without knowledge of the imbecile's mental state and which was for the imbecile's benefit, cannot be avoided when the facts show that the status quo of the party claiming under the contract can be restored. What is clearly implied by Story's language is that a contract made with an [684] idiot, with knowledge of his idiocy, is a fraud on the idiot and therefore void and that when under

these circumstances the defense of idiocy is interposed to any claim made under the contract even courts of law lend an indulgent ear to it and if the idiocy is proven will declare the contract invalid. In the succeeding section (318) of his treatise, under the heading "Contracts with Person Non Compos Mentis Should Be Evidenced by Utmost Good Faith," the great author said: "But courts of equity deal with the subject upon the most enlightened principles, and watch with the most jealous care every attempt to deal with persons non compotes mentis. Whenever from the nature of the transaction there is not evidence of entire good faith (uberrimae fidei), or the contract or other act is not seen to be just in itself or for the benefit of these persons, courts of equity will set it aside or make it subservient to their just rights and interests. Where indeed a contract is entered into with good faith and is for the benefit of such persons, such as for necessaries, there courts of equity will uphold it as well as courts of law. And so if a purchase is made in good faith without any knowledge of the incapacity, and no advantage has been taken of the party, courts of equity will not interfere to set aside the contract if injustice will thereby be done to the other side, and the parties cannot be placed in statu quo, or in the state in which they were before the purchase."

The majority are of the opinion that the portion of this section which precedes the words "and so" relates to a situation entirely different from that

described in the portion following these words. Their view of this section is thus stated in the opinion: "Where indeed a contract is entered into with good faith and is for the benefit of such persons, such as for [685] necessaries, there courts of equity will uphold it as well as courts of law." 1 Story's Eq. Jur. (14 ed.) §318. This, inter alia, was quoted with approval in our former opinion (31 Haw. 885). We do not understand this statement of Story's to be in any way qualified by the next succeeding sentence: "And so if a purchase is made in good faith without any knowledge of the incapacity, and no advantage has been taken of the party, courts of equity will not interfere to set aside the contract if injustice will thereby be done to the other side, and the parties cannot be placed in statu quo, or in the state in which they were before the purchase.' The introductory 'and' indicates that the succeeding sentence is not a repetition of what was said in the sentence first here quoted but deals with a somewhat different state of facts. It is to be noted that in the second sentence no reference is made to the element of 'benefit' to the incompetent or of the contract being 'for necessaries'; and the second adds the element of necessity of restoration to the status quo when it does not appear that the contract was for the benefit of the incompetent, as for necessaries."

I think it is hardly fair to an author to single out any one word he may happen to have used and interpret his entire thesis by it. For instance,

Story uses language which if it stood alone might be susceptible of the construction that if an imbecile conveyed property of great value to one who was ignorant of the imbecility and the consideration was the agreement of the grantee to furnish the imbecile with support during his life the conveyance must stand although the imbecile died a month after the conveyance and only one hundred dollars had [686] been spent for his support. But when Story's entire thesis is considered I imagine no one would contend that this is what he meant. Story also uses language in the second paragraph of the section from which a sophist might argue that unless a "purchase" was involved the doctrine the author thought sound would have no application. I think no court would listen with patience to such a contention, it being evident from the context that all contractual dealings with an imbecile were under consideration.

Story was laying down what he considered equitable principles by which the respective rights of lunatics and those dealing with them should be determined. One of these principles was that if a person deals with a lunatic in good faith and the transaction is for the benefit of the lunatic, such as furnishing him with necessaries, the lunatic should not be permitted to escape responsibility to the detriment of the other contracting party.

I do not believe that it is implicit in the language used by Story that every contract entered into in good faith with a lunatic and for his benefit

should be held incontestable when it appears that the other contracting party would suffer no harm from the cancellation of the contract. This would be to withhold from these unfortunate persons the protection which courts of equity have always given them and instead of making the contract subservient to their just rights and interests would make their rights and interests subservient to the contract. The second paragraph of the text, I think, was intended by the author to make this entirely clear. His introduction of it with the phrase "and do," I believe, indicates this. The para- [687] graph should be interpreted as though the introductory words were "therefore" or "that is to say," indicating that what followed was to be considered as corollary to or a conclusion from what preceded it. (For interpretation of the phrase "and so" and the word "so" see Blanton v. State, 1 Wash. 265, and Clem v. State, 33 Ind. 418, 431.) If the phrase "and so," as it was used by Story, is given the meaning which I think it imports, the second clause of his thesis means that contracts made with an imbecile in good faith, without any knowledge of the incapacity and without taking advantage of the imbecile, should be upheld unless the party dealing with the imbecile can be restored to his status quo and thus protected against injustice. Pomeroy, in his work on Equity Jurisprudence §946, which is quoted by the majority, expresses his view of the law in almost the same language as that used by Story. In view of the cases cited in support of their theory,

which I have examined carefully, I am led to the conclusion that these authors did not intend and could not have meant to lay down a rule that simply because a contract is for the benefit of the lunatic such contract will be upheld even though the parties could be restored to status quo.

In further support of their conclusion the majority also quote from six cases—Rieckhoff v. Goddee, 215 Ill. App. 141; Riggan v. Green, 80 N. C. 175; Stannard v. Burns' Admr., 63 Vt. 244; Casebier v. Casebier, Committee, 193 Ky. 490; Green v. Hulse, 57 Colo. 238, and Clay v. Clay's Committee, 179 Ky. 494.

In Rieckhoff v. Goddee, William Rieckhoff, an insane person, had a judgment against Augusta Greenberg which he assigned to defendant Goddee. William's wife, Anna, who was his conservatrix and the complainant, sought to set aside the as- [688] signment of her husband and alleged that at the date of the assignment he was insane. The defendant Goddee had made advances to William's mother, Karolina Rieckhoff, and had also given thirty dollars to William after the assignment. The majority quote the following dictum from the Reickhoff case (p. 144): "It has been held in many cases that even where the contracting party was shown to have been suffering from IMPAIRED MENTAL FACULTIES, yet if the transaction in question was fair and honest and what the party might reasonably be expected to do under all the circumstances, courts will not set aside such a trans-

action, for the reason that the mental lack has not entered into the act." (Italics mine) The following cases are cited by the Illinois court in support of its statement of the law: English v. Porter, 109 Ill. 285; Kelly v. Nusbaum, 244 Ill. 158; Fitzgerald v. Allen, 240 Ill. 80. An examination of these cases discloses that in the dictum the Illinois court had in mind the rule that is applicable when there is not entire but only partial lunacy. That the quotation is only a dictum is shown by the fact that in the Reickhoff case the Illinois court held the assignment void because of the assignee's knowledge of the assignor's insanity, and refused to require the complainant to restore to Goddee the advances he had made.

In Riggan v. Green, plaintiffs, heirs of a lunatic, sought to recover a tract of land which their lunatic ancestor deeded to Brown and the latter to the defendants. Brown paid five hundred dollars, the full value of the land, and the money was used to extinguish an execution against the lunatic grantor. As a result of this transaction the lunatic was enabled to keep another piece of land which later descended to the plaintiffs. [689] It is apparent from a study of that case that the reason why the court did not apply the doctrine of restoration to status quo was that the plaintiffs would gain nothing by rescission conditioned upon restoration. In refusing to set aside the deed the court particularly had in mind this fact as appears on page 177 of the opinion: "From such a state of facts, it would be ap-

parent to the chancellor, and he would so decide, that a rescission of the deed would produce no benefit to the plaintiffs if coupled with the duty and obligation to replace defendants in statu quo, whilst it would be a great inconvenience and injustice to the defendants, and thereupon the conclusion would be not to interfere to set aside the deed, but leave the same to be operative and valid."

I agree with the Stannard case in holding the lunatic liable for necessaries. The only distinction I need make between the case at bar and the Casebier and Green cases is that in the latter cases no offer of restoration was made and no word on that subject was said. Therefore I believe they do not support the rule that where a contract is for the benefit of the lunatic it will be upheld even though the parties can be placed in statu quo.

The Clay case is clearly distinguishable on its facts from the case at bar. In the Clay case the lunatic, George Clay, and his sister, Letitia, who owned the remainder interest in the land, deeded 296 acres to S. Brooks Clay, but reserved a life interest in fifty acres. The latter paid $12,000 cash and agreed to make eleven annual payments of $2040 each with interest, evidenced by eleven notes. Brooks also agreed to pay $5000 upon the death of George, making the total consideration [690] $39,440. Shortly after the deed was executed suit was brought to have it canceled, which relief was granted by the chancellor. The Kentucky court of appeals, in reversing the decree of the chancel-

lor, held that the consideration was fair and covered the full value of the land. Apparently the land was of no greater value when the suit was brought than it was when the deed was made. Under these circumstances the insane person, having received the full value of the land, would have been no better off by returning the consideration and getting his land back.

Moreover, in the later case of Cash v. Bank of Lowes, 196 Ky. 570, 245 S. W. 137, the court set aside a contract which was beneficial to the lunatic. Nellie Hawkins, a lunatic, and her five children, were living with her brother Noah Wagoner on a farm. Noah held the land under a lease. Nellie and Noah desired to purchase this farm so as to acquire a permanent home. To that end a deed was obtained from the owner and Nellie executed two notes and two checks covering the purchase price of the land. R. L. Cash, who was to receive the money, presented the two checks drawn on the defendant bank. The bank refused payment on the ground that Nellie Hawkins was mentally incompetent at the time she signed the checks. Two days later she was adjudged insane. Cash sued the defendant bank to recover on the two checks. Judgment was rendered by the lower court in favor of the defendants, and in affirming it the appellate court said (p. 573): "The rule refusing a rescission where the contract was made in good faith before inquest does not necessarily prevail if the parties may be placed in statu quo. Inasmuch as

appellant, R. L. Cash, has a purchase money lien against the real estate which will save him harmless the parties [691] may be placed in statu quo. No one a party to this record will suffer by a cancellation of the checks, notes and deed, as directed by the judgment below."

The majority also quote the following from 2 Black on Rescission and Cancellation (§256, p. 726). "The tendency of the modern decisions is to broaden out the rule above stated, and to refuse rescission or cancellation of any ordinary contract or conveyance of an insane person, if it is shown to be fair, reasonable, based upon an adequate consideration, and beneficial to the afflicted person, although, of course, inadequacy of consideration or any misrepresentations as to value of the subject-matter will be held fatal to such a contract." The first case cited by Black in support of his statement of the law is National Metal Edge Box Co. v. Vanderveer, 85 Vt. 488. The first syllabus of this case is as follows: "As a general rule, equity will not set aside the fair and reasonable executed contract of a lunatic, if made in the ordinary course of business on sufficient consideration, of which the lunatic has the benefit, and the parties cannot be placed in their former state, unless the mental condition of the lunatic was known to the other party, or he was chargeable with knowledge of it," and this clearly indicates that Black had no thought of laying down the rule which the majority think should govern the lease of 1905 and the instrument

of 1906. The facts in that case were that Vanderveer and his wife executed a note and mortgage to the plaintiff company to secure a loan made by the latter to the former. The money loaned was used to pay off a former mortgage against the property of the Vanderveers who were being pressed for payment. The trial court entered a decree foreclosing the mort- [692] gage and this decree on appeal was affirmed. Under the facts it is clear enough that equity required that the plaintiff be paid back the money which it had loaned the lunatic and which was used for the lunatic's benefit. This was a complete restoration of the plaintiff to its status quo and was no injustice to the lunatic. But let it be supposed that instead of giving a mortgage to secure the loan the lunatic, for the same amount of money, had leased the land for a term of years and before the expiration of the lease the land had become of very much greater rental value, far in excess of the amount paid him. If the suit had, under these circumstances, been for the purpose of canceling the lease upon the condition that the lunatic return to the lessee what he had received I think under the law as I conceive it and as it was recognized by the Vermont case, the relief prayed for would have been granted. Such a decree would afford the insane person the protection which courts of equity are zealous to afford persons in that unhappy state without doing any injustice to an innocent party who had dealt with the lunatic. This is the great principle upon which equity deals with contracts

between lunatics and parties who are innocent and act in good faith. I know of no case which holds that this principle is to be applied only in instances where the insane person receives no benefit and is not to be applied to instances where the insane person does receive benefit.

The rule which I think applies to the lease of 1905 finds support not only in Story and Pomeroy, as I interpret their language, but is also stated as follows in 32 C. J. 734, 735: "According to the weight of authority, however, where there has been no inquisition or adjudication of insanity, a contract, [693] entered into upon an adequate consideration of which the insane person has had the benefit, and made by the other contracting party in good faith, without fraud or undue influence and without knowledge of the insanity or reason to suspect it, will be upheld against the insane person or his representatives, and it cannot be avoided by them, where the parties cannot be put in statu quo. * * * The right to avoid a voidable contract may be exercised where all the parties thereto can be placed in statu quo, and the good faith of the sane party will not prevent its avoidance."

Smoot in his work on The Law of Insanity, pp. 284, 285, also states the rule as follows: "The manifest hardships worked by the rule above discussed" (the "void rule") "has led to a different rule in a majority of the states where the contract of one insane is held to be voidable only. This is especially evident in the later decisions. It is contended

with force that it would be highly unjust to allow a person, merely because he is mentally unsound, to enjoy the fruits of a contract without giving something in return, or that an insane person be allowed to recover back what he has attempted to convey without being required to return that which he himself has received thereunder. This is especially true where the contract is reasonable with reference to the advantage accruing under it to the non compos, and been fully executed, and the opposite party cannot be put back into the same position he occupied before the contract was entered into. It therefore seems to be the better rule, supported by the decisions of the courts of a majority of the states, that a non compos, not under guardianship at the time of the contract in question, will not be allowed to repudiate [694] an executed contract, where the other party to such contract has acted in good faith and without knowledge of such insanity, and cannot be put back in statu quo with reference to the matter, unless it be shown that such other party should be charged with knowledge of the insanity, that the transaction was without adequate consideration, or that there were other circumstances which would render the transaction inequitable. But where such other person can be put back in statu quo, the mere fact that the contract would have been an advantage to it will not prevent its rescission. This rule is denied by the courts of a few states, who insist that the doctrine of innocent purchaser is no defense, even where the luna-

tic's contract is voidable only." See also 14 R. C. L. 584; 46 A. L. R. 419; 34 A. & E. Ann. Cas. (1914D) 867; 1 Williston on Contracts 494-496. The principles announced by these writers have been many times judicially recognized and applied.

In Czyrson v. Roseau County Nat. Bank, 172 Minn. 420, Lieberg, an insane person, executed a note and a chattel mortgage to the defendant bank before his insanity had been adjudicated and at a time when he had no guardian. The money loaned by the bank was used to pay off taxes on the lunatic's homestead and to pay interest on a mortgage thereon. Lieberg was subsequently adjudicated insane and his guardian sued to cancel the note and mortgage. The trial court (p. 420) "directed that plaintiff have judgment that the note and mortgage be of no effect against Lieberg provided he or his guardian should pay a stated sum to the defendant, and that if payment should not be made, then that the note and mortgage remain in force." In affirming this judgment the appellate court said [695] (pp. 421, 422): "The fact that one of the parties to a contract is incompetent although he has not been so adjudicated, does not render the contract void but only voidable; and such incompetency is no ground for setting it aside where the other party has no notice of the incompetency and derived no inequitable advantage from it, and where the parties cannot be placed in statu quo. * * * The transaction was an honest one. It was for the benefit of Lieberg. He lost nothing. It would be an injustice for the

bank to lose its money and an unjust advantage would accrue to Lieberg. The circumstances and established facts do away with the fraud that is deemed to result from transactions with incompetent persons when such incompetency is known. It is the purpose of Justice to protect the incompetent, not to arm him to do wrong to others. Under the law the transaction is voidable and the guardian has chosen to have it avoided. Seeking this equitable relief, the court observing the unconscionable result, imposed as a condition precedent that the bank should be paid the full sum which it expended for the purposes mentioned at the solicitation of the wife and son and of which Lieberg's estate received and still has the full benefit. This was proper."

Contracts for necessaries are without question highly beneficial to the lunatic. They are nevertheless ordinarily not binding on the lunatic, the party furnishing the necessaries being entitled, in order to protect him against injustice, to recover from the lunatic or his estate, on an implied contract, the reasonable value of the necessaries furnished him. The rule is thus stated in 32 C. J.: "Generally, when necessaries are furnished to a person who by reason of mental incapacity cannot himself make a contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own [696] property; his liability for necessaries is deemed rather a benefit than a disadvantage to him (Sec. 523, p. 739). "Since the

liability is created by law the amount of the liability ordinarily is limited to the reasonable value of the necessaries furnished and not what the insane person may have promised to pay. So there may be a recovery on an express contract for necessaries to the extent of their value; and it has been held that one who lends to an insane person may recover to the extent that the money is used for necessaries, but no more" (Sec. 524, p. 740).

On this subject Smoot says (§350, p. 289): "A seeming exception to the general rule that the contracts of a non compos are voidable is that which gives force to contracts for the procuring of necessities. Such implied obligation is considered as being merely confirmative of an obligation existing independent of express contracts, since under an implied contract the insane person is liable for the reasonable value of necessities furnished him and his family, if he has one. This seems to be the most universal rule, and has been held to apply to persons adjudged insane, as well as to those not so adjudged, provided, of course, the guardian himself fails to furnish the necessities. The reason for the rule is very apparent and is twofold: (1) As a matter of humanity and public policy, it is necessary that such unfortunates be provided for. Unless there was some provision for recovering the value of the necessities furnished to supply such wants, there would be little likelihood of any one doing so. In such a case, such insane person, however extensive his estate, might be reduced to an

object of charity and want. (2) Under the old rule of equity, that the law will imply a promise to give quid pro quo, justice will imply a promise to pay a reason- [697] able equivalent for the benefits actually received, and which are necessary and proper for the insane person's comfort and protection. This has been extended to include material and services furnished for the benefit of his separate estate. It has also been held that, as the services of an attorney may be necessary to protect the property and liberty of the non compos, he will be liable for the reasonable value of legal services rendered him by an attorney, but not for any specific amount determined by the promise of the non compos." See also 14 R. C. L. §§41, 42, pp. 586-588, and 1 Williston on Contracts, §255, p. 498.

Hancock v. Haile, 171 S. W. (Tex.) 1053, was a case in which the plaintiff, a lunatic, transferred his horses and farming implements to the defendant in consideration of the latter's agreement to care for the former as long as he lived unless the lunatic "should become dangerous and confinement shall become necessary." Under this contract the defendant supplied the lunatic with neeessaries for almost two years, after which time he was confined in an asylum. Ten years later the lunatic was restored to sanity. After restoration and his release from the asylum he brought an action against the defendant to recover the difference between the value of the property he had delivered to the defendant and the value of the necessaries furnished him. The jury

found that the plaintiff was incapable of contracting at the time he transferred his property. The trial court entered judgment for the plaintiff. In affirming this judgment the appellate court said (p. 1055): "It is also well settled that, while an insane person or a minor is bound by his contract for necessaries furnished him, the extent of his obligation thereunder is to pay the reasonable value of [698] such necessaries, irrespective of the price which he has agreed to pay."

In Nielsen v. Witter, 111 Cal. App. 742, and Estate of Nielsen, 111 Cal. App. 744, Nielsen, a lunatic, paid $1500 to the defendant attorney for legal services. Subsequently the guardian of the lunatic brought an action against the attorney for the money paid him. The relief asked was not entirely but partially granted, the court holding that the lunatic was entitled to recover the sum of $250 which was the difference between the amount he had paid and what the court held to be the reasonable value of the attorney's services.

The principle that is applied in such cases is eminently just and equitable alike to the lunatic and to the party who has furnished him with such things as were reasonably requisite for his support or otherwise essential for his protection. Any other principle would be unjust and inequitable either to the lunatic or to the party dealing with him. For instance, it would be unjust and inequitable to the lunatic, who in his transactions with others is without the capacity to protect himself, to hold

him unconditionally bound by his contracts. It would be equally unjust and inequitable to dismiss, without remedy, the other party who in good faith had made expenditures either of money or services for the support and maintenance of the lunatic or for the protection of his rights. And so courts of equity have evolved the great doctrine under which both parties may be shielded from injury.

Through all the fabric of the law there runs like a red thread this just and equitable thought—if a contract is made by an imbecile with one who is ignorant of the imbecility and [699] the consideration is fair and is for the benefit of the imbecile it is voidable and not void and will be upheld if by setting it aside injustice will be done the innocent party. Such contract will also be upheld when after restoring to the other party what he is justly entitled to the lunatic is no better off than if the contract remained uncanceled. Equity does not trouble to interfere when the result sought would be fruitless. In other words, and to state the thought affirmatively, I think all contracts made by an imbecile should be canceled, even though the other contracting party was ignorant of the imbecility, if it is to the advantage of the imbecile to cancel them and the rights of the innocent party can be adequately protected.

I come now to a discussion of the instrument of 1906. I think this instrument was absolutely void as between Eliza Christian and Annie Kentwell, and being so I think the latter conveyed nothing to

the Waialua company. The evidence is undisputed that Annie Kentwell took this instrument with full knowledge of Eliza's imbecility. I think therefore that under the view of the law expressed by this court in its former opinion the instrument is void ab initio. In that opinion the court said (p. 873): "* * * We think, also, that if the Waialua company, or its agents duly authorized to obtain her signature to the deed in question, had actual knowledge of her incompetency or had knowledge of facts which would put a reasonable person upon inquiry, which inquiry if honestly pursued would lead to such knowledge, the deed would, as between the parties, be entirely void."

In Kendall v. Ewert, 259 U. S. 139, the Supreme Court of the United States announced and applied this rule in the case [700] of a deed that had been executed by a mentally incompetent grantor whose incompetency was known to the grantee. The deed was canceled without requiring the return of the consideration. The court went even further than this and compelled the grantee to discharge a mortgage lien he had created against the land and to account to the administrator of the grantor for the rents and profits the grantee had received during the lifetime of the grantor.

I can conceive of no reason why the rule should not be applied to the instrument of 1906 as well as to a deed. In my opinion it was not rendered incontestable by the fact that the consideration for its execution was Annie Kentwell's agreement to sup-

port Eliza. Annie Kentwell, as I have already observed in discussing contracts for necessaries made by insane persons, would not, however, be left remediless in case she had furnished Eliza with necessary support. The law as established by judicial authority, being a just and righteous concept, would imply an obligation on Eliza's part to adequately reimburse Annie for her expenditures.

I cannot agree with the conclusion of the majority that because the Waialua company was an innocent purchaser Eliza is precluded from asserting her right to set aside this 1906 instrument. Since Annie Kentwell received nothing under this instrument she had nothing to convey to the Waialua company by the deed of 1910.

In Dexter v. Hall, referred to by the majority, the court had before it the question of whether a grantee of land who had for a valuable consideration and without notice of the insanity of the owner taken a deed from a prior grantee whose [701] deed was void because of the owner's insanity was protected. The court answered this question in the negative. In other words, the court established the principle that when a conveyance of land is made under circumstances that render it void ab initio a subsequent purchaser from the grantee, although ignorant of the fact which renders the deed to his grantor void and although he paid a valuable consideration for the land, is defenseless in a suit to have the deed which he received canceled. So far as I know this principle has never been aban-

doned or modified by the high tribunal which established it.

In their opinion the majority, in considering the Dexter case, say that Hall, who was the primary grantor, and been judicially adjudged to be a lunatic and was in confinement in a lunatic asylum under judicial commitment. From this the majority conclude that Dexter, who was the purchaser from Hall's grantee, had in contemplation of law notice of Hall's lunacy and therefore was not an innocent purchaser, I respectfully suggest that this conclusion is based on a factual misapprehension. This appears from the brief of Dexter's counsel. In arguing that his client should be protected because he was an innocent purchaser counsel said: "There are certain facts which should be remembered. 1. There was no proof that Hall and Dexter or Hall and Page ever met, or that Page or Dexter knew of or suspected the insanity of Hall, nor is there any evidence of unfairness, fraud, or inadequacy of price. In that case the transaction stands. * * * 3. So far as appeared, Hall had not been placed under a committee, nor had he been pronounced insane by judicial decision, and if that had not been done, his contracts are valid; no undue advantage having been taken of him in ob- [702] taining them. 4. No complaint was made that the consideration was inadequate, or that it was not fully paid by the purchaser. And there was no allegation of fraud in obtaining the power, or in executing the grant." These statements were not challenged by opposing

counsel. Moreover, it nowhere appears in the opinion of the court that Dexter was denied relief because he was not an innocent purchaser but because the original deed of Hall was on account of his insanity void ab initio. The conclusion seems to me to be inescapable that when an instrument is void ab initio even subsequent innocent claimants under it have no defense in a proceeding to set it aside.

It was the opinion of the court in the former appeal that under the broad powers of equity in partition proceedings the rights of the Waialua company could, upon cancellation of the deed of 1910, be fully secured. I do not understand from the opinion of the majority that there is any recession from this view. Another means of protecting the Waialua company has, however, been substituted. Under the opinion of the majority, if the parties do not make certain factual agreements, the case is to be remanded to the circuit judge with instructions to take testimony, make the necessary findings and enter a decree accordingly. This would entail further expense and delay, which I consider unnecessary. The better course, it seems to me, would be to now enter a final decree which, so far as this jurisdiction is concerned, would end the litigation.

I think the decree appealed from should be affirmed.

JAS. J. BANKS. [703]

[Title of Court and Cause.]

STIPULATION AND AGREEMENT FOR PURPOSES OF DECREE TO BE ENTERED.

Filed Dec. 19, 1934 at 10:40 o'clock a. m. (s) Robert Parker, Jr., Clerk Supreme Court. [704]

WHEREAS, in the decision and opinion of this Court heretofore duly made and entered in the above entitled matter on, to-wit, May 3, 1934, it was provided that if petitioner, Eliza R. P. Christian, and respondent, Waialua Agricultural Company, Limited, could and did agree upon (1) a more specific definition and description of certain lands and rights of way therein provided to be transferred to Waialua Agricultural Company, Limited, and (2) an enumeration and description of improvements made by Waialua Agricultural Company, Limited, prior to May 2, 1910, to revert to Eliza R. P. Christian, as her interest may appear, a final decree would be entered in this Court pursuant to said decision and opinion; and

WHEREAS, the parties hereto have, as herein indicated, so agreed; NOW, THEREFORE,

SOLELY for the purpose of permitting the entry of a final decree in said matter at this time and of avoiding a remand [705] to the Circuit Court for further proceedings, and without waiving any objections which the parties hereto have or may have to the final decree to be entered herein and/or to the decision and opinion of this Court pursuant to which said decree is to be entered and/or to any other action of this Court in the above en-

titled matter, and without prejudice to all errors and imperfections which the parties hereto claim or may claim with respect to the action of this Court in making and entering its said decision and opinion of May 3, 1934, as aforesaid, and in making and entering of its final decree to be entered herein, pursuant to said decision and opinion, and pursuant to the provisions hereof, IT IS STIPULATED AND AGREED by the parties hereto that a more specific definition and description of the additional lands and rights of way to be conveyed by Eliza R. P. Christian to Waialua Agricultural Company, Limited, and to be agreed upon pursuant to the provisions of said opinion and decision to permit the entry of a final decree herein is as follows, all being shown on a certain map entitled "Map Showing Land and Improvements thereon situated in the District of Waialua, Oahu, Territory of Hawaii, considered in decision of the Supreme Court of Hawaii, dated May 3, 1934, case No. 2078," hereto attached, marked Exhibit A, and made a part of this stipulation, and more particularly described in certain schedules of descriptions prepared by James B. Mann, hereto annexed, marked Exhibit B, and made a part hereof:

(a) That the land referred to as the land at or near the southeastern end of the Holt lands which is occupied by the waters of the Wahiawa reservoir, together with additional land of sufficient width to permit its reasonable care, [706] maintenance and use, as referred to and described in

subdivision a-1 of paragraph II on page 29 of the typewritten decision and opinion of this Court heretofore entered and filed herein on May 3, 1934, for the purposes of said decree may be more particularly described as said description is set forth on page 98 of said Exhibit B;

(b) That that certain land, being a portion of Grant 235, occupied by the Poamoho pump and its accessories, with additional land reasonably necessary for its convenient and effective care and maintenance, described in subdivision a-2 of paragraph II on page 29 of the typewritten decision and opinion of this Court heretofore entered and filed herein on May 3, 1934, for the purposes of said decree may be more particularly described as said description is set forth on page 69 of said Exhibit B;

(c) That all those portions of the Holt lands which are occupied by reservoirs, dams and camps constructed by the Waialua Agricultural Company, Limited, with additional land as referred to and described in subdivision a-3 of paragraph II on page 29 of the typewritten decision and opinion of this Court heretofore entered and filed herein on May 3, 1934, for the purposes of said decree are the lands set forth and more particularly described on the following pages of said Exhibit B:

Helemano 1 camp	Page 12
Helemano 3 camp	" 13
Helemano 4 camp	" 14
Helemano 6 camp	" 15

Helemano 9 camp	"	16
Helemano 10 camp	"	17
Helemano 12 camp	"	18
Opaeula 9 camp	"	19
Opaeula 10 camp	"	20
Opaeula 11 camp	"	21
Overseer's house	"	22
Helemano upper reservoir	"	88
Helemano 3 reservoir	"	89
Helemano 4-A reservoir	"	90
Helemano 4-A domestic reservoir	"	91

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Helemano 6 reservoir	"	92
Helemano 6-B reservoir	"	93
Helemano 9-C reservoir	"	94
Helemano 11 reservoir	"	95
Helemano 12 reservoir	"	96
Portion of Helemano 15 reservoir	"	97

(d) Those lands upon which Waialua Agricultural Company, Limited, has constructed and maintained pumps and their accessories, with additional lands reasonably necessary for their convenient and effective use, as referred to in subdivision a-4 of paragraph II on pages 29 and 30 of the typewritten decision and opinion of this Court heretofore entered an filed herein on May 3, 1934, for the purposes of said decree are those lands more particularly described on page 167 of said Exhibit B;

(e) That all those lands, with additional land adjacent thereto, over which rights of way for

ditches, flumes, siphons, pipelines, railroads, roads, electric power lines, telephone lines, and other utilities referred to by the provisions of subdivision (b) of paragraph II on page 30 of the typewritten decision and opinion of this Court heretofore entered and filed herein on May 3, 1934, for the purposes of said decree are those lands more particularly described on the following pages of said Exhibit B:

		Page
For	Helemano upper ditch	24-25
"	Helemano upper ditch (Poamoho branch)	26
"	Helemano upper reservoir inlet ditch	27
"	Helemano upper reservoir outlet ditch	28
"	Helemano 3 reservoir outlet ditch	29
"	Helemano 4-A reservoir outlet ditch north branch	30
"	Helemano 4-A reservoir outlet ditch south branch	31
"	Helemano 6 reservoir inlet ditch	32
"	Helemano 6 reservoir outlet ditch	33
"	Helemano 6-B reservoir outlet ditch north branch	34
"	Helemano 6-B reservoir outlet ditch south branch	35
"	Helemano 11 reservoir outlet ditch	36
"	Helemano 12 reservoir inlet ditch	37
"	Helemano 12 reservoir outlet ditch	38
"	Helemano 15 reservoir inlet ditch	39

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	Page
For Kemoo ditch extension	40
" Pump 10 high lift ditch	41
" Pump 10 low lift ditch	42
" Wahiawa ditch extension	43-44
" Waialua Agric. Co. Ltd. domestic water line 9	55
" Waialua Agric. Co. Ltd. domestic water line 10	56
" Waialua Agric. Co. Ltd. domestic water line 11	57
" Waialua Agric. Co. Ltd. domestic water line 12	58
" Waialua Agric. Co. Ltd. domestic water line 13	59
" Waialua Agric. Co. Ltd. domestic water line 14	60
" Waialua Agric. Co. Ltd. domestic water line 15	61
" locomotive water line	63
" pump 10 low lift 24" pipe line	65
" pump 10 high lift 30" pipe line	66
" water line from pump 8	67
" Track A	73
" Track B	74
" Track C	75
" Track D	76-77
" Track E	78
" Track F	79
" Track G	80
" Track H	81

	Page
For Track I	82
" Track J	83
" Track K	84
" Track L	85
" Track M	86
" portable track bed	71
" Road 1	101
" Road 1-A	102
" Road 1-B	103
" Road 1-C	104
" Road 1-D	105
" Road 1-E	106
" Road 1-F	107
" Road 1-G	108
" Road 1-H	109
" Road 1-I	110
" Road 1-J	111
" Road 1-K	112
" Road 1-L	113
" Road 2	114-115
" Road 2-A	116
" Road 2-B	117
" Road 2-C	118
" Road 2-D	119
" Road 2-E	120
" Road 2-F	121
" Road 2-G	122
" Road 2-H	123
" Road 2-I	124

	Page
For Road 2-J	125
" Road 2-K	126
	[709]
" Road 2-L	127
" Road 2-M	128
" Road 2-N	129
" Road 2-O	130
" Road 2-P	131
" Road 2-Q	132
" Road 3	133
" Road 3-A	134
" Road 3-B	135
" Road 3-C	136
" Road 3-D	137
" Road 4	138
" Road 4-A	139
" Road 4-B	140
" Road 4-C	141
" Road 5	142
" Road 5-A	143
" Road 5-B	144
" Road 5-C	145
" Road 5-D	146
" Road 5-E	147
" Road 5-F	148
" Road 6	149
" Road 6-A	150
" Road 6-B	151
" Road 6-C	152

	Page
For Road 7	153
" transmission line 1	155
" transmission line 2	156
" transmission line 3	157
" transmission line 4	158
" transmission line 5	159
" transmission line 6	160
" transmission line 7	161
" transmission line 8	162
" transmission line 9	163
" transmission line 10	164
" transmission line 11	165

IT IS LIKEWISE STIPULATED AND AGREED for the purpose of the entry of a decree herein that:

(a) The areas of the lands set forth in the "Schedule of Lands" appearing on said Exhibit A and in said Exhibit B are as follows:

All of:

Grant 235, Apanas 1 and 2 to Jerome Topliff and Lewis Johnson	36.00 acres
Grant 238 to John F. Anderson and Franklin Davis	25.8 "
Grant 431 to Kauohanui	100.00 "

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And Portions of:		
R. P. 4475, L. C. Aw. 7713, Apana 34 to Kamamalu (Boundary Certificate No. 101, Lots 1-12 inclusive)		
Less Helemano School Lot	5.0	12,018.44 acres
Grant 973 to James Robinson, Robert Lawrence and Robert W. Holt	1,765.53	" more or less
TOTAL AREA	13,945.77	acres, more or less;

and that wherever in the record, pleadings, exhibits or testimony heretofore had in said cause, areas of the lands in controversy appear, the same are hereby amended and corrected to conform to the areas above set forth.

(b) In the legend of said map, Exhibit A, the item "Camps" includes 65.1 acres not included in this stipulation which are Hawaiian Pineapple Company camps, and the item "Domestic Water Lines" includes 6.4 acres not included in this stipulation which are Hawaiian Pineapple Company water lines. The item "Roads" includes all roads on the properties in question, whether used by Waialua Agricultural Company, the Hawaiian

Pineapple Company, or by both jointly, all of which roads have been included in this stipulation so that and with the intent that the present interest and right of user of Waialua Agricultural Company, Limited, with respect thereto may be protected in said Waialua Agricultural Company, Limited, as its rights and interests may appear.

IT IS FURTHER STIPULATED AND AGREED that an enumeration and description of the improvements made by the Waialua Agricultural Company prior to May 2, 1910, together with sub- [711] sequent additions, renewals, or replacements thereto, so far as such additions, renewals or replacements can at this time be accurately described, is as follows, reference being made in each instance to the lands on which said improvements are situated as described on the following pages of Exhibit "B"; IT BEING STIPULATED AND AGREED that a final decree may and shall be entered by this court herein upon the facts herein stipulated to and upon such other or further facts as may to the satisfaction of this court appear from the record herein:

CAMPS:

Page

HELEMANO No. 3, built 1906, originally consisting of five wooden frame houses and one bath house; same number houses remaining April 1, 1930; three houses retired in 1934, leaving two houses and 1 bath house 13

Page

OPAEULA No. 9, built 1908 and 1909, consisting of 13 houses and 1 bath house; all remaining; ceilings installed in all houses in 1929 at cost of $1500, and wired for electricity about 1922 19

OPAEULA No. 10, built 1908 and 1909, consisting of nine houses and 1 bath house, all remaining April 1, 1930; ceilings installed in all houses 1929 at cost of $800; wired for electricity in 1931; one house retired 1934 20

HELEMANO OVERSEER'S HOUSE, built in 1905 22

RAILROADS:

TRACK A, of which 1200 feet built in 1906 and 2400 feet after 1910. Track originally consisted of 25-lb. rails, all of which have been replaced since 1910 with 35-lb. rails. All ties have been replaced since 1910 73

TRACK E, built in 1906 with 25-lb. rails; replaced by 35-lb. rails since 1910; all ties likewise replaced since 1910 78

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TRACK F, built in 1906, with 25-lb. rails; replaced by 35-lb. rails since 1910; all ties likewise replaced since 1910 79

TRACK I, 1300 feet, built in 1906; 6300 feet in 1909, and the balance in 1913; original construction all 25-lb. rails since 1910 replaced with 35-lb. rails; all ties replaced since 1910 82

Page

TRACK J, built 1906 with 25-lb. rails; replaced with 35-lb. rails since 1910; all ties replaced since 1910 83

TRACK L, built 1906 with 25-lb. rails; replaced with 35-lb. rails since 1910; all ties replaced since 1910 85

TRACK M, built 1908 with 25-lb. rails; replaced with 35-lb. rails since 1910; all ties replaced since 1910. This track is a storage track, being abandoned as a railroad in 1929 86

DAMS AND RESERVOIRS:

HELEMANO #4-A, (domestic reservoir) built in 1905 91

HELEMANO #3, built in 1906 89

HELEMANO #6, built in 1908; spillway enlarged in 1924 at cost of $1275 92

SIPHONS:

HELEMANO 54", built 1906; new concrete piers installed 1924, replacing old rubble piers; blow-off valve installed 1927; total cost since 1910 and prior to April 1, 1930—$3959.96 ..... 43 and 44

OPAEULA 54", built 1906 ..... 43 and 44

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DITCHES:

WAHIAWA DITCH EXTENSION, built in 1906; $1980 spent in 1931, replacing flumes across the gulch at Helemano #6 Reservoir 43

Page

HELEMANO UPPER DITCH, built 1908; enlarged from 4'6" in width to 6'6" at various times from 1912-1924 at a total cost since 1910 of $10,159 24

HELEMANO UPPER POAMOHO BRANCH, built in 1909 and 1910; wooden flume carrying the water over the gulch was replaced in 1925 by an Armco flume costing $2582 26

HELEMANO LOWER DITCH, built in 1905, and abandoned in 1907 .....

WATERWAYS:

HELEMANO #6 RESERVOIR INLET DITCH, built in 1908 32

HELEMANO #6 RESERVOIR OUTLET DITCH, built in 1908 33

HELEMANO #3 RESERVOIR OUTLET DITCH, built in 1906 29

ROADS, BRIDGES AND FENCES:

ALL OF THE ROADS BELOW THE WAHIAWA DITCH EXTENSION (except Road 1-B) as shown on the map, Exhibit A, were built by Waialua Agricultural Company prior to 1910. THE ROADS ABOVE THE WAHIAWA DITCH were built at various times both by the Waialua Agricultural Company and the Hawaiian Pineapple Company, identification now being practically impossible.

ABOVE THE WAHIAWA DITCH the Waialua Company built a part of Road #3 (page 133), being the portion of the road between the Helemano Upper Reservoir Outlet Ditch and the Poamoho Stream, since 1910; also where the Helemano Upper Reservoir Outlet Ditch crosses Road #3 the [714] old bridge was torn out by Waialua and replaced by a concrete bridge in 1934; likewise above the ditch the bridge or culvert on Road 2-J (page 125) was replaced by a concrete bridge or culvert in 1923.

BELOW THE WAHIAWA DITCH EXTENSION Road 1-B from the Opaeula Gulch to Helemano at Station #3, was built in 1915 by Waialua (page 103).

CLEARING OF CANE LANDS.
SOME TELEPHONE LINES.

Dated: Honolulu, T. H., December 19th, 1934.

ELIZA R. P. CHRISTIAN,
an incompetent person,
By HERMAN V. VON HOLT,
her Guardian,
Petitioner-Appellee,
By (s) BARRY S. ULRICH,
By (s) CHAS. M. HITE,
Her Attorneys.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation,
By ROBERTSON & CASTLE,
[Seal] By (s) ALFRED L. CASTLE,
Its Attorneys.

Approved:

(s) CHARLES F. PARSONS,
Associate Justice Supreme Court of the
Territory of Hawaii. [715]

In the Supreme Court of the Territory of Hawaii.
October Term, 1934.

No. 2078.

Appeal From Circuit Judge First Circuit.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. von HOLT, her Guardian,
Petitioner,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED, and Hawaiian Corporation, James L. Holt and Annie Holt Kentwell,
Respondents.

STATEMENT OF DISQUALIFICATION BY CHIEF JUSTICE COKE.

Filed January 18, 1935 at 9:00 o'clock A. M.
(s) Gus K. Sproat, Deputy Clerk Supreme Court.
[716]

At the time the above entitled cause was pending in the Circuit Court I was employed by Annie Holt Kentwell, one of the respondents in said cause, to act as her attorney therein; I accepted said em-

ployment and performed services for her in connection with said proceeding, for which I expect to receive remuneration. The services performed did not necessitate the entry of my name of record in said cause as the attorney for Mrs. Kentwell but my connection with the case, as her attorney, clearly disqualifies me from sitting as a member of the Supreme Court of Hawaii in the hearing of said cause on appeal and I therefore suggest my disqualification in the hearing and disposition of the above cause.

Dated at Honolulu, Hawaii, January 18, 1935.

(s) JAMES L. COKE,

Chief Justice Supreme Court of Hawaii. [717]

[Title of Court and Cause.]

REQUEST FOR A SUBSTITUTE JUSTICE.

To Honorable Norman D. Godbold, First Judge Circuit Court First Circuit:

Mr. Chief Justice James L. Coke being disqualified to sit with us in the above entitled cause, we, the remaining Justices of the Supreme Court, hereby request and authorize you to sit with us and hear and determine said cause.

Dated the 18th day of January, 1935.

(s) JAS. J. BANKS,

(s) CHARLES F. PARSONS.

Attest:

(s) GUS K. SPROAT,
Deputy Clerk.

Filed January 18, 1935 at 10:00 o'clock A. M.
(s) Gus K. Sproat, Deputy Clerk. [718]

In the Supreme Court of the Territory of Hawaii.

No. 2078.

At Chambers In Equity

Appeal from Decree of Circuit Judge,
First Judicial Circuit.

Hon. A. M. Cristy, Second Judge, Presiding.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her Guardian,
Petitioner-Appellee,

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation, JAMES L. HOLT, and ANNIE HOLT KENTWELL,
Repondent-Appellants.

DECREE.

Filed March 25, 1935 at 12:10 o'clock P. M.
(s) Robert Parker, Jr., Clerk Supreme Court. [719]

The above entitled cause having come duly on for argument in this court upon an appeal duly taken

and perfected by Waialua Agricultural Company, Limited, an Hawaiian corporation, respondent-appellant herein, from the decree duly made and entered in said cause by the Honorable Albert M. Cristy, Presiding Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in equity, on the 6th day of September, A. D. 1932, A. L. Castle, Esq., of the firm of Robertson & Castle, and Herman Phleger, Esq., of the firm of Brobeck, Phleger & Harrison, appearing for said respondent-appellant, and Barry S. Ulrich, Esq., and Charles M. Hite, Esq., of the firm of Ulrich & Hite, appearing for Eliza R. P. Christian, an incompetent person, by Herman V. von Holt, her guardian, petitioner-appellee; and this court having, on May 3, 1934, made, entered and filed its written opinion herein containing its findings of fact and conclusions and rulings of law; and thereafter, pursuant to said opinion and for the purpose of avoiding a remand, the parties hereto agreed to a more specific description of lands, easements and improvements by written stipulation [720] filed herein December 19, 1934, entitled "Stipulation and Agreement for Purposes of Decree to be Entered," as therein more particularly set forth;

NOW, THEREFORE, in pursuance and effectuation of said opinion and of the findings of fact and conclusions and rulings of law so set forth therein as aforesaid, and of the stipulation hereinbefore referred to, IT IS HEREBY ORDERED:

I.

That that certain decree heretofore made and entered by the Honorable A. M. Cristy on September 6, 1932, being the decree herein appealed from, be and the said decree is hereby reversed and set aside.

II.

That subject to the performance or offer of performance made by Eliza R. P. Christian of the terms, conditions and provisions of this decree to be performed by her, that certain deed dated May 2, 1910, by and between John Dominis Holt, Eliza R. P. Christian, Annie Holt Kentwell and Lawrence K. Kentwell, therein named as grantors, and James L. Holt, therein named as grantee, a copy of which deed is annexed to the amended petition on file herein and made a part thereof and marked Exhibit "B", be and said deed is hereby declared and judged cancelled, annulled and void, and of no effect as to Eliza R. P. Christian named as grantor therein, being the same Eliza R. P. Christian appearing herein as petitioner-appellee by her duly appointed guardian. [721]

III.

That respondent Waialua Agricultural Company, Limited, upon the payment to it of the sum of $30,000.00, together with interest thereon at the rate of 6% per annum from May 2, 1910, to the date of the reconveyance hereinafter referred to, or upon the giving to Waialua Agricultural Company, Limited,

by said Eliza R. P. Christian of a good and sufficient first mortgage satisfactory to the said Waialua Agricultural Company, Limited, or to a court having jurisdiction in the premises upon the interest and property restored and conveyed to her pursuant to this decree, as security for the payment of said sum of $30,000.00, together with interest thereon as aforesaid, or upon assurance to the said Waialua Agricultural Company, Limited, of the payment of said sum with interest as aforesaid, satisfactory to said Waialua Agricultural Company, Limited, or to a court having jurisdiction in the premises, shall by good and sufficient deed, which deed shall be joined in by the said Eliza R. P. Christian, quitclaim and reconvey to the said Eliza R. P. Christian, petitioner-appellee herein, upon the terms and conditions of this decree and subject to the exceptions and reservations in fee simple in favor of the said Waialua Agricultural Company, Limited, hereinafter set forth, all of the property and interest therein which the said Waialua Agricultural Company, Limited, acquired from her under and by virtue of the aforesaid deed of May 2, 1910, being an undivided one-third interest in fee simple, unencumbered, in and to all the following described real property, together with all improvements thereon situated, said property being [722] situated in the District of Waialua, City and County of Honolulu, Territory of Hawaii, and more particularly described as follows:

All of:		
Grant 235, Apanas 1 and 2 to Jerome Topliff and Lewis Johnson	36.0	acres
Grant 238 to John F. Anderson and Franklin Davis	25.8	"
Grant 431 to Kauohanui	100.0	"
And Portions of:		
R. P. 4475, L. C. Aw. 7713, Apana 34 to V. Kamamalu (Boundary Certificate No. 101, Lots 1-12 inclusive)	12,018.44	"
Grant 973 to James Robinson, Robert Lawrence and Robert W. Holt	1,765.53 more or less	"
TOTAL AREA	13,945.77 more or less	"

EXCEPTING AND RESERVING therefrom unto the said Waialua Agricultural Company, Limited, in fee simple the real properties, easements, or other interests therein set forth and described in Paragraph IV hereof, being shown on a certain map entitled "Map Showing Land and Improvements thereon situated in the District of Waialua, Oahu, Territory of Hawaii, considered in decision of the Supreme Court of Hawaii, dated May 3, 1934, Case No. 2078," hereto attached, marked Exhibit "A", and made a part of this decree, together with the improvements designated in said Paragraph IV; and the real properties, easements, or other interests therein set forth and described in an exhibit entitled "Descriptions of Permanent Rights of Way," hereto attached, marked Exhibit "B", and made a part of this decree, such exhibit consisting of separate schedules, marked respec-

tively Schedules 1 to 10 inclusive, each description being identified by appropriate reference to said map, Exhibit "A", together with the improvements [723] designated in said Exhibit "B";

Said deed shall contain sufficient provisions assuring to Eliza R. P. Christian such rights-of-way in her behalf as may be reasonably necessary, over, under or across each ditch, flume, siphon, pipe line, railroad, electric power line, telephone line and other utility, constructed and maintained by Waialua Agricultural Company, Limited, on the Holt lands as aforesaid, for the purpose of assuring to Eliza R. P. Christian from Waialua Agricultural Company, Limited, such rights-of-way over, under or across said utilities mentioned above as may be reasonably necessary for access by Eliza R. P. Christian and those acting under her, from each part of the common Holt lands which may be awarded to her on partition to each other part of the Holt lands which may be likewise awarded to her on partition, as well as access by her over, under or across each such utility from or to any nearby public highway to or from any part of the lands so awarded to her on partition.

IV.

That the improvements, real properties, easements and other interests therein to be excepted, and reserved to and to belong to Waialua Agricultural Company, Limited, in fee simple and ab-

solutely referred to in the foregoing Paragraph III are the properties set forth in said Exhibit "B", and (1) the following described real properties, easements and improvements:

WAHIAWA RESERVOIR.

Initial Point in Block 30.

Beginning at the West corner of this piece of land, at the 860 foot contour line on the boundary between Grant 973 to James Robinson, Robert Lawrence and Robert W. Holt and Land Court Application 262, the true azimuth and distance from the end of Course 10 of Land Court Application 262 being 135° 20′ 430 feet more or less, and running:

1. Northeasterly	960 feet	more or less along the 860 foot contour line;

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2. Easterly	1880 feet	more or less along the 860 foot contour line;
3. Southeasterly	80 feet	more or less along the Westerly side of Grant 1092 to Paaluhi;
4. Southwesterly	400 feet	more or less along the Southerly side of North Branch of Kaukonahua Stream;
5. Westerly	2220 feet	more or less along the Southerly side of North Branch of Kaukonahua Stream;
6. Northwesterly	770 feet	more or less along Land Court Application 262 to the point of beginning;

Containing an area of 7.0 acres more or less.

Being shown on a certain map entitled "Map Showing Land and Improvements thereon situated

in the District of Waialua, Oahu, Territory of Hawaii, considered in decision of the Supreme Court of Hawaii, dated May 3, 1934, case No. 2078," hereto attached, marked Exhibit A, and made a part of this decree; this being, by stipulation of the parties, the land at or near the southeastern end of the Holt lands which is occupied by the waters of the Wahiawa reservoir when the waters in that reservoir reach to the top of the spillway of the Wahiawa dam, together with additional land along the northwestern or Holt side of the Wahiawa reservoir when at its extreme height, of a sufficient width to permit of reasonable care, maintenance and use of the reservoir along that side; (2) the following described real property to-wit:

PUMP 10 SITE.

Initial Point in Block 5.

Beginning at the North corner of this piece of land in the middle of Poamoho Stream, the direct azimuth and distance from the center of a 12′ x 12′ shaft being 152° 00′ 300 feet more or less, the coordinates of the center of said shaft referred to [725] Government Survey Triangulation Station "Halemano" being 7,640 feet North and 21,650 feet West, and running:

1.	Southeasterly	400 feet	more or less along the middle of Poamoho Stream;
2.	Southwesterly	400 feet	more or less;
3.	Northwesterly	400 feet	more or less;
4.	Northeasterly	400 feet	more or less to the point of beginning;

Containing an area of 3.8 acres more or less;

together with all the improvements thereon located.

Being shown on said map Exhibit A; being all of that portion of Grant 235 which is occupied by the Poamoho pump and its accessories and as much more as may be reasonably necessary for the convenient and effective care, maintenance and use of that pump and its accessories; (3) all of the following described real property, to-wit:

HELEMANO 1 CAMP.

Initial Point in Block 1.

Beginning at the Southwest corner of this piece of land, on the Northeasterly side of Road 2, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" beginning 12,970 feet North and 21,770 feet West, and running:

1.	Northeasterly	100 feet	more or less;
2.	Southeasterly	190 feet	more or less;
3.	Southwesterly	120 feet	more or less to the Northerly side of Road 2; Thence
4.	Northwesterly	190 feet	more or less along the Northerly side of Road 2 to the point of beginning;

Containing an area of 0.60 acre more or less;

together with all the improvements thereon located.

HELEMANO 3 CAMP.

Initial Point in Block 5.

Beginning at the Southeast corner of this piece of land, on the Northerly side of Road 2, the coordinates of said point of beginning referred to Government [726] Survey Triangulation Station "Halemano" being 10,620 feet North and 18,160 feet West, and running:

1.	Westerly	150 feet	more or less along the Northerly side of Road 2;
2.	Northerly	100 feet	more or less;
3.	Southeasterly	160 feet	more or less; Thence
4.	Southerly	50 feet	more or less to the point of beginning;

Containing an area of 0.3 acre more or less.

HELEMANO 4 CAMP.

Initial Point in Block 5.

Beginning at the end of Course 31 of Boundary Certificate No. 101 on the boundary between Paalaa-Uka and Paukauila, and running:

1.	Northwesterly	225 feet	more or less along the boundary between Paalaa-Uka and Paukauila;
2.	Northeasterly	570 feet	more or less; Thence
3.	Southeasterly	240 feet	more or less; Thence
4.	Southerly	630 feet	more or less to the boundary between Paalaa-Uka and Paukauila; Thence
5.	Northwesterly	360 feet	more or less along the boundary between Paalaa-Uka and Paukauila to the point of beginning;

Containing an area of 5.4 acres more or less;

together with all the improvements thereon located.

HELEMANO 6 CAMP.

Initial Point in Block 6.

Beginning at the Southwest corner of this piece of land on the Northerly side of Road 2, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 8,790 feet North and 14,450 feet West, and running:

1. Northeasterly	420 feet	more or less;
2. Southeasterly	280 feet	more or less;
3. Southerly	160 feet	more or less;
4. Southwesterly	330 feet	more or less along Track I to the Northerly side of Road 2; Thence

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5. Northwesterly	270 feet	more or less along the Northerly side of Road 2 to the point of beginning;

Containing an area of 3.0 acres more or less;

together with all the improvements thereon located.

HELEMANO 9 CAMP.

Initial Point in Block 13.

Beginning at the South corner of this piece of land, on the Northeasterly side of Road 2-E, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 4,540 feet North and 11,030 feet West, and running:

1. Northwesterly	90 feet	more or less along the Northeasterly side of Road 2-E;
2. Northeasterly	90 feet	more or less;
3. Southeasterly	90 feet	more or less; Thence
4. Southwesterly	90 feet	more or less to the point of beginning;

Containing an area of 0.2 acre more or less;

together with all the improvements thereon located.

HELEMANO 10 CAMP.

Initial Point in Block 21.

Beginning at the Northerly corner of this piece of land, on the Southwesterly side of Road 3-B, the coordinates of

said point of beginning referred to Government Survey Triangulation Station "Halemano" being 4,090 feet South and 3,430 feet East, and running:

1.	Southeasterly	230 feet more or less along the Southwesterly side of Road 3-B;
2.	Westerly	250 feet more or less;
3.	Northwesterly	110 feet more or less; Thence
4.	Northeasterly	230 feet more or less to the point of beginning;

Containing an area of 0.8 acre more or less;

together with all the improvements thereon located.

[728]

HELEMANO 12 CAMP.

Initial Point in Block 13.

Beginning at the Southwest corner of this piece of land, about 40 feet more or less Northwesterly from Road 2-K, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 3,300 feet North and 6,580 feet West, and running:

1.	Northerly	200 feet more or less;
2.	Easterly	170 feet more or less;
3.	Southerly	150 feet more or less; Thence
4.	Westerly	180 feet more or less to the point of beginning;

Containing an area of 0.7 acre more or less;

together with all the improvements thereon located.

OPAEULA 9 CAMP.

Initial Point in Block 2.

Beginning at the East corner of this piece of land, on the Northerly side of Road 1, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 13,470 feet North and 16,070 feet West, and running:

1.	Southwesterly	400 feet more or less across the road; Thence
2.	Northwesterly	270 feet more or less to the Southerly side of Road 1; Thence
3.	Northeasterly	300 feet more or less along the Southerly side of Road 1; Thence
4.	Southeasterly	350 feet more or less along the Southerly side of Road 1 to the point of beginning;

Containing an area of 2.5 acres more or less.

OPAEULA 10 CAMP.

Initial Point in Block 3.

Beginning at the Southwest corner of this piece of land, on the Northerly side of Road 1, the coordinates of said point of beginning referred to Government [729] Survey Triangulation Station "Halemano" being 12,170 feet North and 11,610 feet West, and running:

1.	Northerly	270 feet more or less; Thence
2.	Easterly	160 feet more or less;
3.	Southeasterly	310 feet more or less to Road 1; Thence
4.	Westerly	280 feet more or less along the Northerly side of Road 1 to the point of beginning;

Containing an area of 1.3 acres more or less.

OPAEULA 11 CAMP.

Initial Point in Block 7.

Beginning at the West corner of this piece of land, on the Northeasterly side of Road 1, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 10,950 feet North and 6,590 feet West, and running:

1. Northeasterly 70 feet more or less;
2. Southeasterly 100 feet more or less;
3. Southwesterly 70 feet more or less; Thence
4. Northwesterly 100 feet more or less along the Northeasterly side of Road 1 to the point of beginning;

Containing an area of 0.1 acre more or less;

together with all the improvements thereon located.

OVERSEER'S HOUSE.

Initial Point in Block 1.

Beginning at the West corner of this piece of land, on the Northeasterly side of Road 2, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 12,370 feet North and 20,910 feet West, and running:

1. Northeasterly 100 feet more or less;
2. Southeasterly 110 feet more or less;
3. Southwesterly 100 feet more or less; Thence
4. Northwesterly 100 feet more or less along the Northeasterly side of Road 2 to the point of beginning;

Containing an area of 0.3 acre more or less.

[730]

HELEMANO UPPER RESERVOIR.
Initial Point in Block 21.

Beginning at the Northwest corner of this piece of land, on the 990 foot contour line, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 4,210 feet South and 3,580 feet East, and running:

1.	Northeasterly	1770 feet	more or less along the 990 foot contour line;
2.	Easterly	1500 feet	more or less along the 990 foot contour line;
3.	Southwesterly	540 feet	more or less along the 990 foot contour line;
4.	Westerly	1050 feet	more or less along the 990 foot contour line;
5.	Southwesterly	1700 feet	more or less along the 990 foot contour line;
6.	Southwesterly	60 feet	more or less across Road 3-B to toe of dam; Thence
7.	Northwesterly	400 feet	more or less along toe of dam;
8.	Northeasterly	60 feet	more or less across Road 3-B to the point of beginning;
			Containing an area of 27.0 acres more or less;

together with all the improvements thereon located.

HELEMANO 3 RESERVOIR.

Initial Point in Block 1.

Beginning at toe of dam at the Southwest corner of this piece of land, on the Westerly side of Track C, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 14,150 feet North and 20,380 feet West, and running:

1.	Westerly	170 feet more or less along toe of dam; Thence
2.	Northerly	210 feet more or less along toe of dam; Thence
3.	Easterly	170 feet more or less along toe of dam to the Westerly side of Track C; Thence
4.	Southerly	220 feet more or less along the Westerly side of Track C to the point of beginning;

Containing an area of 1.4 acres more or less.

[731]

HELEMANO 4-A RESERVOIR.

Initial Point in Block 6.

Beginning at toe of dam, on the Southeast corner of this piece of land near the Kemoo Ditch Extension, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 9,630 feet North and 17,600 feet West, and running:

1. Westerly	250 feet	more or less along toe of dam;
2. Northerly	260 feet	more or less along toe of dam;
3. Easterly	20[illegible] feet	more or less along toe of dam; Thence
4. Southerly	270 feet	more or less to the point of beginning;
		Containing an area of 1.7 acres more or less;

together with all the improvements thereon located.

HELEMANO 4-A DOMESTIC RESERVOIR.

Initial Point in Block 6.

Beginning at toe of dam, on the Southeast corner of this piece of land, the coördinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 10,330 feet North and 17,600 feet West, and running:

1. Westerly	80 feet	more or less along toe of dam; Thence
2. Northerly	140 feet	more or less along toe of dam; Thence
3. Easterly	80 feet	more or less along the Southerly side of road; Thence
4. Southerly	110 feet	more or less to the point of beginning;
		Containing an area of 0.2 acre more or less.

HELEMANO 6 RESERVOIR.
Initial Point in Block 13.

Beginning at the 685 foot contour line on the Northerly side of this piece of land, on the Easterly side of Road 2-J, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 5,250 feet North and 8,800 feet West, and running: [732]

1.	Northeasterly	640 feet more or less along the 685 foot contour line; Thence
2.	Southerly	1400 feet more or less along the 685 foot contour line; Thence
3.	Northwesterly	870 feet more or less along the 685 foot contour line to the Easterly side of Road 2-J; Thence
4.	Westerly	50 feet more or less across Road 2-J to toe of dam; Thence
5.	Northerly	420 feet more or less along toe of dam; Thence
6.	Easterly	40 feet more or less across Road 2-J to the point of beginning;

Containing an area of 7.0 acres more or less.

HELEMANO 6-B RESERVOIR.
Initial Point in Block 6.

Beginning at toe of dam at the Southwest corner of this piece of land, on the Northeasterly side of Road 2, the coordinates of said point of beginning referred to Government

Survey Triangulation Station "Halemano" being 8,900 feet North and 14,650 feet West, and running:

1.	Northerly	200 feet more or less along toe of dam; Thence
2.	Easterly	360 feet more or less along toe of dam to the Northwest side of Helemano 6 Camp; Thence
3.	Southwesterly	260 feet more or less to the Northeasterly side of Road 2; Thence
4.	Northwesterly	220 feet more or less along the Northeasterly side of Road 2 to the point of beginning;

Containing an area of 2.1 acres more or less;

together with all the improvements thereon located.

HELEMANO 9-C RESERVOIR.

Initial Point in Block 2.

Beginning at the Northeast corner of this piece of land, on the Southwesterly side of Road 1, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 13,090 feet North and 15,450 feet West, and running: [733]

1.	Southwesterly	250 feet more or less along upper side of reservoir; Thence
2.	Northwesterly	300 feet more or less along toe of dam; Thence
3.	Northeasterly	250 feet more or less along toe of dam to the Southerly side of Road 1; Thence

4.	Southeasterly	250 feet more or less along the Southerly side of Road 1 to the point of beginning;
		Containing an area of 1.7 acres more or less;

together with all the improvements thereon located.

HELEMANO 11 RESERVOIR.

Initial Point in Block 7.

Beginning at the 675 foot contour line on the Northerly side of this piece of land, on the Easterly side of Road 1-F, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 10,840 feet North and 6,570 feet West, and running:

1.	Southeasterly	420 feet more or less along the 675 foot contour line; Thence
2.	Southeasterly	1000 feet more or less along the 675 foot contour line; Thence
3.	Southwesterly	200 feet more or less along the 675 foot contour line;
4.	Northwesterly	800 feet more or less along the 675 foot contour line;
5.	Northerly	400 feet more or less along the 675 foot contour line to the Easterly side of Road 1-F; Thence
6.	Westerly	60 feet more or less across Road 1-F to toe of dam; Thence

7. Northerly	300 feet	more or less along toe of dam to the Westerly side of Road 1-F; Thence
8. Easterly	70 feet	more or less across Road 1-F to the point of beginning;
		Containing an area of 7.3 acres more or less;

together with all the improvements thereon located. [734]

HELEMANO 12 RESERVOIR.
Initial Point in Block 13.

Beginning on the 810 foot contour line at the Southwest corner of this piece of land, on the Southeasterly side of Road 2-K, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 3,050 feet North and 6,670 feet West, and running:

1. Northwesterly	60 feet	more or less across Road 2-K to toe of dam; Thence
2. Northeasterly	200 feet	more or less along toe of dam; Thence
3. Southeasterly	100 feet	more or less across Road 2-K to the 810 foot contour line; Thence
4. Southeasterly	950 feet	more or less along the 810 foot contour line; Thence
5. Northwesterly	1000 feet	more or less along the 810 foot contour line to the point of beginning;
		Containing an area of 2.2 acres more or less;

together with all the improvements thereon located.

BEING A PORTION OF HELEMANO RESERVOIR.

Initial Point in Block 19.

Beginning on the 800 foot contour line at the East corner of this piece of land, on the boundary between Grant 431 to Kauohanui and Land Court Application 269, the true azimuth and distance from the initial point of Land Court Application 269 being 10° 00′ 2270 feet more or less, and running:

1. Southerly 130 feet more or less along Land Court Application 269 to the 800 foot contour line; Thence along the 800 foot contour line, the direct azimuth and distance being:
2. Northwesterly 880 feet more or less to the Westerly boundary of Grant 431 to Kauohanui; Thence
3. Northerly 320 feet more or less along the Westerly side of Grant 431 to Kauohanui to the 800 foot contour line; Thence along the 800 foot contour line to the point of beginning, the direct azimuth and distance being:

[735]

4. Southeasterly 940 feet more or less;

Containing an area of 4.3 acres more or less;

together with all the improvements thereon located.

Being shown on said map Exhibit A; being those portions of the Holt lands which are occupied by reservoirs, dams and camps constructed by the Waialua Agricultural Company, Limited, and as much additional land adjoining each of said reservoirs (including dams) and camps on all sides thereof as is reasonably necessary for the convenient and effective care, maintenance and use thereof; and (4) all the following described real property, to-wit:

PUMP 3 WELL SITE.

Initial Point in Block 1.

Beginning at the North corner of this piece of land in the middle of Opaeula Stream, the direct azimuth and distance from the center of a 6′ circular shaft located about 90 feet South of Opaeula Stream being 165° 00′ 130 feet more or less, the coordinates of the center of said shaft referred to Government Survey Triangulation Station "Halemano" being 15,610 feet North and 18,240 feet West, and running:

1.	Southeasterly	340 feet more or less along middle of Opaeula Stream;
2.	Southwesterly	120 feet more or less;
3.	Northwesterly	320 feet more or less;
4.	Northerly	120 feet more or less to the point of beginning;

Containing an area of 0.9 acre more or less;

together with all the improvements thereon located.

Being shown on said map Exhibit A; being those portions of the Holt lands upon which Waialua Agricultural Company, Limited, has constructed and maintains pumps and their [736] accessories, and as much land wholly around each of said pumps and accessories as is reasonably necessary for the convenient and effective care, maintenance and use of said pumps.

V.

That the petitioner, Eliza R. P. Christian, is not entitled to any award of rents or damages in this suit and that she take nothing herein by way of money judgment, for rents or damages against the respondent-appellant Waialua Agricultural Company, Limited.

VI.

That that certain lease dated March 17, 1905, by and between Carlos A. Long, et al., and Waialua Agricultural Company, et al., being Exhibit "F" attached to the second amended petition herein and having been introduced in evidence herein as Exhibit "A-8", is in all respects valid; and that petitioner-appellee Eliza R. P. Christian is not entitled to have the said lease canceled.

VII.

That that certain instrument dated August 31, 1906, by and between Eliza R. P. Christian and Annie Holt Kentwell, being Exhibit "G" attached to the second amended petition herein and having been introduced in evidence herein as Exhibit "2-G," is in all respects valid only as an as-

signment of rents, issues and profits from the land but not as a conveyance of an estate or interest in the land, and that petitioner-appellee is not entitled to have said instrument canceled. [737]

VIII.

That said instrument dated August 31, 1906, referred to in Paragraph VII hereof, conveyed all rents, issues and profits from the land described in the deed of May 2, 1910 (referred to in Paragraph II hereof), which have accrued or will accrue to Eliza R. P. Christian, whether under the lease dated March 17, 1905, referred to in Paragraph VI hereof, or otherwise, and from whomsoever due, from August 31, 1906, the date of said instrument, until the end of the natural life of her, the said Eliza R. P. Christian, and that the respondent-appellant, Waialua Agricultural Company, Limited, is the owner of all said rents, issues and profits so conveyed; provided, however, Waialua Agricultural Company, Limited, shall pay all taxes and lawful assessments upon or against said land during the lifetime of the said Eliza R. P. Christian.

Dated, Honolulu, T. H., this 25th day of March, 1935.

By the Court:

[Seal] ROBERT PARKER JR.
Clerk.

Approved as to form.

CHARLES M. HITE
Attorney for
E. R. P. Christian

Approved:

CHARLES F. PARSONS
Associate Justice. [738]

EXHIBIT B.

DESCRIPTION OF PERMANENT RIGHTS OF WAY.

SCHEDULE 1—DITCHES.

WAHIAWA DITCH EXTENSION.

Initial Point in Block 13.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch except as otherwise indicated.

Beginning at the Southwesterly end of this center line, on the boundary between Paalaa-Uka and Kaheeka, the true azimuth and distance from the end of Course 28 of Boundary Certificate No. 101 being 123° 41′ 2100 feet more or less, and running:

1.	Easterly	2100 feet	more or less crossing Road 2-E and continuing to the end of Helemano Upper Ditch;
2.	Northerly	700 feet	more or less;
3.	Northwesterly	1400 feet	more or less. 10 feet more or less Easterly from Government Survey Triangulation Station "O'Reilly";
4.	Northeasterly	1200 feet	more or less;
5.	Southeasterly	650 feet	more or less to the intake of Helemano 54" siphon;
6.	Northeasterly	1150 feet	more or less to the outlet of Helemano 54" Siphon, the right-of-way being 40 feet wide;
7.	Northwesterly	1400 feet	more or less;
8.	Northeasterly	1900 feet	more or less;
9.	Southeasterly	220 feet	more or less;
10.	Easterly	200 feet	more or less along a flume across Helemano 11 Reservoir;

11.	Northerly	260 feet more or less;
12.	Northwesterly	340 feet more or less to Opaeula 11 Camp;
13.	Northeasterly	330 feet more or less to the middle of Opaeula Stream, the right-of-way being 40 feet wide, the total distance along the center line being 12,900 feet more or less, including the Helemano 54" Siphon and a portion of the Opaeula 54" Siphon;
		Containing an area of 6.6 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in the flume replacements across gulch at Helemano 6 Reservoir. [739]

HELEMANO UPPER DITCH.

Initial Point in Block 17.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Northeasterly end of this center line at the intake in Helemano Stream, 8100 feet more or less Easterly from Old Muto Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 160 feet North and 17,100 feet East, and running:

1.	Westerly	2800 feet	more or less;
2.	Southwesterly	6000 feet	more or less;
3.	Southwesterly	1000 feet	more or less;
4.	Westerly	1800 feet	more or less to Helemano Upper Reservoir Inlet Ditch;
5.	Northwesterly	2600 feet	more or less;
6.	Westerly	1950 feet	more or less to Road 3;
7.	Northwesterly	3200 feet	more or less, 200 feet more or less Northerly from Government Survey Triangulation Station "Halemano";
8.	Northwesterly	3900 feet	more or less to the end of Helemano Upper Reservoir Outlet Ditch;
9.	Northwesterly	2400 feet	more or less to Helemano 12 Reservoir Inet Ditch;
10.	Northwesterly	1500 feet	more or less to Road 2-K;
11.	Northwesterly	2500 feet	more or less to Wahiawa Ditch Extension, 1500 feet more or less Northeasterly from Brodie 4 Camp, the total distance along the center line being 30,960 feet more or less;

Containing an area of 14.2 acres more or less.

HELEMANO UPPER DITCH.

(Poamoho Branch.)

Initial Point in Block 23.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Easterly end of this center line at the intake in Poamoho Stream, 4400 feet more or less Southeasterly from Helemano Camp, the coordinates of said point of [740] beginning referred

to Government Survey Triangulation Station "Halemano" being 3,600 feet South and 13,800 feet East, and running:

1.	Northwesterly	470 feet more or less;
2.	Southwesterly	1600 feet more or less;
3.	Westerly	1900 feet more or less;
4.	Northwesterly	1750 feet more or less to Tunnel 13 of Helemano Branch Ditch, 150 feet more or less Southerly from Helemano Camp, the total distance along the center line being 6,130 feet more or less;

Containing an area of 2.8 acres more or less.

HELEMANO UPPER RESERVOIR OUTLET DITCH.

Initial Point in Block 21.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Easterly end of this center line at the toe of dam, on the Southwesterly side of Helemano Upper Reservoir, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 4,450 feet South and 3,550 feet East, and running:

1. Southwesterly 2700 feet more or less to Road 3;
2. Northwesterly 2100 feet more or less to Road 4;
3. Northwesterly 6500 feet more or less to the Southerly side of Helemano Upper Ditch, 3900 feet more or less Northwesterly from Government Survey Triangulation Station "Halemano" the total distance along the center line being 12,540 feet more or less;

Containing an area of 5.8 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [741]

SCHEDULE 2—OTHER WATERWAYS.

HELEMANO UPPER RESERVOIR INLET DITCH.

Initial Point in Block 22.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Northerly end of this center line, on the Southerly side of Helemano Upper Ditch 2,300 feet more or less Southwesterly from Helemano Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 3,450 feet South and 6,400 feet East, and running:

1. Southerly 300 feet more or less to the 990 foot contour line along the Northerly side of Helemano Upper Reservoir, the total distance along the center line being 330 feet more or less;

Containing an area of 0.2 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

HELEMANO 3 RESERVOIR OUTLET DITCH.

Initial Point in Block 1.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Northwesterly end of this center line, on the boundary between Paalaa-Uka and Paalaa-Kai, the true azimuth and distance from the end of Course 8 of Boundary Certificate No. 101 being 210° 45′ 130 feet more or less, and running:

1. Southeasterly 360 feet more or less to toe of dam on the Westerly side of Helemano 3 Reservoir, the total distance along the center line being 360 feet more or less;

Containing an area of 0.2 acre more or less.

[742]

HELEMANO 4-A RESERVOIR OUTLET DITCH NORTH BRANCH.

Initial Point in Block 6.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Southerly end of this center line at toe of dam, on the Westerly side of Helemano 4-A Reservoir, being also the initial point of Helemano 4-A Reservoir Outlet Ditch South Branch, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 9,800 feet North and 17,800 feet West, and running:

1. Northerly 700 feet more or less to the Southerly side of Road 2, the total distance along the center line being 700 feet more or less;

Containing an area of 0.3 acre more or less.

Eliza R. P. Christian likewise to release all interests she may have in all the improvements thereon located.

HELEMANO 4-A RESERVOIR OUTLET DITCH SOUTH BRANCH.

Initial Point in Block 6.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Northeasterly end of this center line at toe of dam, on the Westerly side of

Helemano 4-A Reservoir, being also the initial point of Helemano 4-A Reservoir Outlet Ditch North Branch, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 9,800 feet North and 17,800 feet West, and running:

1. Southwesterly 490 feet more or less to the boundary between Paalaa-Uka and Pankauila, the true azimuth and distance from the end of Course 30 of Boundary Certificate No. 101 being 1[illegible] 11′ 850 feet more or less, the total distance along the center line being 490 feet more or less;

Containing an area of 0.2 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [743]

HELEMANO 6 RESERVOIR INLET DITCH.

Initial Point in Block 13.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Easterly end of this center line, on the Southwesterly side of Helemano 6 Reservoir, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 4,750 feet North and 8,700 feet West, and running:

1. Westerly 190 feet more or less to Wahiawā Ditch Extension, the total distance along the center line being 190 feet more or less;

Containing an area of 0.1 acre more or less.

HELEMANO 6 RESERVOIR OUTLET DITCH.
Initial Point in Block 13.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Southerly end of this center line at toe of dam, on the Westerly side of Helemano 6 Reservoir, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 5,050 feet North and 8,900 feet West, and running:

1. Northwesterly 2150 feet more or less;
2. Northeasterly 1150 feet more or less to Road 2;
3. Northwesterly 1300 feet more or less across Road 2 and Road 2-F, the total distance along the center line being 4,980 feet more or less;

Containing an area of 2.3 acres more or less.

[744]

HELEMANO 6-B RESERVOIR OUTLET DITCH NORTH BRANCH.
Initial Point in Block 6.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Southwesterly end of this center line at toe of dam, on the Northerly side of Helemano 6-B Reservoir, being also the initial point of Helemano 6-B Reservoir Outlet Ditch South Branch, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 9,160 feet North and 14,450 feet West, and running:

1. Northeasterly 900 feet more or less, the total distance along the center line being 950 feet more or less;

Containing an area of 0.4 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

HELEMANO 6-B RESERVOIR OUTLET DITCH SOUTH BRANCH.

Initial Point in Block 6.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Northeasterly end of this center line at toe of dam, on the Northerly side of Helemano 6-B Reservoir, being also the initial point of Helemano 6-B Reservoir Outlet Ditch North Branch, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 9,160 feet North and 14,450 feet West, and running:

1. Southwesterly 1200 feet more or less to Track I;
2. Southeasterly 850 feet more or less to 1000 feet more or less Southwesterly from Helemano 6-B Reservoir, the total distance along the center line being 2,160 feet more or less;

Containing an area of 1.0 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [745]

HELEMANO 12 RESERVOIR INLET DITCH.

Initial Point in Block 14.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Southerly end of this center line, on the Northerly side of Helemano Upper Ditch, 1,000 feet Southeasterly from Helemano 12 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 2,550 feet North and 5,770 feet West, and running

1. Northerly 150 feet more or less to the Easterly side of Helemano 12 Reservoir, the total distance along the center line being 150 feet more or less;

Containing an area of 0.1 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

HELEMANO 12 RESERVOIR OUTLET DITCH.
Initial Point in Block 13.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Southeasterly end of this center line at toe of dam, on the Northwesterly side of Helemano 12 Reservoir, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 3,150 feet North and 6,700 feet West, and running:

1.	Northwesterly	2280 feet more or less to the Southerly side of Helemano 6 Reservoir, the total distance along the center line being 2,280 feet more or less;
		Containing an area of 1.0 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [746]

HELEMANO 15 RESERVOIR INLET DITCH.
Initial Point in Block 19.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Southwesterly end of this center line, on the boundary between Paalaa-Uka and Kaheeka, the true azimuth and distance from the end of Course 28 of Boundary Certificate No. 101

being 331° 30′ 30″ 3,800 feet more or less, and running:

1. Northeasterly 2300 feet more or less;
2. Easterly 2100 feet to the Southerly side of Helemano Upper Ditch, 2650 feet more or less Southeasterly from Helemano 12 Camp; the total distance along the center line being 5,340 feet more or less;

Containing an area of 2.5 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [747]

HELEMANO 11 RESERVOIR OUTLET DITCH.

Initial Point in Block 7.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Southeasterly end of this center line at toe of dam, on the Northwesterly side of Helemano 11 Reservoir, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 10,750 feet North and 6,650 feet West, and running:

1. Westerly 800 feet more or less;
2. Northwesterly 900 feet more or less;
3. Northerly 600 feet more or less to the Southerly side of Road 1, the total distance along the center line being 2,400 feet more or less;

Containing an area of 1.1 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

KEMOO DITCH EXTENSION.

Initial Point in Block 6.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Southwesterly end of this center line, on the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from the end of Course 30 of Boundary Certificate No. 101 being 113° 11′ 250 feet more or less, and running:

1. Northerly	1150 feet	more or less along the Westerly side of Road 2-B to Road 2;
2. Northeasterly	1850 feet	across Road 2,390 feet more or less from the Westerly side of Helemano 6 Siphon (new), the total distance along the center line being 3,420 feet more or less;
		Containing an area of 1.6 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [748]

PUMP 10 HIGH LIFT DITCH.

Initial Point in Block 6.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Southerly end of this center line, on the boundary between Paalaa-Uka and Kaheeka, the true azimuth and distance from the end of Course 30 of Boundary Certificate No. 101 being 321° 45′ 400 feet more or less, and running:

1.	Northerly	1350 feet more or less and crossing Track I to Road 2;
2.	Northeasterly	1600 feet more or less and crossing Road 2;
3.	Northerly	800 feet more or less to the beginning of Helemano 6 Siphon (new);
4.	Northeasterly	1300 feet more or less;
5.	Northwesterly.	50 feet more or less to the Southeasterly side of Helemano 9-C Reservoir, the total distance along the center line being 5,640 feet more or less;

Containing an area of 2.6 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

PUMP 10 LOW LIFT DITCH.

Initial Point in Block 5.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present ditch.

Beginning at the Southwesterly end of this center line, on the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from the end of Course 31 of Boundary Certificate No. 101 being 122° 43′ 100 feet more or less, and running:

1. Northeasterly	1440 feet more or less to the Southwesterly side of Road 2, the total distance along the center line being 1,440 feet more or less;	
	Containing an area of 0.7 acre more or less.	

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [749]

SCHEDULE 3—SIPHONS.

HELEMANO 54"

(This description covered by that of the Wahiawa Ditch Extension.—Eliza R. P. Christian likewise to release all interest she may have in the concrete piers and blow-off valve installed since 1910.)

OPAEULA 54"

(This description covered by that of the Wahiawa Ditch Extension.)

HELEMANO 6 (NEW).

(This description covered by that of Pump 10 High Lift Ditch.—Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.)

HELEMANO 11 RESERVOIR.

(This description covered by that of Helemano 9-C Reservoir.—Eliza R. P. Christian likewise to

release all interest she may have in all the improvements thereon located.) [750]

SCHEDULE 4—DOMESTIC WATER SYSTEM.
DOMESTIC WATER LINE 9.
Initial Point in Block 13.

Being a right-of-way 5 feet wide, extending 2.5 feet on each side of the center line of the present pipe line.

Beginning at the Easterly end of this center line, on the Westerly side of Helemano 12 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 3,350 feet North and 6,600 feet West, and running:

1.	Southwesterly	900 feet more or less to the middle of Domestic Water Line 6 on the Southerly side of Road 2-K;
2.	Northwesterly	2700 feet more or less to the Southerly side of Wahiawa Ditch Extension;
3.	Westerly	1700 feet more or less to Helemano 9 Camp, the total distance along the center line being 5,520 feet more or less;
		Containing an area of 0.7 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

DOMESTIC WATER LINE 10.
Initial Point in Block 3.

Being a right-of-way 5 feet wide, extending 2.5 feet on each side of the center line of the present pipe line.

Beginning at the Southeasterly end of this center line on the Easterly side of Opaeula 10 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 12,300 feet North and 11,450 feet West, and running:

1. Northwesterly 1850 feet more or less:
2. Northwesterly 300 feet more or less to the middle of Opaeula Stream, the total distance along the center line being 2,150 feet more or less:

Containing an area of 0.2 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [751]

DOMESTIC WATER LINE 11.
Initial Point in Block 6.

Being a right-of-way 5 feet wide, extending 2.5 feet on each side of the center line of the present pipe line.

Beginning at the Southerly end of this center line at the tanks on the Southeasterly side of Track I, 500 feet more or less Northeasterly from Helemano 4-A Reservoir, the coordinates of said point of

beginning referred to Government Survey Triangulation Station "Halemano" being 10,000 feet North and 17,150 feet West, and running:

1.	Northwesterly	650 feet more or less;
2.	Northeasterly	4300 feet more or less to the middle of Opaeula Stream, the total distance along the center line being 4,950 feet more or less;
		Containing an area of 0.6 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

DOMESTIC WATER LINE 12.
Initial Point in Block 6.

Being a right-of-way 5 feet wide, extending 2.5 feet on each side of the center line of the present pipe line.

Beginning at the Northwesterly end of this center line at the tanks on the Southeasterly side of Track I, 500 feet more or less Northeasterly from Halemano 4-A Reservoir, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 10,000 feet North and 17,150 feet West, and running:

1.	Northeasterly	250 feet more or less along the Southeasterly side of Track I;
2.	Southeasterly	2900 feet more or less along the Southwesterly side of Road 2;

3. Northeasterly 100 feet more or less to Helemano 6 Camp, the total distance along the center line being 3,250 feet more or less;

Containing an area of 0.4 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [752]

DOMESTIC WATER LINE 13.
Initial Point in Block 6.

Being a right-of-way 5 feet wide, extending 2.5 feet on each side of the center line of the present pipe line.

Beginning at the Southeasterly end of this center line at the tanks on the Southeasterly side of Track I, 500 feet more or less Northeasterly from Helemano 4-A Reservoir, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 10,000 feet North and 17,150 feet West, and running:

1. Northwesterly 650 feet more or less to the Southerly side of Road 2;
2. Northwesterly 4800 feet more or less along the Southwesterly side of Road 2;
3. Northerly 100 feet more or less to Helemano 1 Camp, the total distance along the center line being 5,550 feet more or less;

Containing an area of 0.6 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

DOMESTIC WATER LINE 14.
Initial Point in Block 6.

Being a right-of-way 5 feet wide, extending 2.5 feet on each side of the center line of the present pipe line.

Beginning at the Northeasterly end of this center line at the tanks on the Southeasterly side of Track I, 500 feet more or less Northeasterly from Helemano 4-A Reservoir, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 10,000 feet North and 17,150 feet West, and running:

1. Southwesterly 850 feet more or less along the Easterly side of Track I to the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from the end of Course 30 of Boundary Certificate No. 101 being 113° 11' 170 feet more or less, the total distance along the center line being 850 feet more or less;

Containing an area of 0.1 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [753]

DOMESTIC WATER LINE 15.
Initial Point in Block 5.

Being a right-of-way 5 feet wide, extending 2.5 feet on each side of the center line of the present pipe line.

Beginning at the Westerly end of this center line at Helemano 4 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 11,050 feet North and 20,500 feet West, and running:

1. Easterly	1550 feet more or less to the center line of Domestic Water Line 13 on the Southerly side of Track F, the total distance along the center line being 1,550 feet more or less;
	Containing an area of 0.2 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

LOCOMOTIVE WATER LINE.

Initial Point in Block 5.

Being a right-of-way 5 feet wide, extending 2.5 feet on each side of the center line of the present pipe line.

Beginning at the Northeasterly end of this center line at the center line of Domestic Water Line 13, 100 feet more or less Southerly from Helemano 3 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 10,580 feet North and 18,240 feet West, and running:

1. Southwesterly 550 feet more or less to the Northerly side of Track H, the total distance along the center line being 550 feet more or less;

Containing an area of 0.1 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [754]

SCHEDULE 5—FLUMES.

HELEMANO UPPER DITCH, POAMOHO BRANCH.

(This description covered by that of the Helemano Upper Ditch, Poamoho Branch.—Eliza R. P. Christian likewise to release all interest she may have in the Armco flumes built about 1925.)

HELEMANO UPPER DITCH.

(This description covered by that of the Helemano Upper Ditch.)

WAHIAWA DITCH EXTENSION.

(This description covered by that of the Wahiawa Ditch Extension.—Eliza R. P. Christian likewise to release all interest she may have in flumes built across the gulch at Helemano 6 Reservoir, built in 1931.)

HELEMANO RESERVOIR 6 OUTLET DITCH.

(This description covered by that of Helemano Reservoir 6 Outlet Ditch.—Eliza R. P. Christian

likewise to release all interest she may have in all improvements thereon located, including flumes.)

[755]

HELEMANO UPPER RESERVOIR OUTLET DITCH.

(This description covered by that of Helemano Upper Reservoir Outlet Ditch.—Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located, including flumes.)

HELEMANO 11 RESERVOIR OUTLET DITCH.

(This description covered by that of Helemano 11 Reservoir Outlet Ditch.—Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located, including flumes.)

[756]

SCHEDULE 6—PIPE LINES.

PUMP 10 LOW LIFT 24" PINE LINE.

Initial Point in Block 5.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present pipe line.

Beginning at the Southwesterly end of this center line at Pump 10, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 7,650 feet North and 21,670 feet West, and running:

1. Northeasterly 200 feet more or less to the Northeasterly side of Grant 235, Apana 2 to Jerome Topliff and Lewis Johnson, the total distance along the center line being 200 feet more or less;

Containing an area of 0.1 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

PUMP 10 HIGH LIFT 30" PIPE LINE.
Initial Point in Block 5.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present pipe line.

Beginning at Pump 10 at the Northwesterly end of this center line, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 7,600 feet North and 21,610 feet West, and running:

1. Southeasterly 270 feet more or less to the Southwesterly boundary of Grant 235, Apana 2 to Jerome Topliff and Lewis Johnson, the total distance along the center line being 270 feet more or less;

Containing an area of 0.1 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [757]

WATER LINE FROM PUMP 8.
Initial Point in Block 1.

Being a right-of-way 20 feet wide, extending 10 feet on each side of the center line of the present pipe line.

Beginning at the end of Course 9 of Boundary Certificate No. 101, and running:

1. Southeasterly	450 feet	more or less to toe of dam on the Northwest corner of Helemano 3 Reservoir, the total distance along the center line being 450 feet more or less;
		Containing an area of 0.2 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [758]

SCHEDULE 7—RAILROADS.
RAILROAD—TRACK A.
Initial Point in Block 1.

Being a right-of-way 40 feet wide, extending 20 feet on each side of the center line of the present railroad track.

Beginning at the Southwesterly end of the center line of this track on the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from a pipe in concrete at the initial point of Boundary Certificate No. 101 being 302° 43′ 11.5 feet, and running:

1.	Northeasterly	1150 feet	more or less;
2.	Northeasterly and Easterly	900 feet	more or less on a curve to the right; Thence
3.	Easterly	800 feet	more or less; Thence
4.	Northeasterly and Northerly	650 feet	more or less along a curve to the left to the boundary between Paalaa-Uka and Paalaa-Kai, the true azimuth and distance from the end of Course 7 of Boundary Certificate No. 101 being 55° 15′ 35.67 feet, the total distance along the center line being 3,600 feet more or less;
			Containing an area of 3.3 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements located thereon except in 1200 feet of grading completed prior to May 2, 1910.

RAILROAD—TRACK B.

Initial Point in Block 1.

Being a right-of-way 40 feet wide, extending 20 feet on each side of the center line of the present railroad track.

Beginning at the Northwesterly end of the center line of this track on the boundary between Paalaa-Uka and Paalaa-Kai, [759] the true azimuth and distance from the end of Course 8 of Boundary Certificate No. 101 being 30° 45′ 23.75 feet, and running:

1. Southeasterly	675 feet	more or less; Thence
2. Southeasterly	310 feet	more or less along a curve to the right;
3. Southerly	300 feet	more or less, the total distance along the center line being 1,300 feet more or less;
		Containing an area of 0.9 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements located thereon.

RAILROAD—TRACK C.

Initial Point in Block 1.

Being a right-of-way 40 feet wide, extending 20 feet on each side of the center line of the present railroad track.

Beginning at the Northeasterly end of the center line of this track, the true azimuth and distance from the end of Course 12 of Boundary Certificate No. 101 being 359° 16′ 317.0 feet, and running:

1. Southwesterly	1390 feet	more or less; Thence
2. Southerly	350 feet	more or less along a curve to the left to the center line of Track B, the total distance along the center line being 1,800 feet more or less;
		Containing an area of 1.3 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

RAILROAD—TRACK D.
Initial Point in Block 1.

Being a right-of-way 40 feet wide, extending 20 feet on each side of the center line of the present railroad track.

Beginning at the Westerly end of the center line of this track, the true azimuth and distance from the end of Course 12 of Boundary Certificate No. 101 being 359° 16' 317 [760] feet more or less, and running:

1.	Northeasterly, Easterly and Southerly	750 feet	more or less along a curve to the right;
2.	Southerly	350 feet	more or less; Thence
3.	Southeasterly	320 feet	more or less on a curve to the left;
4.	Southeasterly	310 feet	more or less; Thence
5.	Southeasterly and Northeasterly	700 feet	more or less on a curve to the left;
6.	Northeasterly	340 feet	more or less; Thence
7.	Northeasterly and Easterly	500 feet	more or less along a curve to the right; Thence
8.	Southeasterly	3200 feet	more or less along tangents and curves to the Northwesterly end of Road 1-G, the total distance along the center line being 7,200 feet more or less;

Containing a gross area of 6.6 acres more or less and a net area of 6.3 acres more or less after deducting that portion of the right-of-way through R. P. 2841, L. C. Aw. 3868, Apana 1 to Pila.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements located thereon.

RAILROAD—TRACK E.

Initial Point in Block 1.

Being a right-of-way 40 feet wide, extending 20 feet on each side of the center line of the present railroad track.

Beginning at the Westerly end of the center line of this track on the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from the initial point of Boundary Certificate No. 101 being 302° 43′ 159.18 feet, and running: [761]

1. Easterly	2300 feet	more or less;
2. Southeasterly	500 feet	more or less along a curve to the right; Thence
3. Southerly	1700 feet	more or less along tangents and curves to the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from the end of Course 31 of Boundary Certificate No. 101 being 293° 11′ 150 feet more or less, the total distance along the center line being 4,680 feet more or less;

Containing an area of 4.3 acres more or less.

Eliza R. P. Christian likewise to release all interest she mave have in all the improvements thereon located, except in the grading.

RAILROAD—TRACK F.

Initial Point in Block 5.

Being a right-of-way 40 feet wide, extending 20 feet on each side of the center line of the present railroad track.

Beginning at the Northwesterly end of the center line of this track, on the center line of Track E near Pump 10 Low Lift Ditch, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 11,410 feet North and 20,310 feet West, and running:

1.	Southeasterly and Easterly	500 feet more or less along a curve to the left;
2.	Easterly	1050 feet more or less, the total distance along the center line being 1,700 feet more or less;
		Containing an area of 1.6 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon, located, except in the grading. [762]

RAILROAD—TRACK G.

Initial Point in Block 5.

Being a right-of-way 40 feet wide, extending 20 feet on each side of the center line of the present railroad track.

Beginning at the Southerly end of the center line of this track, on the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from the end of Course 31 of Boundary Certificate No. 101 being 293° 11′ 500 feet more or less, and running:

1.	Northerly	950 feet more or less to the Easterly side of Track E, the total distance along the center line being 950 feet more or less;
		Containing an area of 0.9 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvementts located thereon.

RAILROAD—TRACK H.
Initial Point in Block 5

Being a right-of-way 40 feet wide, extending 20 feet on each side of the center line of the present railroad track.

Beginning at the Southwesterly end of the center line of this track on the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from the end of Course 31 of Boundary Certificate No. 101 being 293° 11′ 1750 feet more or less, and running:

1. Northeasterly and Southeasterly	1500 feet more or less	along a curve to the right to the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from the end of Course 30 of Boundary Certificate No. 101 being 113° 11′ 880 feet more or less, the total distance along the center line being 1500 feet more or less;

Containing an area of 1.4 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements located thereon. [763]

RAILROAD—TRACK I.

Initial Point in Block 6.

Being a right-of-way 40 feet wide, extending 20 feet on each side of the center line of the present railroad track.

Beginning at the Westerly end of the center line of this track on the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from the end of Course 30 of Boundary Certificate No. 101 being 113° 11′ 210 feet more or less, and running:

1.	Northeasterly	1170 feet more or less;
2.	Easterly	1370 feet more or less;
3.	Southerly	1550 feet more or less;
4.	Easterly	2350 feet more or less;
5.	Southeasterly	1150 feet more or less;
6.	Easterly	2100 feet more or less;
7.	Southerly	1200 feet more or less;
8.	Easterly	1300 feet more or less to a point 308° 20′ 1050 feet more or less from Government Survey Triangulation Station "O'Reilly," the total distance along the center line being 13,680 feet more or less;

Containing an area of 12.6 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements located thereon, except in 7600 feet of grading completed prior to May 2, 1910.

RAILROAD—TRACK J.
Initial Point in Block 6.

Being a right-of-way 40 feet wide, extending 20 feet on each side of the center line of the present railroad track.

Beginning at the Northwesterly end of the center line of this track on the Southwesterly side of Track I, 1500 feet more or less Southeasterly from Helemano 6 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 8,150 feet North and 12,600 feet West, and running:

1. Southeasterly	270 feet	more or less, the total distance along the center line being 270 feet more or less;
		Containing an area of 0.2 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements located thereon, except in the grading. [764]

RAILROAD—TRACK K.
Initial Point in Block 13.

Being a right-of-way 40 feet wide, extending 20 feet on each side of the center line of the present railroad track.

Beginning at the Northwesterly end of the center line of this track on the center line of Track I, 200 feet more or less Westerly from the end of Track I, the coordinates of said point of beginning referred to Government Survey Triangulation Station

"Halemano" being 5,920 feet North and 9,100 feet West, and running:

1. Southerly 700 feet more or less to the top of Halemano 6 Reservoir Dam, the total distance along the center line being 700 feet more or less;

Containing an area of 0.6 acre more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements located thereon.

RAILROAD—TRACK L.
Initial Point in Block 5.

Being a right-of-way 40 feet wide, extending 20 feet on each side of the center line of the present railroad track.

Beginning at the Northwesterly end of this center line, on the Westerly side of Grant 238 to John F. Anderson and Franklin Davis, 80 feet more or less Northerly from the West corner (marked 8 on map) of Grant 238 to John F. Anderson and Franklin Davis, and running:

1. Southeasterly 600 feet more or less;
2. Easterly 650 feet more or less along a curve to the left to the Northeasterly boundary of Grant 238 to John F. Anderson and Franklin Davis, 250 feet more or less Southeasterly from the Northeast corner (marked 2 on map) of Franklin Davis, the

total distance along the center line being 1,260 feet more or less;

Containing an area of 1.2 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements located thereon, except in the grading. [765]

RAILROAD—TRACK M.

Initial Point in Block 5.

Being a right-of-way 40 feet wide, extending 20 feet on each side of the center line of the present railroad track.

Beginning at the Southeasterly end of this center line, on the Northeasterly boundary of Grant 235, Apana 2 to Jerome Topliff and Lewis Johnson, 50 feet more or less Northwesterly from the Northeast corner (marked 3 on map) of Grant 235, Apana 2 to Jerome Topliff and Lewis Johnson, and running:

1.	Northwesterly	170 feet more or less;
2.	Northwesterly and Northerly	530 feet more or less along a curve to the right to the center line of Track L, the total distance along the center line being 750 feet more or less;

Containing an area of 0.7 acre more or less.

Eliza R. P Christian likewise to release all interest she may have in all the improvements located thereon, except in the grading.

PORTABLE TRACK BED.

Initial Point in Block 6.

Being a right-of-way 40 feet wide, extending 20 feet on each side of the present center line.

Beginning at the Westerly end of this center line, on the Northerly side of Road 2-D, 1400 feet more or less Southwesterly from Helemano 6 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 7,850 feet North and 15,350 feet West, and running:

1.	Easterly	1100 feet	more or less;
2.	Southerly	250 feet	more or less on a curve to the right;
3.	Northwesterly	400 feet	more or less, the total distance along the center line being 1,850 feet more or less;
			Containing an area of 1.7 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements located thereon. [766]

SCHEDULE 8—ROADS.

ROADS 1.

Initial Point in Block 1.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line, on the Southeasterly side of the Kamehameha Highway, the true azimuth and distance from the end of

Course 1 of Boundary Certificate No. 101 being 21° 00′ 30 feet more or less, and running:

1.	Easterly	1350 feet	more or less;
2.	Southeasterly	800 feet	more or less;
3.	Northeasterly	1650 feet	more or less;
4.	Southeasterly	3600 feet	more or less to Opaeula 9 Camp; Thence
5.	Northeasterly	250 feet	more or less to the Westerly side of Opaeula 9 Camp:
6.	Southeasterly	350 feet	more or less; Thence
7.	Easterly	4700 feet	more or less to Opaeula 10 Camp;
8.	Easterly	3800 feet	more or less;
9.	Southeasterly	1500 feet	more or less to Opaeula 11 Camp;
10.	Southeasterly	15300 feet	more or less to the Northerly end of Road 1-L;
11.	Northeasterly	3900 feet	more or less;
12.	Southeasterly	5300 feet	more or less to a point near the Bryant House, the total distance along the center line being 44,000 feet more or less;
			Containing an area of 30.3 acres more or less.

ROAD 1-A.

Initial Point in Block 1.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line, the true azimuth and distance from the end of Course 8 of Boundary Certificate No. 101 being 210° 45′ 230 feet more or less, and running:

1. Southeasterly 600 feet more or less to Road 1, the total distance along the center line being 600 feet more or less;

Containing an area of 0.4 acre more or less.

[767]

ROAD 1-B.
Initial Point in Block 1.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Southerly end of this center line, on the Northerly side of Road 1, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 14,370 feet North and 19,620 feet West; and running:

1. Northerly 1150 feet more or less;
2. Easterly 1070 feet more or less;
3. Northerly 100 feet more or less to the middle of Opaeula Stream, 200 feet more or less Southwesterly from Pump 3, the total distance along the center line being 2,200 feet more or less;

Containing an area of 1.5 acres more or less.

Eliza R. P. Christian likewise to release all the interest she may have in all improvements located thereon.

ROAD 1-C.
Initial Point in Block 2.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Southeasterly end of this center line, on the Northerly side of Road 1, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 12,500 feet North and 13,920 feet West, and running:

1. Northwesterly	850 feet	more or less to the end of Track D, the total distance along the center line being 850 feet more or less;

Containing an area of 0.6 acre more or less.

[768]

ROAD 1-D.
Initial Point in Block 3.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northwesterly end of this center line, on the Southerly side of Road 1 near Opaeula 10 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 12,170 feet North and 11,400 feet West, and running:

1. Southeasterly 1200 feet more or less;
2. Westerly 1150 feet more or less;
3. Southeasterly 4300 feet more or less to the Wahiawa Ditch Extension, 1200 feet more or less Southwesterly from the Southerly side of Helemano 11 Reservoir Dam, the total distance along the center line being 9,900 feet more or less;

Containing an area of 6.8 acres more or less.

ROAD 1-E.

Initial Point in Block 3.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northerly end of this center line, on the Southerly side of Road 1, 2400 feet more or less Easterly from Opaeula 10 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 12,120 feet North and 9,000 feet West, and running:

1. Southerly 1320 feet more or less to the northerly side of Road 1-D, the total distance along the center line being 4,600 feet more or less;

Containing an area of 3.2 acres more or less.

[769]

ROAD 1-F.
Initial Point in Block 7.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northeasterly end of this center line, on the Southerly side of Road 1 near Opaeula 11 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 10,900 feet North and 6,550 feet West, and running:

1. Southwesterly	1500 feet	more or less to Road 1-D;
2. Southerly	1850 feet	more or less to the Northeasterly end of Helemano 54" siphon, the total distance along the center line being 3,840 feet more or less;
		Containing an area of 2.6 acres more or less.

ROAD 1-G.
Initial Point in Block 8.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northwesterly end of this center line, 1000 feet Southeasterly from Opaeula 11 Camp, on the Southerly side of Road 1, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 10,450 feet North and 5,650 feet West, and running:

1.	Southerly	600 feet	more or less;
2.	Southeasterly	6700 feet	more or less to Road 1-J;
3.	Southeasterly	5250 feet	more or less to Road 1-K;
4.	Southeasterly	1200 feet	more or less to the Westerly side of Road 1-L, the total distance along the center line being 13,980 feet more or less;

Containing an area of 9.6 acres more or less.

[770]

ROAD 1-H.

Initial Point in Block 9.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the northerly end of this center line, on the Southerly side of Road 1-G, 1000 feet more or less Southerly from Waialua Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemaho" being 7,150 feet North and 1,900 feet East, and running:

1.	Southerly	1250 feet	more or less;
2.	Easterly	700 feet	more or less;
3.	Southerly	550 feet	more or less;
4.	Westerly	1600 feet	more or less;
5.	Southeasterly	4400 feet	more or less;
6.	Easterly	2700 feet	more or less;
7.	Southeasterly	2100 feet	more or less to the Westerly side of Road 1-L, 3000 feet more or less Northeasterly from Old Muto Camp the total distance along the center line being 13,800 feet more or less;

Containing an area of 9.5 acres more or less.

ROAD 1-I.

Initial Point in Block 9.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Southerly end of this center line, on the Northerly side of Road 1, 600 feet more or less Northeasterly from Waialua Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 9,050 feet North and 2,450 feet East, and running:

1. Northwesterly	1400 feet	more or less;
2. Easterly	1500 feet	more or less;
3. Southeasterly	650 feet	to the middle of Opaeula Stream, the total distance along the center line being 3,720 feet more or less;

Containing an area of 2.6 acres more or less.

[771]

ROAD 1-J.

Initial Point in Block 9.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northerly end of this center line, on the Southerly side of Road 1, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 9,010 feet North and 2,450 feet East, and running:

1.	Southwesterly	500 feet more or less;
2.	Southwesterly	600 feet more or less;
3.	Southerly	700 feet more or less;
4.	Northwesterly	700 feet more or less;
5.	Southerly	400 feet more or less to the Northerly side of Road 1-G, 1250 feet more or less Westerly from Road 1-H, the total distance along the center line being 3,000 feet more or less;

Containing an area of 2.1 acres more or less.

ROAD 1-K.

Initial Point in Block 9.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northerly end of this center line, on the Southerly side of Road 1, 3400 feet more or less Easterly from Waialua Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 8,250 feet North and 5,750 feet East, and running:

1.	Southerly	1650 feet more or less to the Northerly side of Road 1-G, the total distance along the center line being 1,650 feet more or less;

Containing an area of 1.2 acres more or less.

[772]

ROAD 1-L.

Initial Point in Block 10.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northerly end of this center line, on the Southerly side of Road 1, 6200 feet more or less Easterly from Waialua Camp and 800 feet more or less Southerly from the middle of Opaeula Stream, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 7,600 feet North and 8,400 feet East, and running:

1.	Southwesterly	2400 feet more or less to Road 1-G;
2.	Southeasterly	3450 feet more or less;
3.	Southerly	800 feet more or less to Road 1-H;
4.	Easterly	1200 feet more or less;
5.	Southeasterly	400 feet more or less;
6.	Southwesterly	1200 feet more or less;
7.	Westerly	1700 feet more or less;
8.	Southwesterly	1900 feet more or less to the Northerly side of Road 2, 1800 feet more or less Northwesterly from Old Muto Camp, the total distance along the center line being 18,390 feet more or less;

Containing an area of 12.7 acres more or less.

ROAD 2.

Initial Point in Block 1.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northwesterly end of this center line, on the Southeasterly side of Kamehameha Highway, the true azimuth and distance from the initial point of Boundary Certificate No. 101 being 201° 00′ 1300 feet more or less, and running:

1. Southeasterly 1060 feet more or less to Helemano 1 Camp;
2. Southeasterly 4050 feet more or less to Helemano 3 Camp;
3. Southeasterly 4500 feet more or less to Helemano 6 Camp;
4. Southeasterly 5250 feet more or less to Road 2-I and Road 2-H, the true azimuth and distance from Government Survey Triangulation Station "O'Reilly" being 228° 50′ 390 feet more or less;

[773]

5. Southeasterly 9000 feet more or less;
6. Southeasterly 3300 feet more or less to Road 2-M;
7. Easterly 2450 feet more or less to Road 3;
8. Northeasterly 350 feet more or less;
9. Easterly 3500 feet more or less to Road 5-A;
10. Northeasterly 250 feet more or less to Road 1-L;
11. Easterly 1850 feet more or less to Old Muto Camp;
12. Southeasterly 2350 feet more or less to Road 5;
13. Northeasterly 3000 feet more or less;
14. Easterly 6600 feet more or less to a point 1350 feet more or less Southwesterly from the end of Course 19 of Boundary Certificate No. 101, the total distance along the center line being 29,700 feet more or less;

Containing an area of 20.4 acres more or less.

ROAD 2-A.

Initial Point in Block 5.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northerly end of this center line, on the Southerly side of Road 2, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 11,850 feet North and 20,250 feet West, and running:

1. Southerly 1350 feet more or less to the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from the end of Course 31 of Boundary Certificate No. 101 being 293° 11' 100 feet more or less, the total distance along the center line being 1,400 feet more or less;

Containing an area of 1.0 acre more or less.

[774]

ROAD 2-B.

Initial Point in Block 6.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northerly end of this center line, on the Southerly side of Road 2 and the Easterly side of Kemoo Ditch Extension, the coordinates of said point of beginning referred to Government

Survey Triangulation Station "Halemano" being 10,420 feet North and 17,550 feet West, and running:

1. Southerly 1160 feet more or less to the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from the end of Course 30 of Boundary Certificate No. 101 being 113° 11' 220 feet more or less, the total distance along the center line being 1180 feet more or less;

Containing an area of 0.8 acre more or less.

ROAD 2-C.

Initial Point in Block 6.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Southwesterly end of this center line, on the Northerly side of Road 2 and the Easterly side of Kemoo Ditch Extension, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 10,460 feet North and 17,550 feet West, and running:

1. Northeasterly 2100 feet more or less to the beginning of Helemano 6 Siphon, the total distance along the center line being 2,280 feet more or less;

Containing an area of 1.6 acres more or less.

ROAD 2-D.

Initial Point in Block 6.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northerly end of this center line on the Southerly side of Road 2 and the Westerly side of Track I, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 9,300 feet North and 15,450 feet West, and running:

1. Southwesterly 750 feet more or less;
2. Southwesterly 900 feet more or less;
3. Easterly 700 feet more or less;
4. Southerly 980 feet more or less to the boundary between Paalaa-Uka and Kaheeka, the true azimuth and distance from the end of Course 29 of Boundary Certificate No. 101 being 303° 41' 2100 feet more or less, the total distance along the center line being 3,600 feet more or less;

Containing an area of 2.5 acres more or less.

Road 2-E.

Initial Point in Block 6.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northwesterly end of this center line, on the boundary between Paalaa-Uka and Kaheeka, the true azimuth and distance from the end of Course 29 of Boundary Certificate No. 101 being 303° 41′ 2400 feet more or less, and running:

1. Southeasterly 1900 feet more or less;
2. Southeasterly 3400 feet more or less to the boundary between Paalaa-Uka and Kaheeka, the true azimuth and distance from a pipe in concrete at the end of Course 28 of Boundary Certificate No. 101 being 123° 41′ 920 feet more or less, the total distance along the center line being 5,320 feet more or less;

Containing an area of 3.7 acres more or less.

[776]

ROAD 2-F.

Initial Point in Block 6.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the westerly end of this center line, on the Northerly side of Road 2, 2000 feet more or less Southeasterly from Helemano 6 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 7,850 feet North and 12,250 feet West, and running:

1. Northeasterly 1350 feet more or less;
2. Southeasterly 2900 feet more or less to the Northwesterly side of Road 2-I, the total distance along the center line being 4,410 feet more or less;

Containing an area of 3.0 acres more or less.

ROAD 2-G.

Initial Point in Block 13.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line, on the Northeasterly side of Road 2-E, 50 feet more or less Southeasterly from Helemanō 9 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 4,500 feet North and 10,950 feet West, and running:

1. Easterly 2150 feet more or less to the Westerly side of Road 2-J, the total distance along the center line being 2,280 feet more or less;

Containing an area of 1.6 acres more or less.

[777]

ROAD 2-H.

Initial Point in Block 7.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northerly end of this center line, on the Southerly side of Road 2, the true azimuth and distance from Government Survey Triangulation Station "O'Reilly" being 230° 00′ 370 feet more or less, and running:

1. Southerly 1100 feet more or less;
2. Southeasterly 800 feet more or less to the Westerly side of Road 2-J, the total distance along the center line being 2,160 feet more or less;

Containing an area of 1.5 acres more or less.

ROAD 2-I.
Initial Point in Block 7

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road:

Beginning at the Southwesterly end of this center line, on the Northerly side of Road 2, the true azimuth and distance from Government Survey Triangulation Station "O'Reilly" being 229° 00′ 410 feet more or less, and running:

1. Easterly 1300 feet more or less to the beginning of Helemano 54" siphon, the total distance along the center line being 1,500 feet more or less;

Containing an area of 1.0 acre more or less.

[778]

ROAD 2-J.

Initial Point in Block 7.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northerly end of this center line, on the Southerly side of Road 2, 1050 feet Easterly from Government Survey Triangulation Station "O'Reilly," and running:

1. Southerly 2500 feet more or less;
2. Southeasterly 6700 feet more or less;
3. Southeasterly 5800 feet more or less to the Northwesterly side of Road 4, 30 feet more or less Southwesterly from Helemano Upper Reservoir Outlet Ditch, the total distance along the center line being 16,740 feet more or less;

Containing an area of 11.5 acres more or less.

Eliza R. P. Christian likewise to release all interest she may have in a concrete bridge or culvert built in 1925.

ROAD 2-K.

Initial Point in Block 13.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line, on the boundary between Paalaa-Uka and Kaheeka, the true azimuth and distance from a pipe in con-

crete at the end of Course 28 of Boundary Certificate No. 101 being 331° 30′ 30″ 680 feet more or less, and running:

1. Easterly 2200 feet more or less;
2. Northeasterly 500 feet more or less to Helemano 12 Camp, the total distance along the center line being 2,700 feet more or less;

Containing an area of 1.8 acres more or less.

[779]

ROAD 2-L.

Initial Point in Block 19.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Southwesterly end of this center line, on the boundary between Paalaa-Uka and Kaheeka, the true azimuth and distance from the end of Course 28 of Boundary Certificate No. 101 being 331° 30′ 30″ 3800 feet more or less, and running:

1. Northeasterly 2350 feet more or less;
2. Easterly 2050 feet more or less to the Southwesterly side of Road 2-J, the total distance along the center line being 5,250 feet more or less;

Containing an area of 3.6 acres more or less.

ROAD 2-M.

Initial Point in Block 15.

Being a right of way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line, on the boundary between Paalaa-Uka and Kaheeka, the true azimuth and distance from a pipe in concrete at the end of Course 28 of Boundary Certificate No. 101 being 331° 30′ 30″ 2900 feet more or less, and running:

1. Easterly	7450 feet	more or less;
2. Southeasterly	600 feet	more or less;
3. Northeasterly	1150 feet	more or less to the Southerly side of Road 2, 1200 feet more or less Northeasterly from Government Survey Triangulation Station "Halemano," the total distance along the center line being 9,200 feet more or less;

Containing an area of 6.4 acres more or less.

[780]

ROAD 2-N.

Initial Point in Block 15.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northwesterly end of this center line, on the Southerly side of Road 2, 1250 feet

Northeasterly from Government Survey Triangulation Station "Halemano," and running:

1. Southeasterly 2500 feet more or less to the Westerly side of Road 3, the total distance along the center line being 2,500 feet more or less;

Containing an area of 1.7 acres more or less.

ROAD 2-O.

Initial Point in Block 23.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northerly end of this center line, on the Southerly side of Road 2, 5400 feet more or less Easterly from Helemano Camp and 1500 feet more or less Southerly from Helemano Stream, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 950 feet South and 14,950 feet East, and running:

1. Southerly 1500 feet more or less;
2. Northeasterly 1200 feet more or less;
3. Southwesterly 1100 feet more or less;
4. Northeasterly 700 feet more or less, the total distance along the center line being 4,740 feet more or less;

Containing an area of 3.3 acres more or less.

[781]

ROAD 2-P.

Initial Point in Block 13.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Southwesterly end of this center line, on the boundary between Paalaa-Uka and Kaheeka, the true azimuth and distance from a pipe in concrete at the end of Course 28 of Boundary Certificate No. 101 being 123° 41′ 2120 feet more or less, and running:

1. Northeasterly	130 feet more or less to the Southwesterly side of Road 2-E, the total distance along the center line being 130 feet more or less;
	Containing an area of 0.1 acre more or less.

ROAD 2-Q.

Initial Point in Block 13.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Southeasterly end of this center line, on the Easterly boundary of Grant 431 to Kauohanui, 20 feet more or less from the boundary between Paalaa-Uka and Kaheeka, and running:

1. Northwesterly	930 feet more or less;
2. Westerly	290 feet more or less to the Westerly boundary of Grant 431 to Kauohanui, the total distance along the center line being 1,220 feet more or less;
	Containing an area of 0.8 acre.

ROAD 3.

Initial Point in Block 15.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northeasterly end of this center line, on the Southerly side of Road 2, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 260 feet North and 3,350 feet East, and running:

1.	Southwesterly	6250 feet	more or less to Helemano Upper Reservoir Outlet Ditch;
2.	Southwesterly	1600 feet	more or less;
3.	Southeasterly	1200 feet	more or less;
4.	Easterly	500 feet	more or less to the boundary between Paalaa-Uka and Land Court Application 262, the total distance along the center line being 10,200 feet more or less;

Containing an area of 7.0 acres more or less.

Eliza R. P. Christian to release all interest she may have in that portion of the road and improvements between the Helemano Upper Reservoir Outlet Ditch and the Poamoho Stream, also in the new concrete bridge where Helemano Upper Reservoir Outlet Ditch crosses Road 3.

ROAD 3-A.

Initial Point in Block 21.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northwesterly end of this center line, on the Southerly side of Road 2-M, 120 feet more or less Northerly from Government Survey Triangulation Station "Halemano" and running:

1. Southeasterly 1850 feet more or less to Road 4-A;
2. Southeasterly 1400 feet more or less to the Westerly side of Road 3, the total distance along the center line being 3,540 feet more or less;

Containing an area of 2.4 acres more or less.

[783]

ROAD 3-B.

Initial Point in Block 21.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line, on the Easterly side of Road 3, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 3,050 feet South and 2,050 feet East, and running:

1. Southeasterly 1000 feet more or less to Road 5;
2. Southeasterly 1650 feet more or less;
3. Northeasterly 300 feet more or less;
4. Southeasterly 650 feet more or less to the Northerly side of Road 3-D, the total distance along the center line being 3,600 feet more or less;

Containing an area of 2.6 acres more or less.

ROAD 3-C.

Initial Point in Block 21.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line, on the Easterly side of Road 3, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 3,350 feet South and 1,950 feet East, and running:

1. Easterly 650 feet more or less to the Southerly side of Road 3-B, the total distance along the center line being 650 feet more or less;

Containing an area of 0.4 acre more or less.

[784]

ROAD 3-D.

Initial Point in Block 26.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Southwesterly end of this center line, on the Northeasterly side of Road 3, 400 feet more or less Northerly from Poamoho Stream, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 6,950 feet South and 150 feet East, and running:

1. Northeasterly 7250 feet more or less;
2. Northwesterly 350 feet more or less;
3. Northeasterly 1250 feet more or less;

4. Northerly 1150 feet more or less to the Southerly side of Road 5, 950 feet more or less Westerly from Helemano Camp, the total distance along the center line being 10,000 feet more or less;

Containing an area of 6.9 acres more or less.

ROAD 4.

Initial Point in Block 21.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Easterly end of this center line, on the Westerly side of Road 3, 300 feet more or less Easterly from Helemano School, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 4,450 feet South and 1,500 feet East, and running:

1. Northwesterly 1450 feet more or less to Road 4-A;
2. Southwesterly 3600 feet more or less;
3. Westerly 2000 feet more or less to the boundary between Paalaa-Uka and Kaheeka, the true azimuth and distance from the end of Course 27 of Boundary Certificate No. 101 being 151° 30′ 30″ 1120 feet more or less, the total distance along the center line being 7,440 feet more or less;

Containing an area of 5.1 acres more or less.

ROAD 4-A.
Initial Point in Block 21.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Southwesterly end of this center line, on the Northerly side of Road 4 near the Southeast corner of Brodie 2 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 3,850 feet South and 160 feet East, and running:

1. Northeasterly 2700 feet more or less to the Southwesterly side of Road 3-A, the total distance along the center line being 2700 feet more or less;

Containing an area of 1.9 acres more or less.

ROAD 4-B.
Initial Point in Block 20.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northerly end of this center line, on the Southeasterly side of Road 4, 1200 feet more or less Southwesterly from Brodie 2 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 4,770 feet South and 1,350 feet West, and running:

1. Southerly 750 feet more or less, the total distance along the center line being 750 feet more or less;

Containing an area of 0.5 acre more or less.

[786]

ROAD 4-C.

Initial Point in Block 20.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northwesterly end of this center line, on the Southerly side of Road 4, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 5,550 feet South and 4,050 feet West, and running:

1. Southeasterly 1200 feet to the boundary between Paalaa-Uka and Land Court Application 262, the total distance along the center line being 1,200 feet more or less;

Containing an area of 0.8 acre more or less.

ROAD 5.

Initial Point in Block 26.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Southwesterly end of this center line, the true azimuth and distance from the end of Course 11 of Land Court Application 262 being 315° 20' 1900 feet more or less, 3500 feet more or less

Southwesterly from Kaukonahua Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 10,850 feet South and 3,850 feet East, and running:

1. Easterly 2600 feet more or less;
2. Northeasterly 900 feet more or less;
3. Easterly 4800 feet more or less, 220 feet more or less Westerly from the Northeast corner of Grant 1092 to Paaluhi;
4. Northerly 2300 feet more or less to Road 5-D;
5. Northwesterly 920 feet more or less to Road 6;
6. Northwesterly 1100 feet more or less to Poamoho Stream;
7. Northeasterly 550 feet more or less to Helemano Upper Ditch (Poamoho Branch);
8. Northerly 2450 feet more or less;
9. Westerly 900 feet more or less to Helemano Camp;
10. Westerly 5300 feet more or less;
11. Southwesterly 3400 feet more or less to the Southeasterly side of Road 3, 350 feet more or less Easterly from Helemano School, the total distance along the center line being 28,800 feet more or less;

[787]

Containing an area of 19.7 acres more or less.

ROAD 5-A.
Initial Point in Block 22.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Southwesterly end of this center line, on the Northerly side of Road 5, 2500 feet more or less Westerly from Helemano Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 2,300 feet South and 6,100 feet East, and running:

1. Northwesterly 2900 feet more or less to the Southeasterly side of Road 2, the total distance along the center line being 2,900 feet more or less;

Containing an area of 2.0 acres more or less.

ROAD 5-B.
Initial Point in Block 22.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Southwesterly end of this center line, on the Northerly side of Road 5, 950 feet more or less Westerly from Helemano Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 2,150 feet South and 7,600 feet East, and running:

1. Northwesterly 2600 feet more or less to the Southerly [788] side of Road 2, 350 feet more or less Westerly from Old Muto Camp, the total distance along the center line being 2,600 feet more or less;

Containing an area of 1.8 acres more or less.

ROAD 5-C.
Initial Point in Block 22.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line, on the Easterly side of Road 5, 1400 feet more or less Southeasterly from Helemano Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 3,350 feet South and 10,600 feet East, and running:

1. Easterly 3950 feet more or less;
2. Southeasterly 2050 feet more or less;
3. Easterly 2000 feet more or less, the total distance along the center line being 8,040 feet more or less;

Containing an area of 5.5 acres more or less.

ROAD 5-D.
Initial Point in Block 27.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line, 4200 feet more or less Southeasterly from Helemano Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 6,250 feet South and 11,500 feet East, and running:

1. Easterly 3800 feet more or less, 1000 feet more or less Southwesterly from the end of Course 24 of Boundary Certificate No. 101, the total distance along the center line being 3,800 feet more or less;

Containing an area of 2.6 acres more or less.

[789]

ROAD 5-E.

Initial Point in Block 27.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line, on the Southeasterly side of Road 5, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 8,550 feet South and 11,700 feet East, and running:

1. Easterly 120 feet more or less to the boundary between Grant 973 to James Robinson, Robert Lawrence and Robert W. Holt and Grant 1092 to Paaluhi Westerly 100 feet more or less from the Northeast corner of Grant 1092 to Paaluhi, the total distance along the center line being 120 feet more or less;

Containing an area of 0.1 acre more or less.

ROAD 5-F.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line on the boundary between Grant 973 to James Robinson, Robert Lawrence and Robert W. Holt and Grant 1092 to Paaluhi, 5300 feet more or less Easterly from Kaukonahua Camp and 30 feet more or less Southerly from the Northeast corner of Grant 1092 to Paaluhi, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 8,520 feet South and 11,870 feet East, and running:

1. Easterly 7750 feet more or less to the Easterly boundary of Grant 973 to James Robinson, Robert Lawrence and Robert W. Holt, the total distance along the center line being 7,750 feet more or less;

Containing an area of 5.3 acres more or less.

[790]

ROAD 6.

Initial Point in Block 22.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Northeasterly end of this center line, on the Southerly side of Road 5, 3300 feet more or less Southeasterly from Helemano Camp, the co-

ordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 5,450 feet South and 11,000 feet East, and running:

1.	Southwesterly	1700 feet more or less;
2.	Westerly	3950 feet more or less to Road 6-C;
3.	Southwesterly	700 feet more or less;
4.	Southeasterly	500 feet more or less along Kaukonahua Camp;
5.	Southwesterly	1300 feet more or less;
6.	Southwesterly	2250 feet more or less to the Northwesterly side of Road 5, the total distance along the center line being 10,740 feet more or less;

Containing an area of 7.4 acres more or less.

ROAD 6-A.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line, on the Southeasterly side of Road 6, 3800 feet more or less Southerly from Helemano Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 6,350 feet South and 10,050 feet East, and running:

1.	Easterly	1300 feet more or less to the Westerly side of Road 5, the total distance along the center line being 1,300 feet more or less;

Containing an area of 0.9 acre more or less.

ROAD 6-B.

Initial Point in Block 26.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line, on the Easterly side of Road 6 near the Southwest corner of Kaukonahua Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 7,750 feet South and 5,540 feet East, and running:

1. Easterly 5150 feet more or less;
2. Southerly 750 feet more or less to the Northerly side of Road 5, the total distance along the center line being 5,900 feet more or less;

Containing an area of 4.1 acres more or less.

ROAD 6-C.

Initial Point in Block 26.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Southwesterly end of this center line, on the boundary between Grant 973 to James Robinson, Robert Lawrence and Robert W. Holt and Land Court Application 262, the true azimuth and distance from the end of Course 26 of Boundary Certificate No. 101 being 4° 49′ 920 feet more or less, the coordinates of said point of beginning referred to Government Survey Triangulation Station

"Halemano" being 7,670 feet South and 2,620 feet East, and running:

1. Northeasterly 950 feet more or less;
2. Easterly 2350 feet more or less to the Northwesterly side of Road 6, 300 feet more or less Northerly from Kaukonahua Camp, the total distance along the center line being 3,300 feet more or less;

Containing an area of 2.3 acres more or less.

[792]

ROAD 7.

Initial Point in Block 5.

Being a right-of-way 30 feet wide, extending 15 feet on each side of the center line of the present road.

Beginning at the Westerly end of this center line, on the Southwesterly boundary of Grant 235, Apana 2 to Jerome Topliff and Lewis Johnson, 800 feet more or less from the Southeast corner (marked 5 on map) of Grant 235, Apana 2 to Jerome Topliff and Lewis Johnson, and running:

1. Easterly 500 feet more or less, the total distance along the center line being 500 feet more or less;

Containing an area of 0.5 acre more or less.

[793]

SCHEDULE 9—TRANSMISSION LINE.

TRANSMISSION LINE 1.

Initial Point in Block 1.

Beginning at the Southerly end of this center line in the middle of Transmission Line 5 at the Southerly side of Domestic Water Line 13, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 12,300 feet North and 20,900 feet West, and running:

1.	Northeasterly	1500 feet	more or less;
2.	Northerly	600 feet	more or less to the Easterly side of Helemano 3 Reservoir;
3.	Northeasterly	1350 feet	more or less along the Northwesterly side of Track C;
4.	Northerly	350 feet	more or less to the end of Course 12 of Boundary Certificate No. 101, the total distance along the center line being 3,800 feet more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

TRANSMISSION LINE 2.

Initial Point in Block 2.

Beginning at the Southeasterly end of this center line, on the Northwesterly side of Opaeula 9 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 13,700 feet North and 16,500 feet West, and running:

1. Northwesterly	2600 feet	more or less;
2. Northerly	300 feet	more or less to the middle of Opaeula Stream, 150 feet more or less Southerly of Pump 3, the total distance along the center line being 2,900 feet more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [794]

TRANSMISSION LINE 3.

Initial Point in Block 3.

Beginning at the Southerly end of this center line, on the Northerly side of Opaeula 10 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 12,450 feet North and 11,550 feet West, and running:

1. Northerly	1400 feet	more or less to the middle of Opaeula Stream, the total distance along the center line being 1,400 feet more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

TRANSMISSION LINE 4.

Initial Point in Block 9.

Beginning at the Southeasterly end of this center line in Waialua Camp, the coordinates of said point of beginning referred to Government Survey Tri-

angulation Station "Halemano" being 8,450 feet North and 1,450 feet East, and running:

1. Northwesterly 1750 feet more or less;
2. Northwesterly 2050 feet more or less;
3. Northerly 400 feet more or less to the middle of Opaeula Stream, the total distance along the center line being 4,200 feet more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

TRANSMISSION LINE 5.
Initial Point in Block 5.

Beginning at the Southerly end of this center line, on the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from the end of Course 31 of Boundary Certificate No. 101 being 293° 11′ 140 feet more or less, and running:

1. Northerly 1320 feet more or less to the Southerly side of Domestic Water Line 13;
2. Northwesterly 1850 feet more or less along the Southwesterly side of Domestic Water Line 13, 100 feet more or less Southwesterly from Helemano 1 Camp, the total distance along the center line being 3,180 feet more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [795]

TRANSMISSION LINE 6.
Initial Point in Block 6.

Beginning at the Southwesterly end of this center line on the boundary between Paalaa-Uka and Paukauila, the true azimuth and distance from the end of Course 30 of Boundary Certificate No. 101 being 113° 11′ 170 feet more or less, and running:

1. Northeasterly 1100 feet more or less to the middle of Transmission Line 7, 800 feet more or less Southeasterly from Helemano 4-A Domestic Water Reservoir, the total distance along the center line being 1100 feet more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

TRANSMISSION LINE 7.
Initial Point in Block 6.

Beginning at the Southeasterly end of this center line in Helemano 6 Camp, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 8,750 feet North and 14,350 feet West, and running:

1. Southwesterly 100 feet more or less;
2. Northwesterly 3800 feet more or less;
3. Westerly 700 feet more or less, the total distance along the center line being 4,600 feet more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

TRANSMISSION LINE 8
Initial Point in Block 5.

Beginning at the Southeasterly end of this center line, on the Northeasterly boundary of Grant 238 to John F. Anderson and Franklin Davis, 370 feet more or less Southeasterly from the Northeast corner (marked 2 on map) of Grant 238 to John F. Anderson and Franklin Davis, and running:

1. Northwesterly 1230 feet more or less to the Westerly side of Grant 238 to John F. Anderson and Franklin Davis 300 feet more or less Southerly from the Northwest corner (marked 1 on map) of Grant 238 to John F. Anderson and Franklin Davis, the total distance along the center line being 1,230 feet more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [796]

TRANSMISSION LINE 9.
Initial Point in Block 5.

Beginning at the Northwesterly end of this center line, on the Northerly boundary of Grant 235, Apana 2 to Jerome Topliff and Lewis Johnson, 390 feet more or less Southeasterly from the Northeast corner (marked 3 on map) of Grant 235, Apana 2 to Jerome Topliff and Lewis Johnson, and running:

1. Southeasterly 710 feet more or less to the Westerly side of Pump 10 Site, the total distanee along the center line being 710 feet more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

TRANSMISSION LINE 10
Initial Point in Block 4.

Beginning at the Northwesterly end of this center line, on the Westerly boundary of Grant 235, Apana 1 to Jerome Topliff and Lewis Johnson, 100 feet more or less Northerly from the Southwest corner of Grant 235, Apana 1 to Jerome Topliff and Lewis Johnson, and running:

1. Southeasterly 320 feet more or less to the Southerly boundary of Grant 235, Apana 1 to Jerome Topliff and Lewis Johnson, the total distance along the center line being 320 feet more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located.

TRANSMISSION LINE 11.
Initial Point in Block 5.

Beginning at the Northwesterly end of this center line, at the center line of Transmission Line 5, 140 feet more or less Southeasterly from the end of Course 31 of Boundary Certificate No. 101, the

coordinates of said point of beginning referred to Government Survey Triangulation Station "Halemano" being 10,600 feet North and 20,700 feet West, and running:

1. Southeasterly 3430 feet more or less near and along Course 31 of Boundary Certificate No. 101 to the center line of Transmission Line 6, the total distance along the center line being 3,430 feet more or less.

Eliza R. P. Christian likewise to release all interest she may have in all the improvements thereon located. [797]

SCHEDULE 10—TELEPHONE SYSTEM.

Eliza R. P. Christian to release all interest she may have in the existing telephone system. [798]

[Title of Court and Cause.]

PETITION FOR APPEAL AND AFFIDAVIT OF BARRY S. ULRICH.

Filed April 18, 1935 at 1:50 o'clock p. m. Robert Parker, Jr., Clerk Supreme Court. [799]

PETITION FOR APPEAL.

To: The Honorable Acting Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii:

Comes now ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. von HOLT,

her guardian, and, deeming herself aggrieved by the final decision of this Court entered herein on, to-wit: May 3, 1934, and by the Final Decree of this Court entered herein on, to-wit: the 25th day of March, 1935, hereby prays that an appeal may be allowed from the said Decree to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and that a transcript of the record, proceedings, and documentary exhibits upon which said decree was made and based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. And in connection with this, her Petition, your petitioner herein presents [800] her assignment of errors.

Your petitioner further shows that the said Decree was rendered in a proceeding in equity, and that the amount involved, exclusive of costs and interests, exceeds the sum of Five Thousand Dollars ($5,000.00).

DATED at Honolulu, T. H., April 18, 1935.

BARRY S. ULRICH,
CHAS. M. HITE,
Attorneys for
Petitioner-Appellant.

Territory of Hawaii,
City and County of Honolulu—ss.

HERMAN V. von HOLT, beinp first duly sworn, on oath deposes and says: That he is the Herman

V. von HOLT named as guardian for Eliza R. P. Christian, an incompetent person, in the foregoing petition for appeal; that he has read the said petition and knows the contents thereof; that he makes this vertification for and on behalf of the said Eliza R. P. Christian and as her guardian for the reason that she is incompetent to make the same on her own behalf; that the matters and things set forth in said foregoing petition are true of his own knowledge; and further affiant says that the amount involved, exclusive of costs and interest, exceeds the sum of Five Thousand Dollars ($5,000.00).

HERMAN V. von HOLT.

Subscribed and sworn to before me this 18th day of April, 1935.

[Seal] FRANK F. FERNANDES,
Notary Public, First Judicial Circuit,
Territory of Hawaii. [801]

AFFIDAVIT OF BARRY S. ULRICH.

Territory of Hawaii,
City and County of Honolulu—ss.

BARRY S. ULRICH, being first duly sworn, on oath deposes and says: That he is an attorney at law and one of the attorneys for the petitioner in the above-entitled matter; that he is now and at all times has been one of the attorneys of record in the above-entitled cause throughout the various proceedings which have transpired in said cause.

and in the court below, and that he is familiar with the subject matter of the said litigation.

Affiant says that by the judgment and decree of the Honorable A. M. Cristy, Second Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, sitting at Chambers, in Equity, it was adjudged and decreed, among other things, that that certain deed dated May 2, 1910, by and between John Dominis Holt, Eliza R. P. Christian, Annie Holt Kentwell and Lawrence Kentwell, therein named as grantors, and James L. Holt, therein named as grantee, be [802] canceled, annulled, and adjudged to be void and of no effect as to Eliza R. P. Christian, named as grantor therein; that the interest in the property covered by said deed of Eliza R. P. Christian be reconveyed to her by respondent, Waialua Agricultural Company, Limited; that that certain lease dated March 17, 1905, by and between Carlos A. Long et al, and Waialua Agricultural Company, Limited, be canceled and annulled as to the said Eliza R. P. Christian; that certain rights with respect to improvements on said properties as particularly set forth in said decree be protected in the Waialua Agricultural Company, Limited, as in said decree specified, and that said Waialua Agricultural Company, Limited, do pay to said Eliza R. P. Christian, by payment to her duly appointed and acting guardian, the total sum of Six Hundred Six Thousand Seven Hundred Eighty-five and 75/100 Dollars ($606,785.75).

Affiant says that by the final decree entered in this court in said matter on, to-wit: the 25th day of March, 1935, the rendition and entry of which decree is assigned as error herein, said decree of the said Circuit Judge, sitting in Equity as aforesaid, has been affirmed in part only and has been reversed in part, and that said decree, among other things, has been affirmed with respect to its provisions providing for the cancellation of the aforesaid deed of May 2, 1910, and the reconveyance to said Eliza R. P. Christian of her interest in the lands covered by said deed, but that it has been reversed, among other things, with respect to those provisions in the decree of [803] said Circuit Judge canceling and annulling the aforesaid lease of May 17, 1905, and the aforesaid instrument of August 31, 1906, and further with respect to the provision requiring the payment of the said sum of Six Hundred Six Thousand Seven Hundred Eighty-five and 75/100 Dollars ($606,785.75) by said Waialua Agricultural Company, Limited to said Eliza R. P. Christian, which provision in said final decree has been eliminated, and that the decree of the Circuit Judge has been reduced in its effect and the amount by which said Waialua Agricultural Company, Limited was by said decree of said Circuit Judge ordered to reimburse said Eliza R. P. Christian has been diminished by an amount greatly in excess of the sum of Five Thousand Dollars ($5,000.00), exclusive of costs and interest, and that the amount now involved in the prosecution of this appeal in

this cause is consequently an amount greatly in excess of said sum of Five Thousand Dollars ($5,000.00) exclusive of costs and interest, all as more fully appears from the records in said cause.

This affidavit is made in support of the foregoing petition for the allowance of an appeal, and affiant further says that as to said petition for appeal, he knows the contents thereof, and that the same is true of his own knowledge.

BARRY S. ULRICH.

Subscribed and sworn to before me this 18th day of April, 1935.

[Seal] KATHRYN R. CONNOR,
Notary Public, First Judicial Circuit,
Territory of Hawaii. [804]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS ON APPEAL.

Filed April 18, 1935 at 1:50 o'clock p. m. Robert Parker, Jr., Clerk Supreme Court. [805]

Comes now ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, appellant herein, and, in connection with her petition for appeal, says that in the record, proceedings, decision and decree in the above entitled matter, manifest error has intervened to the prejudice of her, the said appellant, as follows, to-wit:

1.

That the Supreme Court of the Territory of Hawaii, in its decision and opinion entered May 3, 1934 and in its final decree entered March 25, 1935, committed error in not completely affirming the judgment and decree of the trial court made and entered September 6, 1932, ordering and decreeing that the deed of May 2, 1910, the lease of March 17, 1905, and the instrument of August 31, 1906, be all and each of them canceled and set aside as to Eliza R. P. Christian; that Waialua Agricultural [806] Company, Limited do re-transfer to Eliza R. P. Christian her interest in the lands involved and do pay to her the sum of $606,785.75, and that certain rights in said Waialua Agricultural Company, Limited be protected as in said decree provided.

2.

That the Supreme Court of the Territory of Hawaii, in its decision entered May 3, 1934 and in its final decree entered March 25, 1935, committed error in reversing and setting aside the decree of the trial judge entered Septembr 6, 1932 in so far as said decree provided for the canceling and setting aside as to Eliza Christian of the lease dated March 17, 1905.

3.

That the Supreme Court of the Territory of Hawaii, in its final decree entered March 25, 1935 and in the decision pursuant to which said decree was entered, committed error in reversing and set-

ting aside the judgment and decree of the trial judge made and entered on September 6, 1932 in so far as said decree provided for the canceling and setting aside of that certain instrument dated August 31, 1906.

4.

That the Supreme Court of the Territory of Hawaii committed error in its final decree entered in said cause in not canceling and setting aside as to Eliza R. P. Christian the lease dated March 17, 1905.

5.

That the Supreme Court of the Territory of Hawaii committed error in its final decree entered in said cause in not canceling and setting aside the instrument dated August 31, 1906.

6.

That the Supreme Court of the Territory of Hawaii, in [807] its final decree entered March 25, 1935 and in the decision pursuant to which said decree was entered, committed error in reversing and setting aside the decree of the trial judge entered in said cause September 6, 1932, in so far as said decree ordered and directed the payment of the sum of $606,785.75 by Waialua Agricultural Company, Limited to Eliza R. P. Christian, petitioner herein.

7.

That the Supreme Court of the Territory of Hawaii committed error in its final decree entered

in said cause in failing to provide for the payment of $606,785.75, or of any sum at all, by Waialua Agricultural Company, Limited to Eliza R. P. Christian, petitioner herein.

8.

That the Supreme Court of the Territory of Hawaii, in its decision entered May 3, 1934, committed error in holding and deciding that the lease dated March 17, 1905 was and should be considered binding as against Eliza R. P. Christian, notwithstanding her mental incompetence to execute the same.

9.

That the Supreme Court of the Territory of Hawaii committed error in its decision of May 3, 1934 in holding and deciding that Eliza R. P. Christian's joinder in or assent to the lease of March 17, 1905 was in fact beneficial as to her.

10.

That the Supreme Court of the Territory of Hawaii committed error in its said decision in holding and deciding that the lease of 1905, even if beneficial to the mental incompetent, was binding against her to any extent beyond that of requiring an accounting for benefits actually received under [808] it upon cancellation.

11.

That the Supreme Court, in its said decision committed error in holding and deciding that the lease of one mentally incompetent, who has not

been judicially declared insane, to a lessee without knowledge of the incompetency, for an adequate consideration which was never paid, and which has been performed only in the use of the property by the lessee, without accounting for the value of such user, if accompanied by no fraud, cannot be canceled, even though the lessee can be fully and completely restored to the status quo ante.

12.

That the Supreme Court in its said opinion and decision committed error in holding and finding that the lease of 1905 had been "fully performed" as between Eliza Christian and Waialua Agricultural Company, Limited, when the evidence conclusively shows that there was never a particle of performance under and pursuant to the provisions of said lease, the occupancy throughout having been adverse to and inconsistent with the effective existence of such a lease at all.

13.

The Supreme Court of the Territory of Hawaii committed error in its decision made and entered April 18, 1931, and in the interlocutory remanding order entered pursuant thereto, in holding and deciding that it was necessary that the said lease of March 17, 1905 be canceled or annulled at all in order that its invalidity might appear or that recovery be had by petitioner for rents for user of her lands by respondent upon cancellation of the deed of 1910. [809]

14.

That the Supreme Court in its said decision of April 18, 1931 committed error in not then affirming the decree of the trial judge dated October 16, 1929.

15.

That the Supreme Court of the Territory of Hawaii, in its final decree entered March 25, 1935 and in the decision pursuant to which said decree was entered, committed error in not holding and finding that the instrument of August 31, 1906 was wholly and completely void.

16.

That the Supreme Court committed obvious error in its final decree and in the decision pursuant to which said decree was entered, in finding and deciding that the instrument of 1906 could not have the effect of the conveyance of a life estate and then in giving it exactly that effect by depriving petitioner of a right to accounting for rents throughout the remainder of her life.

17.

That the Supreme Court committed error in its decision and opinion entered May 3, 1934 in deciding and holding that the lease of 1905 was incontestable by Eliza Christian for the reason that it was taken in ignorance of her imbecility and was beneficial to her.

18.

That the Supreme Court committed error in its said decision in not holding that the said lease of 1905 was voidable by Eliza Christian for the reason that upon its avoidance the parties could be restored substantially to status quo ante. [810]

19.

That the Supreme Court committed error in its decision of May 3, 1934 in deciding and holding that the instrument of 1906 was incontestable by Eliza for the reason that the Waialua Company purchased rights under said instrument from Annie Kentwell for a valuable consideration in ignorance of Eliza's imbecility.

20.

That the Supreme Court committed error in not holding and deciding that whatever rights Annie Kentwell may have had by virtue of the instrument of 1906, were personal, non-assignable (except as in said instrument provided) and in fact were never assigned to Waialua Agricultural Company, Limited at all.

21.

That the Supreme Court committed error in its decision entered May 3, 1934 in deciding and holding that the trial judge committed error in decreeing cancellation of the lease of 1905 for the reason that the trial judge, in decreeing such cancellation, had merely followed the rulings and instructions of said Supreme Court theretofore announced and

made in its prior decision of April 18, 1931, and in the order of remand entered pursuant thereto, which ruling the Supreme Court, in its last decision and opinion, has not reversed, altered, or amended.

22.

That the Supreme Court committed error in its decision entered May 3, 1934 in deciding and holding that the trial judge committed error in decreeing cancellation of the instrument of 1906 for the reason that the trial judge, in decreeing such cancellation, had merely followed the rulings and instructions [811] of said Supreme Court theretofore announced and made in its prior decision of April 18, 1931, and in the order of remand entered pursuant thereto, which ruling the Supreme Court, in its last decision and opinion, has not reversed, altered, or amended.

23.

That the Supreme Court committed error in its final decree entered March 25, 1935 and in its decision pursuant to which said decree was entered, in holding and decreeing that the lease of 1905 should be considered as binding, effective in enforcing it as against Eliza Christian, and then in refusing to enforce it, except to a very limited extent, in her favor according to its expressed provisions.

24.

That the Supreme Court committed error in its final decree and in the decision pursuant to which said decree was entered, in decreeing that Eliza

R. P. Christian should be allowed credit for improvements only to the extent that they were placed on said properties prior to 1910, whereas the express provisions of the lease provided that all improvements should revert as of the date of the termination of the lease, March 31, 1930.

25.

That the Supreme Court committed error in its final decree and in its decision pursuant to which said decree was entered in holding and decreeing in substance and effect that the lease conveying a term of years, expiring in 1930, should be and was fully effective, and at the same time that the instrument of 1906, held by said court to convey a much larger estate in interest, was also fully and completely effective. [812]

26.

That the Supreme Court committed error in its said final decree and decision in not holding and decreeing that the instrument of 1906 could be and was at most effective as an assignment of the rents payable under the lease of 1905.

27.

That the Supreme Court in its final decree and decision committed error in deciding and decreeing that the instrument of 1906 was incontestable even as to Annie Kentwell, who took with full knowledge of the incompetency of the said Eliza Christian.

28.

That the Supreme Court committee error in its final decree and decision in not holding that the instrument of 1906 as to Annie Kentwell, even if considered as merely voidable, could be held binding as against the incompetent only to the extent of requiring an accounting for the reasonable worth of necessaries actually furnished.

29.

That the Supreme Court, in its opinion and decision entered May 3, 1934, committed error in that said opinion and decision is inconsistent with itself, in that in one part thereof said Supreme Court holds that the instrument of 1906 could not be and was not effective as the conveyance of a life estate because the husband of Eliza Christian had not joined therein, while in another place in the same decision said Supreme Court holds and decides that said instrument, if sustained, affords "a complete protection to the W. A. Co. against any award of rents or damages," large amounts of rents having already accrued to and been received by the said Waialua Agri- [813] cultural Company, Limited for use and user of the properties in question after the expiration of the lease of 1905 and to a time in the future which may exceed even the life of the said Eliza R. P. Christian.

30.

That the Supreme Court committed error in its final decree and decision in attempting to and in

granting relief to respondent Waialua Agricultural Company which it had no jurisdiction to grant in these proceedings and which could only properly be granted in an action or proceedings for partition.

31.

That the Supreme Court committed error in its final decree and decision in attempting to grant and in granting rights by way of partition to respondent Waialua Agricultural Company, Limited without even attempting to grant or to settle in petitioner, Eliza R. P. Christian, corresponding and similar rights, without the recognition of which no partition could be effected even if these were proceedings for partition rather than merely for cancellation and accounting.

32.

That the Supreme Court, in its final decree and decision, committed error in ordering and decreeing that Eliza R. P. Christian restore to Waialua Agricultural Company, Limited, on cancellation of the instrument of 1910, $30,000 with interest thereon, claimed to have been received by her under said instrument, and in not even attempting to require Waialua Agricultural Company, Limited to account for any one of the innumerable benefits admittedly received by and enjoyed by it under, by virtue of, and pursuant to the execution of said same instrument. [814]

33.

That the Supreme Court committed error in its final decree and decision in holding and deciding

that the lease of 1905 protected the respondent Waialua Agricultural Company, Limited against any obligation to account by virtue of the cancellation of the deed of 1910, and in giving said lease no such effect at all with respect to the corresponding rights and obligations of Eliza R. P. Christian.

34.

That the Supreme Court committed error in its final decree and decision in restoring respondent Waialua Agricultural Company, Limited to its status quo ante, and in failing completely to even give serious consideration to the matter of restoring petitioner to her status quo ante upon cancellation of the deed of 1910.

35.

That the Supreme Court committed error in holding and deciding that the lease of 1905 saved Waialua Agricultural Company from the obligation to account for the reasonable value of the use and user of plaintiff's land throughout its entire term, or until 1930, and at the same time in holding that it gave to petitioner rights with respect to improvements only until 1910.

36.

That the Supreme Court committed error in its final decree and decision in holding that a grantee who takes a conveyance from a mental incompetent, with full knowledge of the incompetency, may nevertheless thereafter convey perfectly good title to an innocent third person and thus place the property

completely beyond reach of the incompetent either at law or in equity. [815]

37.

That the Supreme Court, in its final decree and decision, committed error in not holding that the conveyance of a mental incompetent to one taking with full knowledge of the incompetency is wholly void.

38.

That the Supreme Court, in its final decision, committed error in holding that Waialua Agricultural Company, Limited was in fact a purchaser in good faith and for a valuable consideration of all rights purported to be conveyed by the instrument of 1906.

39.

That the Supreme Court, in its final decision, committed error in failing to even give consideration to the fact that in the purchase from Annie Kentwell of her rights and of the rights of John D. Holt in and to the properties in question, the sum of $5,000 paid to the said Annie Kentwell, considered as consideration for the right to receive all income which might accrue on the property during the remainder of the life of Eliza Christian, would be and was wholly, utterly, and absurdly inadequate.

40.

That the Supreme Court committed error in its decision of April 18, 1931, as well as in its final

decision of May 3, 1934, in holding and deciding that the question of the validity as to Eliza Christian of the lease of 1905 and of the instrument of 1906 had not been and was not presented to the court prior to the amendments of the petition allowed pursuant to the court's order of remand and that those amendments presented new and distinct issues. [816]

41.

That the Supreme Court committed error in its final decision of May 3, 1934 in holding and deciding, at least inferentially, that a gift of all income from property for a period comprising the remainder of the life of the owner and/or grantor, is not and would not amount to a gift of a life estate, being a freehold interest in said property.

42.

That the Supreme Court committed error in its final decision in deciding and holding that Eliza Christian was in fact a party lessor in that certain indenture of lease of March 17, 1905.

43.

That the Supreme Court committed error in its final decision herein in not holding and deciding that the lease of 1905 as to the interest of Eliza Christian in the property in question was surrendered in 1910 by the valid and binding act of the lessee and her predecessor life tenant lessor.

44.

That the Supreme Court committed error in its final decision in not holding and deciding that Eliza Christian's assent to the lease of 1905 for no consideration other than a contingent undertaking to pay rentals which were never paid, created no estate in the land and never became effective.

45.

That the Supreme Court committed error in its decision of May 3, 1934 in holding, deciding, and announcing, by way of dictum, that it had committed error in its own prior decision of April 18, 1931 and in the order of remand made pursuant thereto in not reopening the question of mental incompetency [817] with respect to the lease of 1905 and the instrument of 1906.

46.

That the Supreme Court committed error in its decisions of April 18, 1931 and May 3, 1934 in holding and deciding that in an action for cancellation of a single instrument under which property is claimed, the validity of other instruments cannot even be passed upon unless cancellation of them is also prayed for.

47.

That the Supreme Court committed error in its decisions of April 18, 1931 and May 3, 1934 in deciding and holding that the validity of an instrument could not be passed upon in an equitable pro-

ceeding simply because "relief against" the said instrument was not prayed for in said proceeding.

48.

That the Supreme Court committed error in its decisions of April 18, 1931 and May 3, 1934 in not holding and deciding that where restoration to certain properties is prayed for in an action in equity seeking cancellation of an instrument under which said properties are presently claimed, the validity of all other instruments under which respondent may claim an interest in said property is necessarily put in issue.

49.

The Supreme Court committed error in its decision of May 3, 1934 in holding and deciding that the lease of 1905 has been fully performed, when it appears from the record beyond any question that performance under it was ended and voluntarily abandoned by all parties in 1910, and when performance of it with respect to Eliza Christian, petitioner herein, was never even commenced. [818]

50.

The Supreme Court committed error in its decision of May 3, 1934 in deciding and announcing on page 8 of said decision the utterly erroneous doctrine of law that a court of equity cannot and should not grant to a mental incompetent any relief which it could not and would not grant to a person perfectly sane.

51.

That the Supreme Court committed error in its final decision herein in that said decision is inconsistent with itself in that it applies one rule of law to the deed of 1910 and totally different and inconsistent rules of law to the lease of 1905 and the instrument of 1906.

52.

That the Supreme Court committed error in its final decision herein in considering the lease of 1905 as a contract for necessaries, on the theory that the consideration supposed to have been received under it could be used as a means for acquiring necessaries.

53.

That the Supreme Court committed error in its decision of April 18, 1931 in not specifically finding and holding that Waialua Agricultural Company acted in bad faith in procuring the conveyance of May 2, 1910.

54.

That the Supreme Court committed error in its decisions of April 18, 1931 and May 3, 1934 in not deciding and holding that the bad faith of Waialua Agricultural Company affecting the transaction of May 2, 1910 attached to all parts of that transaction and to the procuring by it of any rights under the [819] instrument of 1906 by virtue of said transaction.

55.

That the Supreme Court committed error in its decision of May 3, 1934 in holding and deciding that Waialua Agricultural Company, Limited by virtue of the deed of May 2, 1910 herein canceled as to Eliza Christian, nevertheless indirectly procured rights against said Eliza Christian through the joinder in said instrument of Annie Kentwell.

56.

That the Supreme Court committed error in its final decision of May 3, 1934 in holding and deciding that by virtue of the instrument of May 2, 1910 Waialua Agricultural Company, became and was a bona fide purchaser for value of rights against the mental incompetent under the provisions of the instrument of August 31, 1906.

57.

That the Supreme Court committed error in its decision of April 18, 1931 and in its final decision herein in holding and deciding that some $30,000 paid for the conveyance of the Eliza Christian interest under the deed of May 2, 1910 was adequate.

58.

That the Supreme Court committed error in its decisions of 1931 and 1934 and in its final decree entered herein, in holding, deciding and decreeing that Eliza Christian should pay to the Waialua Agricultural Company, Limited the sum of $30,000, together with interest thereon.

59.

That the Supreme Court committed error in its final decision in said cause in holding and deciding that as a fact [820] in and by virtue of the transaction of May 2, 1910 Waialua Agricultural Company had paid $30,000 for a contingent interest in remainder to acquire value only after the death of Eliza Christian and of comparatively little present value, and $5,000 for very much more valuable interest to continue throughout the life of the said Eliza Christian.

60.

That the Supreme Court committed error in its said final decision in holding and deciding in effect that both of the interests referred to in the foregoing assignment were acquired in good faith and for adequate consideration.

61.

That the Supreme Court committed error in its decision of April 18, 1931 and in its final decision in said cause in not holding and deciding that Waialua Agricultural Company, Limited, in and by virtue of the transaction and deed of May 2, 1910, had committed and been guilty of a direct violation of the provisions of Section 55 of the Hawaiian Organic Act providing that "no corporation, domestic or foreign, shall acquire or hold real estate in Hawaii in excess of one thousand acres."

62.

That the Supreme Court committed error in its decisions of 1931 and 1934 in not holding and finding that by virtue of the illegality attaching to the action of Waialua Company in participating in said transaction of May 2, 1910, said Company had been guilty of constructive fraud which attached to and invalidated all parts of said transaction.

63.

That the Supreme Court committed error in its decisions [821] of 1931 and 1934 in not holding and deciding that the deed of May 2, 1910 was illegal and invalid as to Eliza Christian by virtue of said violation of the provisions of the said Hawaiian Organic Act.

64.

That the Supreme Court committed error in its decisions of 1931 and 1934 in not holding and deciding that said instrument of 1910 was invalid and illegal as to Annie Kentwell by virtue of the violation of Waialua Company of the provisions of said Hawaiian Organic Act.

65.

That the Supreme Court committed error in its final decision and decree in failing to order and direct that Waialua Company pay to Eliza Christian reasonable rental for user by said Company prior to the date of the expiration of the lease of 1905 of the properties to be reconveyed to her herein.

66.

That the Supreme Court committed error in its final decision and decree in not ordering and directing the Waialua Company to pay to Eliza Christian rental for the user by said Company subsequent to the date of the expiration of the lease of 1905 of the properties to be reconveyed to her herein.

67.

That the Supreme Court committed error in its final decision and decree in not ordering and directing that the Waialua Company do henceforth pay to Eliza Christian reasonable rental for such use as it may hereafter make of the properties to be reconveyed to her herein. [822]

68.

That the Supreme Court committed error in its final decision and decree in not ordering and directing that the Waialua Company do pay to Eliza Christian interest on rentals as they should have become payable to the said Eliza Christian in the past for the user by said Waialua Company of properties ordered to be reconveyed to her herein from such dates as such rentals would have and should have become due and payable.

69.

That the Supreme Court committed error in its final decision and decree in not ordering and directing the Waialua Company to pay to Eliza Christian all moneys actually received in the past by said

Waialua Agricultural Company for the use and user by third persons of the properties ordered to be reconveyed to her herein.

70.

That the Supreme Court committed error in its final decision in not ordering and directing that Waialua Company do pay to Eliza Christian interest on all moneys received by said Company for the use and user by third persons of the properties ordered to be reconveyed to her herein from the dates upon which said moneys were received by said Waialua Company.

71.

That the Supreme Court committed error in not ordering and directing that the Waialua Company do pay to Eliza Christian the moneys and consideration actually received by said Waialua Company upon the execution by it of that certain lease dated January 10, 1923 between Waialua Agricultural Company, Limited and Hawaiian Pineapple Company, Limited as [823] consideration for the use by said Hawaiian Pineapple Company, Limited of the properties of said Eliza Christian under and pursuant to the terms of said lease.

72.

That the Supreme Court committed error in its final decision in not holding and deciding that upon the affirmance and ratification of said lease to the Hawaiian Pineapple Company, Limited dated January 10, 1923 by Eliza Christian, said Eliza Chris-

tian became entitled to her appropriate and proportionate share of the paid-up rentals received by said Waialua Agricultural Company, Limited upon and as consideration therefor.

73.

That the Supreme Court committed error in its final decision in failing to even consider the fact that the properties herein ordered to be restored to Eliza Christian are restored to her burdened with said lease to the Hawaiian Pineapple Company, Limited of January 10, 1923, and in failing to allow to her any credit at all for the consideration actually received by Waialua Agricultural Company, Limited for the placing of such burden upon her properties as aforesaid.

74.

That the Supreme Court committed error in its final decision and decree in holding and ordering that upon a reconveyance by Waialua Company to Eliza Christian of the properties covered by the deed of 1910, Eliza Christian should execute a conveyance to the Waialua Company of all her right, title and interest in and to the land at or near the southeastern end of the Holt lands which is occupied by the waters of the Wahiawa reservoir when the waters of that reservoir [824] reach the top of the spillway of the Wahiawa dam, together with additional land along the northwestern or Holt side of the Wahiawa reservoir when at its extreme height, of a sufficient width to permit of reasonable

care, maintenance, and use of the reservoir along that side.

75.

That the Supreme Court committed error in its final decision in ordering and directing that upon performance of the final decree herein, Eliza Christian convey to the Waialua Company all of that certain portion of Grant 235 which is occupied by the Poamoho pump and its accessories and as much more as may be reasonably necessary for the convenient and effective care, maintenance, and use of that pump and its accessories.

76.

That the Supreme Court committed error in its final decision and decree in holding and ordering that upon performance of said decree Eliza Christian convey to the Waialua Company all of those portions of the Holt lands which are occupied by reservoirs, dams, and camps constructed by the Waialua Company, and as much additional land adjoining each of said reservoir (including dams) and camps on all sides thereof as is reasonably necessary for the convenient and effective care, maintenance and use thereof.

77.

That the Supreme Court committed error in its final decision and decree in holding and ordering that upon performance of said decree, Eliza Christian do convey to Waialua Agricultural Company

all portions of the Holt lands upon which the Waialua Company has constructed and maintained pumps and [825] their accessories, and as much land wholly around each of said pumps and accessories as is reasonably necessary for the convenient and effective care, maintenance and use of said pumps.

78.

That the Supreme Court committed error in its final decision and decree in deciding and ordering that upon the performance of said decree Eliza Christian do grant to the Waialua Company, by good and sufficient written instrument, permanent rights of way for all ditches, flumes, syphons, pipe lines, railroads, roads, electric power lines, telephone lines, and other utilities, if any, which have been constructed and are being maintained by the Waialua Company on the Holt lands, or any part thereof, together with such additional land on each side of each such ditch, flume, syphon, pipe line, railroad, road, electric power line, telephone line, and other utility above referred to, of such width as may be reasonably necessary for the convenient and effective care, maintenance, and use of each such utility.

79.

That the Supreme Court committed error in its decision of April 18, 1931 in holding and deciding that the decree of the trial judge entered October 16, 1929 should be reversed so far as it required the payment of the sum of $540,906.07 by Waialua Company to the guardian of Eliza R. P. Christian.

80.

That the Supreme Court committed error in its decision of April 18, 1931 in not holding and deciding that the decree of the trial judge dated October 16, 1929 should be then affirmed in its entirety, and in not thereupon entering its [826] final decree in said cause to that effect.

81.

That the Supreme Court committed error in its decision of April 18, 1931 in holding and deciding that the question of the validity as to Eliza Christian of the lease of March 17, 1905 had not theretofore been in issue in the case.

82.

That the Supreme Court committed error in its decision of April 18, 1931 in deciding and holding that merely because cancellation of the lease of March 17, 1905 had not theretofore been prayed for, the question of its validity or invalidity could not be passed upon.

83.

That the Supreme Court committed error in its decision of April 18, 1931 in not holding and deciding that the trial court had properly found the lease of March 17, 1905 to have been invalid and of no effect as to Eliza Christian.

84.

That the Supreme Court committed error in its decision of April 18, 1931 and in its order of remand

issued pursuant thereto in holding and decreeing that the cause be remanded to the trial court for a re-examination a second time by that court of the question of the validity as to Eliza Christian of the lease of March 17, 1905.

85.

That the Supreme Court committed error in its decision of April 18, 1931 in holding and deciding that the question of the validity as to Eliza Christian of the instrument of August 31, 1906 had not theretofore been in issue in the case. [827]

86.

That the Supreme Court committed error in its decision of April 18, 1931 in deciding and holding that merely because cancellation of the instrument of August 31, 1906 had not theretofore been prayed for, the question of its validity or invalidity could not be passed upon.

87.

That the Supreme Court committed error in its decision of April 18, 1931 in not holding and deciding that the trial court had properly found the instrument of August 31, 1906 to have been invalid and of no effect as to Eliza Christian.

88.

That the Supreme Court committed error in its decision of April 18, 1931 and in its order of remand issued pursuant thereto in holding and decreeing that the cause be remanded to the trial court

for a re-examination a second time by that court of the question of the validity as to Eliza Christian of the instrument of August 31, 1906.

89.

That the Supreme Court committed error in its order and decree of remand dated May 21, 1931 in setting aside the decree of the Honorable A. M. Cristy dated October 16, 1929.

90.

That the Supreme Court committed error in its said order and decree dated May 21, 1931 in not then ordering and decreeing that the decree of the Honorable A. M. Cristy dated October 16, 1929 be affirmed and enforced without any modification or amendment thereto.

91.

That the Supreme Court committed error in its decree [828] of May 21, 1931 in ordering and decreeing that said cause be remanded to the Circuit Court judge for further proceedings as therein outlined before a final decree giving to petitioner complete relief could be entered in said cause.

92.

That the Supreme Court committed error in its decision of May 3, 1934 in holding and deciding by way of dictum that respondent Waialua Agricultural Company, Limited, in the proceedings had pursuant to the said order of remand, should have been permitted to reopen the question of mental

competency and present evidence bearing on the question of mental competency with respect to the lease of 1905 and the instrument of 1906.

93.

That the Supreme Court committed error in its decision of May 3, 1934 in holding and deciding by way of dictum that it, said Supreme Court, had itself committed error in its prior decision of April 18, 1931 in there deciding that the question of mental competency should not be reopened in the proceedings to be had on remand.

94.

That the Supreme Court of Hawaii committed error in its decision of May 3, 1934 in holding and finding that error had been involved in the following by the trial court of instructions given it by the Supreme Court after said instructions had been fully complied with.

95.

That the Supreme Court committed error in its decision of May 3, 1934 and in its prior decision of April 18, 1931 in holding and deciding that "neither the lease of 1905 nor the indenture of 1906 was a subject of contention between the [829] parties at the original trial."

96.

That the Supreme Court committed error in its decisions of 1931 and 1934 in holding and deciding in effect that in an action for the cancellation of an instrument under which a sole claim of right

is being urged, there can be no determination as to the validity or invalidity of any other instrument unless a prayer for its cancellation is also made.

97.

That the Supreme Court committed error in its decision of April 18, 1931 in holding and deciding that the consideration paid for the deed of May 2, 1910 was adequate.

98.

That the Supreme Court committed error in its decision of April 18, 1931 in not holding and deciding that the consideration paid for the deed of 1910 was grossly inadequate.

99.

That the Supreme Court committed error in its decisions of 1931 and 1934 in not holding and deciding that the deed of 1910 was wholly invalid and of no effect as to Eliza Christian, not only as to rights claimed to have been acquired against her by virtue of her own joinder in said instrument, but also as to rights claimed to have been acquired against her indirectly through the joinder therein of Annie Kentwell.

100.

That the Supreme Court committed error in its decisions of 1931 and 1934 in not holding and deciding that Waialua Company could not and did not acquire the status of bona fide purchaser for value of any rights as against Eliza Christian by virtue

of the execution by any party of the deed of 1910. [830]

101.

That the Supreme Court committed error in its decisions of 1931 and 1934 in not holding and deciding that Waialua's lack of good faith tainted and affected the transaction of May 2, 1910 in all its parts, and deprived said Waialua Company of the status of a purchaser in good faith of any rights against Eliza Christian under or by virtue of the instrument of 1906.

102.

That the Supreme Court committed error in its decisions of 1931 and 1934 in not holding and deciding that it was not intended by the parties to the deed of May 2, 1910 to thereby effect a transfer to Waialua of rights under the instrument of 1906 and that in equity no such transfer was accomplished.

103.

That the Supreme Court committed error in its decisions of 1931 and 1934 in holding and deciding that in equity Annie Kentwell, through the execution of the deed of 1910, transferred and conveyed to the Waialua Company rights held by her against Eliza Christian under and by virtue of the instrument of 1906.

104.

That the Supreme Court committed error in its decisions of 1931 and 1934 in not holding and deciding that the Waialua Company paid no considera-

tion at all for any rights under the instrument of 1906.

105.

That the Supreme Court committed error in its decisions of 1931 and 1934 in deciding that the Waialua Company was a purchaser for value of rights against Eliza Christian under the instrument of 1906. [831]

106.

That the Supreme Court committed error in its decisions of 1931 and 1934 in not holding that any consideration claimed to have been paid by Waialua for rights under the instrument of 1906 was grossly inadequate.

107.

That the Supreme Court committed error in its decisions of 1931 and 1934 in not holding that the instrument of 1906 was not even considered or thought of by the parties in the consummation and effecting of the transaction of May 2, 1910 and that in equity it should not be considered as having been involved in or affected thereby.

108.

That the Supreme Court of the Territory of Hawaii committed error in making and entering its final decree in the above entitled matter on, to-wit: March 25, 1935, for all of the reasons hereinabove recited as indicating error committed in the prior decisions and order of the said Court hereinabove more specifically referred to, to the extent that said

errors involved in said prior decisions and order are reflected in said final decree.

109.

That the Supreme Court committed error in its final decree made and entered herein on March 25, 1935 in reversing and setting aside the decree of the Honorable A. M. Cristy dated September 6, 1932.

110.

That the Supreme Court committed error in Paragraph III of its final decree dated March 25, 1935 in excepting and reserving from the lands ordered to be restored to Eliza R. P. [832] Christian upon cancellation as to her of that certain deed dated May 2, 1910, the real properties, easements and other interests referred to in said Paragraph III, and further described in Paragraph IV of said decree.

111.

That the Supreme Court committed error in attempting in its said final decree of March 25, 1935 to partially effect in these proceedings a partition of rights and interests with respect to the properties in question as between the parties hereto.

112.

That the Supreme Court committed error in said final decree of March 25, 1935 in requiring that Eliza R. P. Christian join in the instrument and deed referred to in Paragraph III of said decree.

113.

That the Supreme Court committed error in making and entering its final decree of March 25, 1935 and in providing in Paragraph V of said decree that Eliza R. P. Christian is not entitled to any award of rents or damages in this suit.

114.

That the Supreme Court committed error in making and entering its final decree of March 25, 1935 in not decreeing that Eliza R. P. Christian is entitled in this action to an award for rents or other compensation for the use of her properties restored to her herein.

115.

That the Supreme Court committed error in its said final decree of March 25, 1935 in not awarding to Eliza R. P. Christian rents or damages for the use of the property restored [833] to her herein just as it does in said same decree award to Waialua Agricultural Company, Limited interest for the use of the moneys restored to it herein.

116.

That the Supreme Court committed error in its first and final decision in not holding and finding that the trial court should have considered evidence of profits made by Waialua Agricultural Company, Limited in its management of the land.

117.

That the Supreme Court committed error in its decree of March 25, 1935 in holding by the provisions of Paragraph VI of said decree that that certain lease dated March 17, 1905 between Carlos A. Long et al and Waialua Agricultural Company, Limited et al, is in all respects valid, and that Eliza R. P. Christian is not entitled to have said lease canceled.

118.

That the Supreme Court committed error in its said final decree of March 25, 1935 in failing to cancel that certain lease dated March 17, 1905, and referred to in Paragraph VI of said decree, for the same reasons that in said same decree it did cancel the deed of May 2, 1910.

119.

That the Supreme Court committed error in its said decree of March 25, 1935 in holding said lease of March 17, 1905 to be valid, and then in failing and refusing to grant to Eliza R. P. Christian the rights, and particularly the rights of all improvements on said property on the termination of said lease, which rights would have belonged to her if said lease had been valid. [834]

120.

That the Supreme Court committed error in its final decree of March 25, 1935 in awarding to the Waialua Agricultural Company, Limited a certain large area of the common lands as incidental to the conveyance to Waialua Agricultural Company, Lim-

ited of certain improvements, without in any way providing for a securing to Eliza R. P. Christian of an appropriate corresponding area of acreage of said common lands.

121.

That the Supreme Court committed error in its said final decree of March 25, 1935 in providing in Paragraph VII of said decree that that certain instrument dated August 31, 1906 by and between Eliza R. P. Christian and Annie Holt Kentwell is in all respects valid as an assignment of rents, issues and profits from the land, and that said Eliza R. P. Christian is not entitled to have said instrument canceled.

122.

That the Supreme Court committed error in its decree of March 25, 1935 in failing therein to order and direct that said instrument of August 31, 1906, referred to in Paragraph VII of said decree, be canceled and set aside.

123.

That the Supreme Court committed error in its said decree of March 25, 1935 in failing to hold said instrument of August 31, 1906, referred to in Paragraph VII of said decree, to be wholly and completely void.

124.

That the Supreme Court committed error in its said decree of March 25, 1935 in providing in the provisions of Paragraph VIII of said decree that by virture of the instrument [835] of August 31,

1906 Waialua Agricultural Company, Limited acquired all rents, issues and profits from the land therein referred to which have accrued or will accrue to Eliza R. P. Christian from any source from August 31, 1906 until the end of the natural life of her, the said Eliza R. P. Christian.

125.

That the Supreme Court committed error in its said final decree of March 25, 1935 in providing in Paragraph VIII of said decree in substance and effect that Waialua Agricultural Company, Limited should have a life estate in said properties for the life of Eliza R. P. Christian by virtue of the instrument of August 31, 1906, while in its decision of May 3, 1934, (and in fact in Paragraph VII of said decree itself) the said Court decreed that Waialua Agricultural Company, Limited had no life estate in said lands, and that the said instrument of 1906 conveyed and could convey no life estate.

126.

That the Supreme Court committed error in its said decree of March 25, 1935 in failing to therein order and provide that the decree of the Honorable A. M. Cristy dated September 6, 1932, herein appealed from, be in all respects affirmed.

127.

That the Supreme Court committed error in its decree of March 25, 1935 in failing therein to provide for the payment to Eliza R. P. Christian by Waialua Agricultural Company, Limited of the sum of $606,785.75, or of any sum at all. [836]

WHEREFORE IT IS PRAYED that said decree of March 25, 1935 may be reversed, and that the decree of the Honorable A. M. Cristy dated September 6, 1932 be affirmed and reinstated and/or that appellant may have such other and further relief as may be appropriated.

Dated: Honolulu, T. H., April 18th, 1935.

ELIZA R. P. CHRISTIAN,
An incompetent person,
By HERMAN V. VON HOLT,
Her Guardian,
Petitioner-Appellee,
By BARRY S. ULRICH,
By CHARLES M. HITE,
Her Attorneys. [837]

[Title of Court and Cause.]

NOTICE.

Filed April 18, 1935 at 1:51 o'clock p. m. (s) Robert Parker, Jr., Clerk Supreme Court. [838]

To: Waialua Agricultural Company, Limited and Herman Phleger, Esquire and Messrs. Robertson & Castle, its attorneys; James B. Holt and John R. Desha, Esquire, his attorney; and Annie Holt Kentwell, and John R. Desha, Esquire, her attorney:

YOU AND EACH OF YOU will please take notice that petitioner above named proposes presenting to the Honorable James J. Banks, Justice of the Supreme Court of the Territory of Hawaii, in his Chambers in the Judiciary Building, Hon-

olulu, T. H., on Monday, April 22, 1935, at the hour of 10:00 o'clock a. m., a petition for the allowance of an appeal from the decree of the Supreme Court of the Territory of Hawaii in the above entitled matter made and entered and filed in said cause on, to-wit, March 25, 1935.

Dated: Honolulu, T. H., April 18th, 1935.

ELIZA R. P. CHRISTIAN,
An incompetent person,
By HERMAN V. VON HOLT,
Her Guardian,
Petitioner-Appellee,
By HARRY S. ULRICH and
CHAS. M. HITE,
By (s) CHAS. M. HITE,
Her Attorneys. [839]

Receipt of a copy of the foregoing Notice, copy of proposed Petition for Appeal with affidavit, and copy of Assignment of Errors admitted this 18th day of April, 1935.

WAIALUA AGRICULTURAL
COMPANY, LTD.,
By HERMAN PHLEGER and
ROBERTSON & CASTLE
By (s) ALFRED L. CASTLE,
Its Attorneys.
JAMES L. HOLT,
By (s) JOHN R. DESHA,
His Attorney.
ANNIE HOLT KENTWELL,
By (s) JOHN R. DESHA,
Her Attorney. [840]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND.

Filed April 23, 1935 at 11:00 o'clock a. m. Gus K. Sproat, Deputy Clerk Supreme Court. [841]

Upon reading and filing the verified petition of Eliza R. P. Christian, an incompetent person, by Herman V. von Holt, her guardian, for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and upon consideration of the assignment of errors presented and filed therewith:

IT IS ORDERED that the said appeal from the final decree of this Court, entered herein on, to-wit: the 25th day of March, 1935, to the United States Circuit Court of Appeals for the Ninth Circuit be and said appeal is hereby allowed.

And said petitioner is hereby ordered to file with the Clerk of this Court, within thirty (30) days from the date hereof, an approved bond in the sum of Five Thousand Dollars ($5,000.00) conditioned that she will prosecute said appeal to conclusion and effect and answer all damages and costs if she fail to make good on her said plea and appeal.

Dated at Honolulu, T. H., this 23rd day of April, A. D. 1935.

[Seal] JAS. J. BANKS,
Justice Supreme Court of the Territory of Hawaii. [842]

Service of a copy of the foregoing Order Allowing Appeal and Fixing Amount of Bond is hereby admitted this 23rd day of April, 1935.

ROBERTSON & CASTLE,
By J. G. ANTHONY,
Attorneys for Waialua Agricultural Company, Limited.
JOHN R. DESHA,
Attorney for James L. Holt.

.....
Attorney for Annie Holt Kentwell. [843]

[Title of Court and Cause.]

BOND ON APPEAL.

Filed April 24, 1935 at 9:25 o'clock a. m. (s) Robert Parker, Jr., Clerk Supreme Court. [844]

KNOW ALL MEN BY THESE PRESENTS, that ELIZA R. P. CHRISTIAN, an incompetent person, by Herman V. von Holt, her guardian, as Principal, and UNITED STATES FIDELITY & GUARANTY COMPANY, as Surety, are held and firmly bound unto WAIALUA AGRICULTURAL CO., LTD., an Hawaiian corporation, JAMES L. HOLT, and ANNIE HOLT KENTWELL, in the penal sum of Five Thousand Dollars ($5,000.00), for the payment of which, well and truly to be made, to the said Waialua Agricultural Co., Ltd., an Hawaiian corporation, James L. Holt, and Annie Holt

Kentwell, the said Eliza R. P. Christian, an incompetent person, by Herman V. von Holt, her guardian, as Surety, by these presents do bind themselves, their respective successors and heirs, executors, and assigns jointly and severally and firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT:

WHEREAS, on the 18th day of April, 1935, the above bounden principal filed her petition for an appeal to the United States [845] Circuit Court of Appeals for the Ninth Circuit from the decisions and decree made and entered in the above entitled cause by the Supreme Court of the Territory of Hawaii;

NOW, THEREFORE, if the said principal shall prosecute her appeal with effect, and answer all damages and costs which may be hereinafter taxed either in the Supreme Court of the Territory of Hawaii or in the Ninth Circuit Court of Appeals or in both of said Courts if she fails to sustain said appeal, then this obligation shall be void; otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF the said ELIZA R. P. CHRISTIAN, an incompetent person, by Herman V. von Holt, her guardian, has set her hand and seal, and the said UNITED STATES FIDELITY & GUARANTY COMPANY, as surety, has caused its name to be signed and its corporate seal

to be attached by its own proper officers thereunto duly authorized, this the 23rd day of April, 1935.

ELIZA R. P. CHRISTIAN,
An incompetent person,
By (s) HERMAN V. VON HOLT,
Her Guardian,
Principal.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
[Seal] By (s) HERMAN LUIS,
Its Attorney-in-Fact,
Surety.

Approved as to form, amount, and sufficiency of surety:

(s) JAS. J. BANKS,
Justice Supreme Court of the Territory of Hawaii. [846]

[Title of Court and Cause.]

CITATION.

Filed April 26, 1935 at 10:05 o'clock a. m. Robert Parker, Jr., Clerk Supreme Court. [847]

The United States of America.—ss.

The President of the United States of America, to: Waialua Agricultural Company, Limited, an Hawaiian corporation, James L. Holt and Annie Holt Kentwell, Greeting:

You and each of you, are hereby cited and admonished to be and appear before the United States

Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, within thirty days from the date of this Writ, pursuant to an appeal duly allowed by the Supreme Court of the Territory of Hawaii and filed in the Clerk's office of said Court on the 23rd day of April, 1935, in the said cause, wherein ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, is and was appellant, and you are appellees, to show cause, if any cause you can show, why the final decree made and entered by the said Supreme Court of the Territory of Hawaii on, to-wit: the 25th day of March, 1935, should not be [848] corrected as indicated in said petition for appeal and assignment of errors filed therewith and why speedy justice should not be done to the parties on that behalf.

WITNESS the hand and seal of the Honorable CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States of America, this 26th day of April, in the year of our Lord, One Thousand Nine Hundred and Thirty-five.

JAS. J. BANKS,
Justice Supreme Court of the Territory of Hawaii.

Attest:

[Seal] ROBERT PARKER, JR.,
Clerk Supreme Court of the Territory of Hawaii.

Service of the within Citation and receipt of a copy is hereby admitted this 26th day of April, 1935.

ROBERTSON & CASTLE,
By J. G. ANTHONY,
Attorneys for Waialua Agricultural Company, Limited.
JOHN R. DESHA,
Attorney for James L. Holt.
BARRY S. ULRICH,
Attorney for Annie Holt Kentwell. [849]

[Title of Court and Cause.]

CONSENT TO APPEARFANCE OF COUNSEL.

Filed April 26, 1935 at 2:45 o'clock p. m. (s) Robert Parker, Jr., Clerk Supreme Court. [850]

Comes now ELIZA R. P. CHRISTIAN, an incompetent person, by Herman V. Von Holt, her Guardian, petitioner herein, and consents and agrees that Barry S. Ulrich, heretofore and now appearing and acting as her attorney in the above-entitled matter, may also appear and act in said matter as attorney for Annie Holt Kentwell, respondent above-named, notwithstanding any adversity of interest which may or might exist as between said Eliza R. P. Christian and said Annie Holt Kentwell.

Dated at Honolulu, Hawaii, this 26th day of April, 1935.

ELIZA R. P. CHRISTIAN,
an incompetent person,
By (s) HERMAN V. VON HOLT,
Her Guardian,
Petitioner-Appellee. [851]

[Title of Court and Cause.]

MOTION FOR LEAVE TO APPEAR AS COUNSEL.

Filed May 1, 1935 at 10:23 o'clock a. m. (s) Gus K. Sproat, Deputy Clerk Supreme Court. [852]

Comes now JOHN R. DESHA, attorney at law of Honolulu, and moves this Honorable Court that he be permitted to enter his name and appear as attorney of record in the above-entitled cause for ANNIE HOLT KENTWELL.

Your movant shows to this Court that he is an attorney at law duly authorized to practice in all of the courts of this Territory and that he has his authority and employment to appear and act for the said Annie Holt Kentwell as attorney in the above-entitled matter through one, Barry S. Ulrich, attorney at law of Honolulu, as indicated by the letter of Barry S. Ulrich of even date herewith, addressed to your movant, together with radiograms passing between said Barry S. Ulrich and the said Annie Holt Kentwell of 159 Woodstock

Road, Oxford, England, all of which are hereto attached and made a part hereof.

Dated at Honolulu, T. H. this 1st day of May, A. D. 1935.

(s) JOHN R. DESHA

Territory of Hawaii,
City and County of Honolulu.—ss.

JOHN R. DESHA, being first duly sworn, on oath deposes and says: That he is the movant in the foregoing motion; that he has read said motion and knows the contents [853] thereof and that the allegations therein contained are true.

(s) JOHN R. DESHA

Subscribed and sworn to before me this 1st day of May, 1925.

[Notarial Seal] (s) THOMAS B. KAMIOKA,
Notary Public First Judicial Circuit, Territory of Hawaii.

(COPY)

Cable and Wireless Address
"Ulbar" Honolulu

BARRY S. ULRICH
Attorney at Law
Dillingham Building
Honolulu, Hawaii

April 30, 1935.

John R. Desha, Esq.
Attorney at Law
Honolulu, Hawaii

Dear Sir:

Confirming my oral conversation with you and pursuant to the authority indicated by the inclosed radiograms, I herewith employ and authorize you to appear and act as attorney for Annie Holt Kentwell in the Supreme Court of the Territory of Hawaii and in the United States Circuit Court of Appeals for the Ninth Judicial Circuit on appeal, in the matter of "Eliza R. P. Christian, an Incompetent person, by Herman V. Von Holt, her Guardian, Petitioner-Appellee, vs. Waialua Agricultural Company, Limited, an Hawaiian corporation, James L. Holt and Annie Holt Kentwell, Respondents-Appellants".

In explanation of the cable to me from Mrs. Kentwell, I may say that "Ulbar" is my cable adress in Honolulu.

Very truly yours,
(s) BARRY S. ULRICH

BSU:H
Inc 2 [854]

RADIOGRAM.

(April 23, 1935)
(2:35 P. M.)

Annie Kentwell
159 Woodstock Road
Oxford England

Waialua appeal being perfected stop to avoid delay please cable me at once authority to employ counsel to act for you on appeal wire collect

ULRICH

Sender's Name and Address
(Not to be Transmitted)
Barry S. Ulrich,
317 Dillingham Bldg., Honolulu. [855]

RADIOGRAM.

Received at 125 So. King St., Honolulu, at 1935 Apr 27 pm 1 12

816 London 28 27 NFT
NLT Ulbar Honolulu

Authorize you employ counsel stop urgent von Holt cable requested funds Christians further treatment Drortwich duCampbell against travelling France because imbecility bars return England reply

KENTWELL [856]

[Title of Court and Cause.]

ORDER.

Filed May 1, 1935 at 3:15 o'clock p. m. (s) Gus K. Sproat, Deputy Clerk Supreme Court. [857]

Upon motion duly made and presented to this Court by John R. Desha, an attorney-at-law and a member of the Bar of this Court, that he be permitted to appear and act as attorney and counsel for Annie Holt Kentwell, respondent in the above-entitled cause, and just cause appearing therefor;

IT IS HEREBY ORDERED, AND IT IS THE ORDER OF THIS COURT, that said motion be granted and the said John R. Desha be and he hereby is authorized and permitted to appear and act in the above entitled cause as counsel of record for Annie Holt Kentwell, respondent above-named.

Dated at Honolulu, Hawaii, May 1, 1935.

BY THE COURT:

[Seal] (s) GUS K. SPROAT,
Deputy Clerk, Supreme Court.

Approved:

(s) JAS. J. BANKS,
Associate Justice. [858]

[Title of Court and Cause.]

ACKNOWLEDGMENT OF SERVICE OF CITATION.

Filed May 9, 1935 at 9:30 o'clock a. m. (s) Robert Parker, Jr., Clerk Supreme Court. [859]

Comes now ANNIE HOLT KENTWELL, respondent-appellant in the above entitled Court and cause, by her attorney, John R. Desha, and acknowledges service of the citation on appeal issued April 26, 1935 pursuant to the Order allowing appeal of petitioner-appellee above named dated April 23, 1935.

Dated: Honolulu, T. H., May 9, 1935.

ANNIE HOLT KENTWELL,
Respondent-Appellant,
By (s) JOHN R. DESHA,
Her Attorney. [860]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Filed June 5, 1935 at 11:20 o'clock a. m. Robert Parker, Jr., Clerk Supreme Court. [861]

To the Honorable Acting Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii:

Comes now WAIALUA AGRICULTURAL COMPANY, LIMITED, one of the respondents-appellants above named, by its attorneys, Robertson & Castle, deeming itself aggrieved by the decision

and decree of the above entitled Court in the above entitled cause, which final decree of the Supreme Court of the Territory of Hawaii was made and entered on the 25th day of March, 1935, pursuant to the opinion of the Court rendered May 3, 1934, and claiming that there are manifest and material errors to the damage of said Waialua Agricultural Company, Limited, in said cause, which errors are specifically set forth in the assignment of errors filed herewith, to which reference is hereby made, and respectfully prays that an appeal may be allowed it in the above entitled [862] cause and that it be allowed to prosecute said appeal to the United States Circuit of Appeals for the Ninth Circuit in accordance with the statutes in such cases made and provided; that an order be made fixing the amount of security that Waialua Agricultural Company, Limited, respondent-appellant shall give, and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record, proceedings and papers in this cause, duly authenticated, for the correction of the errors so complained of, and that a citation may issue.

And in this behalf Waialua Agricultural Company, Limited, respondent-appellant, shows that the said decree was rendered in an appeal in the above entitled Court and cause and that the value of the land in controversy, the subject matter of said cause, exclusive of interest and costs, exceeds $5,000; and

further that James L. Coke, Chief Justice of the Supreme Court of the Territory of Hawaii, is disqualified from acting in said cause and that the Honorable James J. Banks is the Senior Associate Justice of the Supreme Court of the Territory of Hawaii.

Dated: Honolulu, T. H., June 4th, 1935.

ROBERTSON & CASTLE,
By J. G. ANTHONY and
BROBECK, PHLEGER & HARRISON,
Attorneys for Waialua Agricultural Company, Limited, Appellant. [863]

Territory of Hawaii,
City and County of Honolulu—ss.

J. G. Anthony, being first duly sworn, under oath deposes and says that he is a member of the law firm of Robertson & Castle, attorneys for WAIALUA AGRICULTURAL COMPANY, LIMITED, one of the respondents-appellants in the above entitled cause, and as such has authority to make oath on behalf of said respondent-appellant; that he has read the foregoing Petition for Appeal, knows the contents thereof and that the matters and things therein set forth are true of his own knowledge, and that the value in controversy, exclusive of interest and costs, exceeds $5,000.

J. G. ANTHONY

Subscribed and sworn to before me this 4th day of June, 1935.

[Seal] CHARLES Y. AWANA,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Service of a copy of the foregoing Petition for Appeal, and Assignment of Errors hereto attached, is hereby admitted this 4th day of June, 1935.

ELIZA R. P. CHRISTIAN,
An incompetent person,
Petitioner-Appellee,
By BARRY S. ULRICH and
CHAS. M. HITE,
Her Attorneys.
JAMES L. HOLT,
Respondent-Appellant,
By JOHN R. DESHA,
His Attorney.
ANNIE HOLT KENTWELL,
Respondent-Appellant,
By JOHN R. DESHA,
Her Attorney. [864]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Filed June 5, 1935 at 11:20 o'clock a. m. Robert Parker, Jr., Clerk Supreme Court. [865]

Comes now WAIALUA AGRICULTURAL COMPANY, LIMITED, appellant in the above entitled cause, by Robertson & Castle, and Brobeck, Phleger & Harrison, its attorneys, and says that there is manifest error in the record, proceedings and opinions in the above entitled cause in the Supreme Court of the Territory of Hawaii and in the final decree rendered by said Court in said cause on March 25, 1935, to the prejudice of said appellant in this, to-wit:

1.

The Supreme Court of the Territory of Hawaii (hereinafter referred to as "the Court") erred in making said decree.

2.

The Court erred in not making a decree reversing in its entirely the decree of the trial court dated September 6, 1932. [866]

3.

The Court erred in not making a decree dismissing the bill with costs to appellant.

4.

The Court erred in ordering, adjudging and decreeing that certain deed dated May 2, 1910, by

and between John Dominis Holt, Eliza R. P. Christian, Annie Holt Kentwell and Lawrence K. Kentwell, Grantors, to James L. Holt, Grantee, Exhibit A-21, (hereinafter referred to as the deed of 1910), is cancelled, annulled and void, and of no effect as to Eliza R. P. Christian, grantee therein.

5.

The Court erred in ordering and decreeing that appellant quitclaim and reconvey to Eliza R. P. Christian upon the terms and conditions set forth in its decree, the property and interest in said premises which the appellant acquired from Eliza R. P. Christian under and by virtue of the deed of 1910.

6.

The Court erred in ordering and decreeing that appellant quitclaim and reconvey to Eliza R. P. Christian an undivided one-third interest in fee simple unencumbered in and to the premises described in the deed of 1910 because the interest which Eliza R. P. Christian conveyed to the appellant by said deed was only a contingent remainder in an undivided one-third interest in said premises. [867]

7.

The Court erred in finding that Eliza R. P. Christian on May 2, 1910, the date of the execution of the deed of 1910, was a congenital imbecile.

8.

The Court erred in holding that Eliza R. P. Christian was a congenital imbecile, for the reason

that said finding is contrary to the weight of the evidence.

9.

The Court erred in cancelling the deed of 1910 as to Eliza R. P. Christian upon the ground of the alleged incompetency of Eliza R. P. Christian, for the reason that the evidence failed to show that Eliza R. P. Christian was incompetent and there was no clear and convincing proof of the fact of incompetency such as is required by law.

10.

The Court erred in giving no weight to the fact that no guardianship proceedings were brought with respect to Eliza R. P. Christian for more than sixteen years after the execution of the deed in question.

11.

The Court erred in holding that the testimony of an attorney whose integrity was and is undisputed, who visited Eliza R. P. Christian in 1912 for the express purpose of exercising an option on her property, and who saw her on five separate occasions; and that of two attorneys and notaries who saw petitioner in 1907 and took her acknowledgments to deeds; is merely the testimony of "casual" and/or "superficial" observers, and in giving no weight to such testimony. [868]

12.

The Court erred in giving no weight to the fact of actual participation of Eliza R. P. Christian in

business transactions, transfers and conveyances, and the acceptance of such transactions, transfers and conveyances by the public and public officials, and in not holding that the fact of such participation in business transactions controls mere opinion evidence.

13.

The Court erred in giving no weight to the fact that the family and closest relations of Eliza R. P. Christian dealt with her as a competent person.

14.

The Court erred in giving no weight to the fact that the members of the family of Eliza R. P. Christian—her father, her husband, and her two most intimate relatives—joined with her in the execution of the deed of 1910, and treated her as fully competent to execute said deed.

15.

The Court erred in finding that the letters from Eliza R. P. Christian to James L. Holt (Exhibits 1-B, 1-C and 1-D) were not written by her and in holding "there is no evidence * * * from which even an inference can be drawn that these letters were the product of Eliza's brain or her hand." (31 Hawaii 817, 868.)

16.

On motion of appellant an open commission to take the deposition of Dr. J. C. Masson of the Mayo Clinic was [869] regularly issued out of the Circuit

Court. Dr. Masson testified that he was the hospital physician of the Manhattan Maternity Hospital in New York in 1909; that he had attended Eliza R. P. Christian, who was a patient at the hospital, as a maternity case; that he observed her daily from January 1, 1909, to January 21, 1909; that from his observation she was a normal person and that had there been anything abnormal in her mentality it would have been observed by him and noted on the hospital chart; that it was his duty to make such notations on the chart and also the duty of the nurse in charge to make such notations. The hospital chart was offered in evidence, attached to the deposition of Dr. J. C. Masson, marked Exhibits 2, 3, 4, 5 and 6. Said exhibits were identified by the witness as true copies of the originals, Exhibits 2, 3 and 4 being in the witness' own handwriting.

When the deposition of Dr. J. C. Mason was offered in evidence, together with the exhibit thereto attached, the trial court upon the objection of appellee excluded Exhibits 2, 3, 4, 5 and 6 from evidence. Said exhibits disclose a careful detailed recorded observation of the condition of Eliza R. P. Christian for a period of three weeks, including hourly observations by the attendant nurse; that said exhibits further disclose Eliza R. P. Christian correctly gave her name, place of birth, age and address, and was a normal person; that in no place in said exhibits was there any indication of any abnormality during the entire period Eliza R. P. Christian was under observation; that Eliza R. P.

Christian gave birth to a normal child and on January 21, 1909, both she and her child were discharged and their condition noted on the chart as "good"; that the Court erred in failing to reverse [870] the ruling of the trial court excluding the hospital chart, attached to said deposition, being Exhibits 2, 3, 4, 5 and 6.

17.

The Court erred in cancelling the deed of 1910 because appellant cannot be restored to status quo.

18.

The Court having found that appellant purchased the contingent interest of Eliza R. P. Christian in the premises by mesne conveyance, in good faith and without knowledge or notice of the alleged fact of incompetency, and having further found that appellant paid a fair and adequate consideration therefor, erred in failing to enter its decree in favor of appellant dismissing the bill.

19.

The Court, having found as a fact that appellant was a purchaser of Eliza R. P. Christian's contingent interest in the premises in dispute under the deed of 1910, in good faith and without knowledge or notice of the alleged fact of incompetency, and for a fair and adequate consideration, erred in failing to hold that said deed should not be cancelled after the contingency vested, and in failing to enter its decree in favor of appellant dismissing the bill.

20.

The Court erred in holding that status quo can be restored when in fact it cannot because when Eliza R. P. Christian made said deed of 1910, she had only a contingent [871] estate, but now the same has vested, and a contingent estate can no longer be conveyed.

21.

The Court erred in failing to hold that status quo could not be restored by cancelling the deed of 1910 as to Eliza R. P. Christian, and in not entering a decree in favor of appellant dismissing the bill.

22.

The Court erred in failing to hold that status quo could not be restored by requiring appellant to convey to Eliza R. P. Christian an undivided one-third interest in the premises, and in not entering a decree in favor of appellant dismissing the bill.

23.

The Court erred in holding that the fact that the appellant had paid the purchase price in good faith and had incurred other burdens, risks and expenses on the chance that a contingent interest might vest and the fact that thereafter said contingent interest did vest constitutes no such change of conditions as would make it inequitable to compel the appellant to convey a vested estate in exchange for the purchase price of a contingent interest.

24.

The Court erred in cancelling the deed because at the time of the execution of the deed of 1910, the appellant paid an adequate consideration, and in the eighteen years elapsing between the execution of the deed and the bringing [872] of the suit the premises had increased many fold in value.

25.

The Court erred in holding that an increase in value due to natural causes is not a bar to the restoration to status quo.

26.

The Court erred in directing cancellation of the deed of 1910, for the reason that appellant, after the purchase of the contingent interest of Eliza R. P. Christian under said deed, erected large and valuable improvements in good faith upon the premises and cannot now be restored to status quo.

27.

The Court erred in cancelling the deed of 1910 for the reason that, after obtaining the deed from Eliza R. P. Christian of her contingent interest in the disputed premises, appellant erected large and valuable improvements adjacent to and off the disputed premises as an integral part of its plantation system and cannot now be restored to status quo.

28.

The Court erred in holding that the efficiency of the Wahiawa dam and reservoir will not be appreciably diminished by the loss to Eliza R. P.

Christian of one-third of the Holt estate cane lands, and in holding that said loss is not an impediment to status quo. [873]

29.

The Court erred in holding that the sale of Eliza R. P. Christian's contingent interest in the premises by the deed of 1910 was not for her benefit.

30.

The Court erred in failing to hold that the sale of Eliza R. P. Christian's contingent interest was beneficial to her.

31.

The Court erred in finding that Eliza R. P. Christian "never received the money which was paid for her interest" (31 H. 894), which finding is contrary to the evidence.

32.

The Court erred in failing to enter a decree dismissing the bill upon the ground that the suit was barred by the statute of limitations.

33.

The Court erred in failing to enter a decree dismissing the bill upon the ground of appellee's laches.

34.

The Court erred in failing to enter a decree dismissing the bill upon the ground of laches of appellee's attorneys, who were employed in the above cause four years prior to the filing of said bill.

35.

The Court erred in failing to require as a concur- [874] rent or precedent condition to the cancellation of said deed of 1910 and the execution of the deed from appellant to Eliza R. P. Christian which the Court decreed be executed and delivered, the repayment by Eliza R. P. Christian to the appellant of the purchase price of $32,500, together with interest thereon at the lawful rate from May 2, 1910, to the date of cancellation.

36.

The Court erred in cancelling the deed of 1910 because the penalty thereby imposed on the appellant is unconscionable and inequitable.

WHEREFORE, appellant prays that the decree of the Supreme Court of the Territory of Hawaii dated March 25, 1935, be reversed (1) in the particulars whereof error is assigned; (2) that a decree be entered directing that appellee's bill be dismissed; and (3) for such other and further relief as may be appropriate.

DATED: Honolulu, T. H., June 4th, 1935.

WAIALUA AGRICULTURAL COMPANY, LIMITED,

Appellant.

By ROBERTSON & CASTLE

By J. G. ANTHONY

and

BROBECK, PHLEGER & HARRISON,

Its Attorneys. [875]

[Title of Court and Cause.]

REQUEST TO JOIN IN APPEAL.

Filed June 5, 1935, at 11:21 o'clock A. M. (s) Robert Parker, Jr., Clerk Supreme Court. [876]

To James L. Holt and Annie Holt Kentwell, Respondents-Appellants in the above entitled cause, and to John R. Desha and Barry S. Ulrich, their attorneys:

You and each of you will please take notice that Waialua Agricultural Company, Limited, one of the respondents-appellants in the above entitled cause, will present its petition for appeal from the decree in the above entitled cause to the Honorable Acting Chief Justice and Associate Justice of the Supreme Court of the Territory of Hawaii at 2 o'clock p. m. on the 5th day of June, 1935, at which time and place you are requested to join in said petition for the allowance of said appeal.

Dated: Honolulu, T. H., June 4th, 1935.

ROBERTSON & CASTLE
By (s) J. G. ANTHONY, and
BROBECK, PHLEGER & HARRISON
Attorneys for Waialua Agricultural Company, Limited, respondent-appellant above named. [877]

Service of a copy of the foregoing Request to Join in Appeal is hereby admitted this 4th day of June, 1935.

(s) JOHN R. DESHA
Attorney for James L. Holt and Annie Holt Kentwell,
Respondents-Appellants.

(s) JOHN R. DESHA
Attorney for Annie Holt Kentwell,
Respondent-Appellant.

(s) BARRY S. ULRICH
(s) CHAS. M. HITE
Attorneys for Eliza R. P. Christian,
Petitioner-Appellee. [878]

[Title of Court and Cause.]

ORDER OF SEVERANCE.

Filed June 8, 1935 at 10:25 o'clock a. m. (s) Robert Parker, Jr., Clerk Supreme Court. [879]

It appearing that on the 4th day of June 1935, James L. Holt and Annie Holt Kentwell, co-respondents-appellants had been duly notified and requested by Waialua Agricultural Company, Limited, respondent-appellant, to join in said petition for appeal, but have failed or refused to join therein, the said Waialua Agricultural Company, Limited, re-

spondent-appellant, is hereby granted the right to appeal alone without joining the said James L. Holt and Annie Holt Kentwell as appellants.

Dated: Honolulu, T. H., June 8, 1935.

[Seal] (s) JAS. J. BANKS
Acting Chief Justice, Supreme Court, Territory of Hawaii.

Attest:

(s) ROBERT PARKER, JR.
Clerk Supreme Court. [880]

Service of a copy of the foregoing Order of Severance is hereby admitted this 8th day of June, 1935.

(s) CHAS. M. HITE
(s) BARRY S. ULRICH
Attorneys for Petitioner-Appellee.

(s) JOHN R. DESHA
Attorney for James L. Holt and Annie Kentwell, respondents-Appellants.

(s) JOHN R. DESHA
Attorney for Annie Kentwell, Respondent-Appellant. [881]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND.

Filed June 8, 1935, at 10:26 o'clock A. M. Robert Parker, Jr., Clerk Supreme Court. [882]

Upon reading and filing the verified Petition for Appeal and Assignment of Errors presented to this Court by WAIALUA AGRICULTURAL COMPANY, LIMITED, in which it prays that an appeal may be allowed it to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this Court made and entered March 25, 1935, in the above entitled cause, wherein it is alleged that manifest and material errors have occurred to the end that said errors, if any there be, may be speedily corrected and justice done in the premises;

IT IS HEREBY ORDERED that said appeal to the United States Circuit Court of Appeals be and the same is hereby allowed, and said Waialua Agricultural Company, Limited, respondent-appellant, is ordered to file with the Clerk of this Court an approved bond in the penal sum of $5,000.00 within thirty days from the date hereof, conditioned that it will prosecute said appeal to conclusion [883] and effect and answer all damages and pay all costs if it fails to make good its said appeal.

Dated: Honolulu, T. H., June 8, 1935.

JAS. J. BANKS
Acting Chief Justice of the Supreme Court of the Territory of Hawaii.

Attest:

[Seal] ROBERT PARKER, Jr.,
Clerk, Supreme Court.

Service of a copy of the foregoing Order Allowing Appeal and Fixing Amount of Bond is hereby admitted this 8th day of June, 1935.

BARRY S. ULRICH
CHAS. M. HITE
Attorneys for Petitioner-Appellee.
JOHN R. DESHA
Attorney for James L. Holt and Annie Kentwell, Respondents-Appellants.
JOHN R. DESHA
Attorney for Annie Kentwell, Respondent-Appellant. [884]

[Title of Court and Cause.]

BOND ON APPEAL.

Filed June 8, 1935, at 10:27 o'clock a. m. (s) Robert Parker, Jr., Clerk Supreme Court. [885]

KNOW ALL MEN BY THESE PRESENTS: That WAIALUA AGRICULTURAL COMPANY,

LIMITED, as principal, and FRANK C. ATHERTON and T. H. PETRIE, of Honolulu, Territory of Hawaii, as sureties, are held and firmly bound unto ELIZA R. P. CHRISTIAN, petitioner-appellee, in the penal sum of FIVE THOUSAND DOLLARS ($5,000.00) for the payment of which, well and truly to be made to the said Eliza R. P. Christian, the said Waialua Agricultural Company, Limited, as principal, and Frank C. Atherton and T. H. Petrie, as sureties, by these presents do bind themselves, their respective successors, heirs, executors, and assigns, jointly and severally and firmly by these presents.

The condition of this obligation is such that:

WHEREAS, the above bounden principal has filed or is about to file, its petition for an appeal to the United [886] States Circuit Court of Appeals for the Ninth Circuit from the decree entered in the above entitled cause by the Supreme Court of the Territory of Hawaii;

NOW, THEREFORE, if the said principal shall prosecute its appeal with effect, and answer all damages and costs if it fails to sustain said appeal, then this obligation shall be void, otherwise, it shall remain in full force and effect.

IN WITNESS WHEREOF, the said Waialua Agricultural Company, Limited, has caused its name to be signed and its *corporate duly* authorized, and the said Frank C. Atherton and T. H.

Petrie, as sureties, have hereunto set their hands this 5th day of June, 1935.

WAIALUA AGRICULTURAL COMPANY, LIMITED,

[Seal] By (s) A. E. BUDGE
Its President.

and

By (s) W. M. BUSH
Its Assistant Treasurer.
Principal.

(s) FRANK C. ATHERTON
(s) T. H. PETRIE
Sureties [887]

Territory of Hawaii
City and County of Honolulu—ss.

FRANK C. ATHERTON and T. H. PETRIE, being first duly sworn, each for himself and not one for the other, under oath deposes and says: That they are sureties on the foregoing bond; that they are residents of Honolulu, Territory of Hawaii, and have property situated within said Territory subject to execution and that they are worth in such property more than double the amount of the penalty specified in said bond, over and above all of their just debts and liabilities and property exempt from execution.

(s) FRANK C. ATHERTON
(s) T. H. PETRIE

Subscribed and sworn to before me this 5th day of June, 1935.

[Notarial Seal] (s) JOHN F. STONE
Notary Public, First Judicial Circuit, Territory of Hawaii.

The foregoing bond is hereby approved as to form, amount, and sufficiency of sureties.

[Seal] (s) JAS. J. BANKS
Acting Chief Justice.

Attest:

(s) ROBERT PARKER, Jr.
Clerk Supreme Court. [888]

[Title of Court and Cause.]

CITATION ON APPEAL.

Filed June 8, 1935, at 10:30 o'clock a. m. Robert Parker, Jr., Clerk Supreme Court [889]

United States of America—ss.

The President of the United States of America to Eliza R. P. Christian, an incompetent person, by Herman V. von Holt, her guardian, appellee; James L. Holt and Annie Holt Kentwell; and to Barry S. Ulrich, Charles M. Hite and John R. Desha, their attorneys, Greeting:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit in

the City of San Francisco, State of California, within thirty (30) days from the date of this Citation, pursuant to an appeal duly allowed and filed in the office of the Clerk of the Supreme Court of the Territory of Hawaii on June 8th, 1935, in the said cause wherein Waialua Agricultural Company, Limited, is appellant, and you are appellees, to show cause, if any [890] there may be, why the final decree made and entered in the Supreme Court of the Territory of Hawaii on March 25, 1935, should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 8th day of June, 1935.

JAS. J. BANKS,
Acting Chief Justice, Supreme Court of the Territory of Hawaii.

Attest:

[Seal] ROBERT PARKER, JR.,
Clerk, Supreme Court of the Territory of Hawaii.

Service of a copy of the foregoing Citation on Appeal is hereby admitted this 8th day of June, 1935.

BARRY S. ULRICH
CHAS. M. HITE
Attorneys for Eliza R. P. Christian, Appellee.

JOHN R. DESHA
Attorney for James L. Holt and Annie Holt Kentwell. [891]

[Title of Court and Cause.]

APPEARANCE OF ANNIE HOLT KENTWELL.

Filed June 10, 1935 at 10:25 o'clock a. m. Gus K. Sproat, Deputy Clerk Supreme Court. [892]

WHEREAS, the Petition of Herman V. von Holt, guardian of the Estate of Eliza R. P. Christian, for the allowance of an appeal from the decree of the Supreme Court of the Territory heretofore entered in the above-entitled matter has been heretofore duly presented; and

WHEREAS, an order has been duly made and entered allowing such appeal; and

WHEREAS, citation has heretofore issued citing the parties to the above-entitled cause to be and appear before the United States Circuit Court of Appeals for the Ninth Judicial Circuit on such appeal;

NOW, THEREFORE, Annie Holt Kentwell, Respondent in the above-entitled matter, does hereby enter her appearance on such appeal and in the above-entitled cause in the Supreme Court of the Territory of Hawaii and in said United States Circuit Court of Appeals for the Ninth Judicial [893] Circuit, submitting herself in all wise to the jurisdiction of said Supreme Court of the Territory of Hawaii and of said United States Circuit Court of Appeals for the Ninth Judicial Circuit, and undertaking that she shall be bound by whatever action, judgment or decree may be taken and entered in said matter.

Dated at 49 Cornmarket Street, Oxford, England, this 14th day of May, 1935.

(s) ANNIE HOLT KENTWELL
Respondent herein.

James Lungley, Solicitor, Oxford—ss.

Before me this day personally appeared ANNIE HOLT KENTWELL, to me known to be the Annie Holt Kentwell named in and who duly executed the foregoing appearance and acknowledged to me that she did execute said appearance as her free act and deed.

Dated at 49 Cornmarket Street, Oxford, England, this 14th day of May, 1935.

(s) JAMES LUNGLEY
Commissioner of Oaths of the Supreme Court of Judicature in England. [894]

[Title of Court and Cause.]

NOTICE.

Filed June 12, 1935 at 11:45 o'clock a. m. (s) Gus K. Sproat, Deputy Clerk Supreme Court. [895]

To: Waialua Agricultural Company, Limited, an Hawaiian corporation, and Messrs. Brobeck, Phleger & Harrison and Robertson & Castle, its attorneys; James L. Holt, and Annie Holt Kentwell, and John R. Desha, Esquire, their attorneys:

You and each of you will please take notice that on Friday, July 12, 1935 at the hour of ten o'clock

a. m. of said day, or as soon thereafter as counsel can be heard, we will ask the Honorable James J. Banks, Justice of the Supreme Court of the Territory of Hawaii, in the Chambers of said Justice, to settle and approve the Statement of the Evidence in the above entitled cause, lodged in the Clerk's office of said Court this 12th day of June, 1935.

ELIZA R. P. CHRISTIAN,
An incompetent person,
By HERMAN V. VON HOLT,
Her Guardian,
Petitioner-Appellee,
By BARRY S. ULRICH and
CHARLES M. HITE,
By (s) CHAS. M. HITE
Her Attorneys.

Receipt of a copy of the foregoing Notice, together with copy of the proposed Statement of the Evidence, admitted this 12th day of June, 1935.

ROBERTSON & CASTLE,
By (s) J. G. ANTHONY
Attorneys for Waialua Agricultural Company, Limited.
(s) JOHN R. DESHA
Attorney for James L. Holt and Annie Holt Kentwell. [896]

[Title of Court and Cause.]

STIPULATION FOR PURPOSES OF RECORD ON APPEAL.

Filed April 27, 1936 at 9:35 o'clock a. m. (s) Robert Parker, Jr., Clerk Supreme Court. [897]

IT IS STIPULATED AND AGREED by and between ELIZA R. P. CHRISTIAN, an incompetent person, by Herman V. von Holt, her Guardian, and WAIALUA AGRICULTURAL COMPANY, LIMITED, both parties appealing herein to the United States Circuit Court of Appeals for the Ninth Circuit, that for the purposes of the record on appeal and in order to avoid duplication and to reduce the said record, as follows:

1. That Exhibits A, B, C, D, and E referred to and described in the original petition and in the first amended petition are identical;

2. That Exhibits A, B, C, D, and E referred to and described in the second amended petition are identical with [898] Exhibits A, B, C, D, and E referred to and described in the original petition and in the said first amended petition;

3. That only one set of said Exhibits A, B, C, D, and E need to be transmitted on appeal.

IN WITNESS WHEREOF said parties have hereunto set their hands, through their respective attorneys.

Dated: Honolulu, T. H., April 27, 1936.

ELIZA R. P. CHRISTIAN,
An incompetent person,
By HERMAN V. VON HOLT,
Her Guardian,
By (s) CHAS. M. HITE,
Her Attorney.
WAIALUA AGRICULTURAL
COMPANY, LIMITED,
By ROBERTSON & CASTLE,
By (s) ALBERT L. CASTLE
Its Attorneys.

Approved:

(s) JAS. J. BANKS
Justice Supreme Court of the
Territory of Hawaii.

Attest:

(s) ROBERT PARKER, JR.
Clerk Supreme Court of the
Territory of Hawaii. [899]

[Title of Court and Cause.]

REQUEST FOR A SUBSTITUTE JUSTICE.

Filed July 24, 1936 at 11:49 o'clock a. m. (s) Gus K. Sproat, Deputy Clerk Supreme Court. [900]

To Honorable Delbert E. Metzger, Circuit Judge, Fourth Circuit:

Honorable Norman D. Godbold, First Judge, Circuit Court, First Circuit having formerly sat as a member of this court in the above entitled cause as

substitute justice in place of Honorable James L. Coke, Chief Justice, disqualified, and Judge Godbold being now dead, we the remaining justices of the Supreme Court, hereby request and authorize you to sit with us as substitute justice in place of Honorable James L. Coke, Chief Justice, disqualified, to hear and determine any and all matters in the above entitled cause.

Dated the 24th day of July, 1936.

(s) JAS J. BANKS
Associate Justice.

(s) E. C. PETERS
Associate Justice.

Attest:

[Seal] (s) GUS K. SPROAT
Deputy Clerk. [901]

[Title of Court and Cause.]

STIPULATION

Filed July 24, 1936 at 2:13 o'clock P. M. (s) Gus K. Sproat, Deputy Clerk Supreme Court. [902]

IT IS HEREBY STIPULATED by and between the parties hereto that,

WHEREAS, each of them is appealing from the decree of the Supreme Court of the Territory of Hawaii made and entered herein on the 25th day of March, 1935, and therefore obligated to file a statement of the evidence with the clerk of the court from which the appeal is taken; and

WHEREAS, it is the desire to obviate such duplication and to file only one such statement;

NOW, THEREFORE, IT IS AGREED that the foregoing statement of the evidence herein, being duly lodged with the clerk by both of the parties hereto, and now amended and settled by the Supreme Court of the Territory of Hawaii, shall serve as the [903] statement of each of the parties hereto upon the appeals herein in satisfaction of the requirement of Supreme Court Equity Rule No. 75.

IT IS FURTHER AGREED that certain facts were admitted by respective counsel, certain stipulations entered into, and certain exhibits introduced, at the several hearings in the trial court, and that such facts, stipulations and exhibits, in full or condensed form, are correctly set forth in the Condensed Statement of Evidence, and more particularly from the beginning of such Statement and down to the title, "Narrative Statement of Further Evidence" therein.

Dated: Honolulu, T. H., July 24, 1936.

(s) CHAS. M. HITE
Attorney for the Petitioner

ROBERTSON & CASTLE,
By (s) ALFRED L. CASTLE
Attorneys for the Respondent Waialua Agricultural Company, Limited.

The foregoing stipulation is approved:

[Seal] (s) JAS. J. BANKS
Justice of the Supreme Court of the Territory of Hawaii.

[904]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

Filed July 30, 1936 at 8:40 o'clock A. M. Robert Parker, Jr., Clerk Supreme Court. [905]

To Robert Parker, Jr., Esquire, Clerk of the Supreme Court of the Territory of Hawaii:

YOU WILL PLEASE prepare and certify a transcript of the record in this, the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore allowed, and include in said transcript the following pleadings, proceedings, opinions, judgments, exhibits, and papers on file in said cause, to-wit:

1. Original petition filed May 9, 1928, with Exhibits A, B, C, D, and E, and Chambers Summons;

2. Answer of James L. Holt, filed May 18, 1928;

3. Answer of Waialua Agricultural Company, Limited, filed July 16, 1928; [906]

4. Replication of petitioner to answer of Waialua Agricultural Company, Limited, filed July 18, 1928;

5. Replication of petitioner to answer of James L. Holt, filed July 20, 1928;

6. Amended bill for cancellation, filed March 5, 1929;

7. Answer of respondent Waialua Agricultural Company, Limited, to amended complaint, filed March 8, 1929;

8. Stipulation substituting name Herman V. von Holt as Guardian in place of George H. Holt, filed March 12, 1929;

9. Decision of Honorable Albert M. Cristy, dated May 11, 1929;

10. Motion by Waialua Agricultural Company, Limited to dismiss bill, filed July 12, 1929;

11. Appearance of Annie Holt Kentwell, filed August 1, 1929;

12. Supplemental decision re accounting by Honorable Albert M. Cristy, filed August 9, 1929;

13. Decree of Circuit Court, First Circuit (without exhibit) filed October 16, 1929;

14. Notice of appeal, and appeal, filed October 19, 1929;

15. Opinion of the Supreme Court, filed April 18, 1931;

16. Order remanding cause, dated May 21, 1931;

17. Notice of order remanding cause, filed May 22, 1931;

18. Request by Waialua Agricultural Company, Limited to James L. Holt to join in appeal, filed July 20, 1931;

19. Petition for appeal by Waialua Agricultural Company, Limited, filed July 23, 1931;

20. Order allowing appeal and fixing amount of bond, filed July 24, 1931; [907]

21. Citation on appeal, dated and filed July 24, 1931;

22. Order of severance, dated and filed July 24, 1931;

23. Order extending time to prepare statement of evidence, file record, and docket cause, filed July 29, 1931;

24. Mandate of United States Circuit Court of Appeals for the Ninth Circuit, dated October 19, 1931;

25. Notice of above mandate, dated October 28, 1931;

26. Motion by Eliza R. P. Christian for allowance of amendments to pleadings, filed May 25, 1931;

27. Second amended petition, with Exhibits F and G, filed May 25, 1931;

28. Objections by Waialua Agricultural Company, Limited to allowance of proposed second amended petition, filed October 31, 1931;

29. Clerk's minutes of October 31, 1931;

30. Motion for order of service on Annie Kentwell as shown by clerk's minutes November 6, 1931;

31. Motion for commission to take depositions, with affidavits attached, dated November 18, 1931;

32. Amended motion to take depositions, with affidavit attached, dated November 20, 1931;

33. Oral ruling of Judge A. M. Cristy of November 23, 1931;

34. Affidavits in opposition to motions to take depositions, filed November 30, 1931;

35. Counter-affidavit of A. L. Castle, filed December 24, 1931;

36. Motion for commission, dated January 7, 1932;

37. Clerk's minutes re proceedings on foregoing motions, of January 9, 1932; [908]

38. Clerk's minutes on foregoing proceedings, January 21, 1932;

39. Motion to take depositions, filed February 29, 1932;

40. Answer of James L. Holt to second amended petition, filed December 5, 1931;

41. Answer of Annie Holt Kentwell to second amended petition, filed January 15, 1932;

42. Answer of Waialua Agricultural Company, Limited, to second amended petition, filed December 24, 1931;

43. Replication to answer of James L. Holt, filed December 7, 1931;

44. Replication to answer of Waialua Agricultural Company, Limited, filed January 4, 1932;

45. Decision Honorable A. M. Cristy, filed August 18, 1932;

46. Decree Circuit Court, First Circuit, filed September 6, 1932;

47. Notice of appeal and appeal, filed September 10, 1932;

48. Decision of Supreme Court, dated May 3, 1934;

49. Exhibit A, being map showing lands and improvements considered in the decision of the Supreme Court, filed December 19, 1934, and Exhibit B, containing descriptions of lands considered in said decision;

50. Statement of disqualification Chief Justice Coke, filed January 18, 1935;

51. Request for a substitute Justice, filed January, 18, 1935;

52. Decree of Supreme Court, Territory of Hawaii, dated and filed March 25, 1935;

53. Petition for allowance of appeal, filed April 18, 1935; [909]

54. Assignment of errors, filed April 18, 1935;

55. Notice of appeal and acknowledgment of service, filed April 18, 1935;

56. Order allowing appeal and fixing bond, filed April 23, 1935;

57. Bond, filed April 24, 1935;

58. Citation, filed April 26, 1935;

59. Consent to appearance of counsel, filed April 26, 1935;

60. Motion for leave to appear as counsel, with attached letters and cables, filed May 1, 1935;

61. Order entering John R. Desha as counsel, filed May 1, 1935;

62. Acknowledgment of service of citation, filed May 9, 1935;

63. Appearance of Annie Kentwell, filed June 10, 1935;

64. Notice, filed June 12, 1935;

65. Stipulation for purposes of record, filed April 27, 1936;

66. Request for a substitute justice, filed July 24, 1936;

67. Condensed statement of the evidence, filed July 24, 1936, including Court's order and approval of same;

68. Stipulation of counsel regarding condensed statement of evidence, filed July 24, 1936;

69. All orders enlarging time within which to file statement of evidence and praecipe and docketing cause in United States Circuit Court of Appeals for the Ninth Circuit;

70. This praecipe, filed July 30, 1936; [910]

AND THE FOLLOWING EXHIBITS:

71. Petitioner's Exhibit C, being map;

72. Petitioner's Exhibits D-10, D-11, D-13, D-15, D-16, D-19, D-21, D-22, D-25, D-28, D-29, D-30, D-32, and D-37;

73. Petitioner's Exhibit A-21;

74. Petitioner's Exhibits 1 and 2 in connection with the deposition of Dr. Thomas Saxty Good;

75. Exhibit, being book or pamphlet, entitled, "Scale of Tests," accompanying deposition of Dr. Thomas Saxty Good;

76. Slips in connection with Exhibit D-35;

77. Two powers of attorney, Exhibits 15-A and 15-B;

78. Respondent's Exhibit 6-A;

79. Respondent's Exhibits 2, 3, 4, 5, and 6, for identification, attached to deposition Dr. Masson and contained in sealed envelope;

80. Respondent's Exhibit S-3, map;

81. Respondent's Exhibit S-4, map;

82. Petitioner's Exhibit R-9, for identification, being sealed envelope;

83. Book of photographs, Exhibit S-9;

84. Photostat copy of page with signatures on Exhibit A-21, same to be inserted at end of printed volume of condensed statement of evidence;

85. Reduced reproductions of maps Exhibits C, S-3 and S-4, same to be inserted as above.

DATED: HONOLULU, T. H., JULY 30, 1936.

ELIZA H. P. CHRISTIAN, an incompetent person, by HERMAN V. VAN HOLT, her Guardian, Petitioner-Appellee,

By CHARLES HITE,

Her Attorney [911]

Service of the foregoing Praecipe acknowledged this 30th day of July, 1936.

WAIALUA AGRICULTURAL COMPANY, LIMITED

By ROBERTSON & CASTLE

Its Attorneys.

ANNIE HOLT KENTWELL and JAMES L. HOLT

By JOHN R. DESHA

Their Attorneys. [912]

[Title of Court and Cause.]

STIPULATION FOR PURPOSES OF RECORD ON APPEAL.

Filed Aug. 5, 1936, at 2:30 o'clock P. M. Robert Parker, Jr., Clerk Supreme Court. [912-A]

IT IS STIPULATED AND AGREED by and between the parties hereto that the contents of Exhibits A and B, referred to in and a part of a certain stipulation entered herein on or about the 19th

day of December, 1934, being likewise incorporated in the Decree of the Supreme Court entered herein March 25, 1935, need not be incorporated in the record on appeal herein, as a part of said stipulation of December 19, 1934, but shall be omitted therefrom.

IT IS FURTHER STIPULATED AND AGREED that Exhibit A referred to in and a part of said Decree of March 25. 1935, being an original map, may be transmitted by the Clerk to the United States Circuit Court of Appeals for the Ninth Circuit [912-B] in original form in connection with the record on appeal herein.

IN WITNESS WHEREOF said parties have hereunto set their hands, through their respective attorneys.

Dated, Honolulu, T. H., August 5th, 1936.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her Guardian.

By CHARLES HITE,

Her Attorney.

WAIALUA AGRICULTURAL COMPANY, LIMITED.

By ROBERTSON & CASTLE,

Its Attorneys.

ORDER.

The foregoing stipulation is hereby approved, and it is hereby ordered that an original map, being a part of the Decree of this Court herein entered

March 25, 1935, and marked Exhibit A, be transmitted by the Clerk to the United States Circuit Court of Appeals for the Ninth Circuit in its original form as a part of the record on appeal herein.

[Seal] JAS J. BROWN,
Associate Justice, Supreme Court of Hawaii. [912-C]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

Filed Aug. 6, 1936, at 3:00 o'clock P. M. Robert Parker, Jr., Clerk Supreme Court. [913]

To ROBERT PARKER, JR., ESQUIRE, Clerk of the Supreme Court of the Territory of Hawaii:

YOU ARE HEREBY REQUESTED to prepare and certify a transcript of record in this, the above entitled cause, to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the appeal allowed in said cause, and to include in such transcript the following, and no other, pleadings, proceedings, opinions, decisions, exhibits, and papers on file, to-wit:

1. Bill of Cancellation filed May 9, 1928, and exhibits A. B, C, D and E attached thereto.
2. Chambers Summons attached thereto with return of service.
3. Answer of James L. Holt, filed May 18, 1928. [914]

4. Demurrer of Respondent Waialua Agricultural Co., Ltd., filed June 12, 1928.
5. Decision on Demurrer filed June 22, 1928.
6. Answer of Waialua Agricultural Co., Ltd., filed July 16, 1928.
7. Replication of Eliza R. P. Christian by her Guardian, filed July 20, 1928, to answer of Waialua Agricultural Co., Ltd.
8. Replication of Eliza R. P. Christian by her Guardian, filed July 20, 1928, to answer of James L. Holt.
9. Notice to Produce Will, directed to Eliza R. P. Christian and her attorneys, dated December 4, 1928.
10. Amended Bill for Cancellation, filed March 5, 1929.
11. Answer of Waialua Agricultural Co., Ltd., to Amended Bill, filed March 8, 1929.
12. Stipulation that name of H. von Holt as Guardian be substituted for George H. Holt, filed March 12, 1929.
13. Decision of Hon. A. M. Cristy, dated May 11, 1929.
14. Motion of the Waialua Agricultural Co., Ltd., for dismissal of bill, filed July 12, 1929.
15. Appearance of Annie Holt Kentwell, filed August 1, 1929.
16. Supplemental decision on accounting by Hon. A. M. Cristy.
17. Decree of the Circuit Court, First Circuit, filed October 16, 1929.

18. Notice of Appeal and Appeal of Waialua Agricultural Co., Ltd., to Supreme Court of Hawaii, dated October 19, 1929.
19. Opinion of Supreme Court of Hawaii, dated April 18, 1931.
20. Objections of Respondent Waialua to Proposed Order Remanding Cause, dated May 21, 1931.
21. Order Remanding Cause, dated May 21, 1931.
22. Notice of Order Remanding Cause, dated May 22, 1931.
23. Motion to Allow Amended Pleadings, filed May 25, 1931.
24. Stipulation for Purposes of Record on Appeal, filed in Supreme Court, April 27, 1936. [915]
25. Petitioner's Second Amended Petition, dated May 25, 1931, together with Exhibits F and G, but omitting Exhibits A to E inclusive.
26. Objection by Waialua Agricultural Co., Ltd., to allowance of proposed second amended bill, dated October 31, 1931.
27. Clerk's Minutes of October 31, 1931, showing ruling on objections.
28. Waialua Agricultural Co., Ltd., special demurrer to second amended petition, dated November 14, 1931.
29. Clerk's Minutes of November 17, 1931, showing ruling on Special Demurrer.
30. Answer of James L. Holt to second amended petition, filed December 5, 1931.
31. Replication of Petitioner to Answer of James L. Holt, filed December 7, 1931.

32. Notice to Produce Deed, Christian to Kentwell, dated December 8, 1931.
33. Answer of Waialua Agricultural Co., Ltd., to Second Amended Petition, dated December 24, 1931.
34. Replication of Petitioner to Answer of Waialua Agricultural Co., Ltd., filed January 4, 1932.
35. Answer of Annie Holt Kentwell to second amended petition, filed January 15, 1932.
36. Decision of Honorable A. M. Cristy on Remand, filed August 18, 1932.
37. Decree Circuit Court, First Circuit, entered September 6, 1932.
38. Notice of Appeal and Appeal of Waialua Agricultural Company, Ltd., dated September 9, 1932.
39. Opinion of Supreme Court of Hawaii, dated May 3, 1934.
40. Stipulation and Agreement for Purposes of Decree to be Entered, dated December 19, 1934, omitting Exhibits A and B.
41. Statement of Disqualification of Chief Justice Coke, filed January 18, 1935.
42. Request for a substitute Justice, filed January 18, 1935.
43. Decree of Supreme Court of Hawaii, dated March 25, 1935, with Exhibits A and B attached (Exhibit A to be transmitted in original form). [916]
44. Consent to Appearance of Counsel, filed April 26, 1935.

45. Motion for leave to appear as counsel, filed May 1, 1935, together with attached letters and cables.
46. Order entering John R. Desha as counsel, filed May 1, 1935.
47. Petition for Appeal, filed by Waialua Agricultural Co., Ltd., June 5, 1935, with acknowledgment of service.
48. Assignment of Errors, filed June 5, 1935.
49. Request to Join in Appeal, filed June 5, 1935, with acknowledgment of service.
50. Order of Severance, filed June 8, 1935, with acknowledgment of service.
51. Order Allowing Appeal and Fixing Amount of Bond, filed June 8, 1935, with acknowledgment of service.
52. Bond on Appeal, filed June 8, 1935.
53. Citation on Appeal, filed June 8, 1935, with acknowledgment of service.
54. Appearance of Annie Holt Kentwell, filed June 10, 1935.
55. Request for substitute Justice, filed July 24, 1936.
56. Condensed Statement of Evidence, including Court's Order attached thereto approving same, and Order re Certain Exhibits, filed July 24, 1936.
57. Stipulation of counsel regarding Condensed Statement of Evidence, filed July 24, 1936.
58. Stipulation for Purposes of Record on Appeal, and Order, filed August 5, 1936.

59. All orders enlarging time within which to file statement of evidence and praecipe, and docketing cause in United States Circuit Court of Appeals for the Ninth Circuit.
60. This Praecipe.
61. Other Stipulations and Orders which may be entered herein prior to the transmittal of the record to the United States Circuit Court of Appeals for the Ninth Circuit.
62. The following original exhibits, to be transmitted in their original form:
    a. Cables numbered and lettered Petitioner's Exhibits D-10, D-11, D-13, D-15, D-16, D-19, D-21, D-22, D-25, D-27, D-28, D-29, D-30, and D-32.
    b. Two undated slips on paper of Canadian Bank of Commerce, London, and introduced in connection with Exhibit D-35. [917]
    c. Unsigned draft of agreement, Petitioner's Exhibit D-37.
    d. Map, Petitioner's Exhibit C.
    e. Petitioner's Exhibits 1 and 2 in connection with the testimony of Dr. Good.
    f. Petitioner's Exhibit 6-A, catechism in connection with testimony of Mrs. Alice Fisher.
    g. Two powers of attorney, Respondent's Exhibits 15-A and 15-B.
    h. Envelope containing hospital sheets, marked Respondent's Exhibits 2, 3, 4, 5 and 6 for identification in connection with testimony of Dr. Masson.

i. Two maps, Respondent's Exhibits S-3 and S-4.

j. Book of photographs, Respondent's Exhibit S-9.

k. Envelope marked Petitioner's Exhibit R-9 for identification.

l. Map attached to Decree of Supreme Court, dated March 25, 1935, and marked Exhibit A.

63. The following photostat copies, or reduced reproductions of exhibits:

a. Photostat copy of page of grantor signatures in Petitioner's Exhibit A-21, the same to be inserted at the end of the printed volume of the Condensed Statement of Evidence.

b. Reduced reproductions of Maps, Exhibits C, S-3, and S-4, the same to be inserted at the end of the printed volume of the Condensed Statement of Evidence.

Said transcript of record on appeal to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the clerk of said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, on or before the 30th day of September, 1936, [918] pursuant to orders of this Court enlarging and extending the time for filing said transcript.

DATED, Honolulu, T. H., August 5, 1936.

ROBERTSON & CASTLE,
Attorneys for Appellant,
Waialua Agricultural
Company, Limited.

Service of the foregoing Praecipe is hereby acknowledged this 6 day of August, 1936.

CHAS. M. HITE,
Attorney for Petitioner-Appellee, Eliza R. P. Christian, an incompetent person, by Herman V. von Holt, her Guardian.

JOHN R. DESHA,
Attorney for James L. Holt and Annie Holt Kentwell.

[919]

[Title of Court and Cause.]

CLERK'S CERTIFICATE

I, ROBERT PARKER, JR., Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the petitions for appeal filed April 18, 1935 and June 5, 1935 respectively, the originals whereof are attached to the foregoing transcript of record, being pages 799 to 804, both inclusive, pages 861 to 864, both inclusive, and in pursuance to the praecipes, filed herein July 30, 1936 and August 6, 1936, origi-

nals whereof are attached to the foregoing transcript, being pages 905 to 919, both inclusive.

DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the foregoing transcript of record, being pages 1 to 798, both inclusive, 838 to 840, both inclusive, pages 844 to 846, both inclusive, pages 850 to 860, both inclusive, 876 to 881, both inclusive, 885 to 888, both inclusive, pages 892 to 904, both inclusive, and I CERTIFY the same to be full, true and correct copies of the originals, which are now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in the above entitled cause, Numbers 1920 and 2078.

I DO FURTHER CERTIFY that the original assignment of errors, filed April 18, 1935, being pages 805 to 837, both inclusive, original order allowing appeal and fixing amount of bond, filed April 23, 1935, pages 841 to 843, both inclusive, original citation on appeal, filed April 26, 1935, pages 847 to 849, both inclusive, the original assignment of errors, filed June 5, 1935, pages 865 to 875, both inclusive, the original order allowing appeal and fixing amount of bond, filed June 8, 1935, pages 882 to 884, both inclusive, the original citation on appeal, filed June 8, 1935, pages 889 to 891, both inclusive, the original stipulation for purposes of record on appeal, filed August 5, 1936, pages 912-A to 912-C, both inclusive of the foregoing transcript of record, are herewith returned.

I DO FURTHER CERTIFY that in accordance with the praecipes and in obedience to the order of

the Supreme Court of the Territory of Hawaii I transmit herewith the following original exhibits in said cause, to-wit:

PETITIONER'S EXHIBITS:

Exhibit "A-21", Original Deed and Copy of Deed, dated May 10, 1910, executed by John D. Holt, et al., to James Lawrence Holt, and recorded in Liber 337, pages 75-78, Registry of Conveyances, Territory of Hawaii,

Exhibit "C", May of the Holt Estate Lands showing uses and improvements as of May 2, 1910, traced from Map of W. A. Co., Plantation, Waialua, Oahu. Compared and drawn by John Gomes. Scale: 1"—1000' 1902. Traced by Engineering Office, W. A. Co., Ltd., Jan. 1929,

Exhibit "D-10", Carbon copy of Cablegram in Code and also translation, dated Apr. 8, 1910, addressed to "Withington" Shermipple, Boston, and unsigned,

Exhibit "D-11", Carbon copy of Cablegram in Code and also translation, dated Apr. 11, 1910, addressed to "Withington" Shermipple, Boston, and unsigned,

Exhibit "D-13", Carbon copy of Cablegram in Code and also translation, dated Apr. 12, 1910, addressed to Wikinikona, Shermipple, Boston, and unsigned,

Exhibit "D-15", Carbon copy of Cablegram in Code and also translation, dated Apr. 13, 1910, addressed to Wikinikona, Shermipple, Boston, and unsigned,

Exhibit "D-16", Original Cablegram in Code, dated Apr. 14, 1910, addressed to Ola, Honolulu, and signed "Wikinikona",

Exhibit "D-19", Pencil copy of Cablegram in Code and also translation, dated Apr. 15th, addressed to Wikinekona, Shermipple, Boston, and unsigned,

Exhibit "D-21", Carbon copy of Cablegram in Code and also translation, dated Apr. 16, 1910, addressed to Wikinekona, Shermipple, Boston, and unsigned,

Exhibit "D-22", Carbon copy of Cablegram in Code and also translation, dated Apr. 19/10, sent to Shermipple, Boston and unsigned,

Exhibit "D-25", Original Cablegram in Code with penciled translation, dated Apr. 26, 1910, addressed to Ola, Honolulu, and signed "Lothrop",

Exhibit "D-27", Copy of Cablegram in Code with translation, dated Apr. 28, 1910, addressed to Lothrop, London, England, and unsigned,

Exhibit "D-28", Original Cablegram in Code, dated Apr. 28, 1910, addressed to Ola, Honolulu, and unsigned,

Exhibit "D-29", Original Cablegram in Code with translations, dated Apr. 29, 1910, addressed to Ola, Honolulu, and signed "Husband",

Exhibit "D-30", Original Cablegram, undated, addressed to "Kentwell", 159 Woodstock, Oxford, and signed "Holt",

Exhibit "D. 32", Original Cablegram in Code with translation, dated Apr. 29/10, addressed to

Lethrop, dated Apr. 29/10 addressed to Lothrop, Oxford, and signed "Ola",

Exhibit "D-37", Proposed Agreement, dated Apr. 15, 1910, between James L. Holt, John F. Colburn and William R. Castle, Trustee, and unsigned and unexecuted,

Exhibit "6-A", Book, entitled "Catechism of Christian Doctrine",

Exhibit "15-A", Original General Power of Attorney, dated Jan. 11, 1923, executed by Eliza Holt Christian to Henry Smith,

Exhibit "15-B", Original Power of Attorney, dated Mar. 16, 1923, executed by Eliza Holt Christian to Henry Smith,

Exhibit "R-9", (For Identification),

Exhibit "S-3", Small Map of Waialua Agricultural Co's physical location of properties in the case and adjoining properties as of 2/1/32, showing roads, canals, railroads, etc.,

Exhibit "S-4", Large Map of Holt Lands, showing ditches, siphons, transmission lines, camps, etc., as of Feb. 1, 1932,

Exhibits "1 & 2" in connection with the deposition of Dr. Thomas Saxty Good,

Exhibit being book or pamphlet, entitled, "Scale of Tests", accompanying deposition of Dr. Thomas Saxty Good;

RESPONDENT'S EXHIBITS:

Exhibits 2, 3, 4, 5 and 6 for Identification in connection with testimony of Dr. Masson,

Exhibit "S-9", Book of Photographs,

Map dated March 25, 1935, and marked Exhibit "A",

"Condensed Statement of Evidence, including Court's Order attached thereto approving same, and Order re Certain Exhibits, filed July 24, 1936, and attached thereto—Photostat copy of page with signatures on Exhibit "A-21",

I DO FURTHER CERTIFY that all original orders enlarging time within which to file the statement of evidence and praecipes and docketing said cause, were transmitted to Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California,

I LASTLY CERTIFY that the cost of the foregoing transcript of record is $292.60, and the said amount has been paid by Charles M. Hite, Esquire, attorney for petitioner-appellee, and Messrs. Robertson & Castle, attorneys for respondent-appellant equally.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 25th day of August, 1936.

[Seal] ROBERT PARKER, JR.,
Clerk of the Supreme Court of the Territory of Hawaii.

[Title of Court and Cause.]

CONDENSED STATEMENT OF EVIDENCE

Filed July 24, 1936 at 2:12 o'clock P. M. Gus K. Sproat, Deputy Clerk Supreme Court.

The following is the condensed statement, in narrative form, of the testimony introduced upon the trial on behalf of the Petitioner, Eliza R. P. Christian, an incompetent person, by Herman V. von Holt, her Guardian, and Respondent, Waialua Agricultural Company, Limited, (both of said parties appealing herein), as approved and settled by the Supreme Court of Hawaii, pursuant to stipulation of the said parties filed contemporaneously herewith that only one statement need be so approved, settled and filed.

PRELIMINARY STATEMENT OF PROCEEDINGS

The taking of testimony in this case commenced in Honolulu before the Circuit Court of the First Judicial Circuit, Territory of Hawaii (Judge Cristy presiding), and was concluded on March 11, 1929. Decision was rendered in favor of the Petitioner on May 11, 1929, which decision, among other things, called for an accounting. This accounting was had before Judge Cristy and a decision thereon rendered August 9, 1929. The decree in the Circuit Court was entered October 16, 1929. Petitioner did not appeal.

From this decree the Respondent Waialua Agricultural Company, Limited, appealed to the Supreme Court of Hawaii. The decision of the Ha-

waiian Supreme Court was rendered April 18, 1931 (31 Haw. 817), affirming the decree in part and reversing the decree in other respects. On such decision of the Supreme Court of Hawaii, an Order Remanding Cause was entered May 21, 1931.

Respondent Waialua appealed to this Court from the Order Remanding Cause, the appeal being dismissed on September 18, 1931, on the ground that said Order Remanding Cause was not a final order (52 Fed. (2d) 847).

After the pleadings had been amended in accordance with the Order of Remand of the Supreme Court of Hawaii, further trial was had in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, resulting in the decision of said court (Judge Cristy presiding) of August 18, 1932, on which a decree was entered September 6, 1932.

From this decree Respondent Waialua appealed to the Supreme Court of Hawaii. Petitioner did not appeal. The said court rendered its decision on May 3, 1934 (33 Haw. 34), and a decree was thereafter entered from which both parties appealed to this court.

Certain facts stipulated to by counsel during the trial or shown by the testimony of witnesses, and not now nor heretofore disputed, may be briefly stated as follows and will not hereafter be duplicated in this narrative statement:

THE PROPERTY INVOLVED

Eliza Holt (Eliza R. P. Christian, the Petitioner) is the daughter and only child of John Dominis Holt

and a granddaughter of Robert William Holt. The property, subject matter of this litigation, is property originally owned by the said R. W. Holt and passing under the terms of his will.

R. W. Holt, an Englishman and grandfather of Petitioner Eliza R. P. Christian as aforesaid, died in Honolulu in 1862. He came to Hawaii many years before with one child (a daughter of a former marriage) and here married a native Hawaiian woman by whom he had three sons. He left him surviving these four children, namely, John Dominis Holt (the father of Petitioner), James R. Holt, Owen J. Holt and Elizabeth M. Aldrich. The applicable part of his will provided:

> "I give, devise, and bequeath to my son, John Dominis Holt, one quarter of all my estate, both real and personal the income of the same to be paid to him by my Executor hereinafter named for his use and support for the term of his natural life and after the death of my said son, I give, devise and bequeath the said one quarter to the heirs of the said John Dominis Holt and their assigns."

Similar provision was made for the other sons, the daughter Elizabeth M. Aldrich being given her one-quarter outright. After the payment of debts and legacies, and the distribution of the one-quarter to the daughter, Elizabeth M. Aldrich, there was left in the estate, among other properties, the property involved in this litigation, being certain lands in the district of Waialua, Oahu, consisting of approxi-

mately 14,000 acres, hereinafter called the "Holt Lands." These lands are a large wedge-shaped piece, as appears from the maps in evidence, starting at an elevation of some 20 feet and running in a general westerly direction for about eight miles up to an extreme elevation of 1616 feet on the slopes of the Koolau mountain range, and include sugar, pineapple, forest and waste lands.

Each of the sons, including John Dominis Holt, under the terms of the will, had a life estate in one-third of this property (as well as other property left by R. W. Holt as above indicated), the remainder as to each one-third being in the heirs of the respective sons, as indicated by the language above quoted from the will.

The family relationships are illustrated by the following diagram:

R. W. HOLT
Died 1862

OWEN J. HOLT	JAMES R. HOLT	JOHN DOMINIS HOLT
Born Dec. 10, 1842	Born Oct. 17, 1838	Born Dec. 17, 1839
Died June 10, 1891	Died Apr. 18, 1916	Died Apr. 10, 1922
9 children	ROBERT HOLT	JAMES L. HOLT	ELIZA CHRISTIAN
ROBERT W. HOLT	Born	Born	Born
EDWARD S. HOLT	.....	Nov. 1873	Dec. 30, 1885
CHRIS HOLT	Died 1918		
GEORGE H. HOLT			
JAMES R. HOLT, JR.			
JOHN D. HOLT, JR.			
OWEN J. HOLT, JR.			
ELIZABETH H. RICHARDSON			
ANNIE HOLT KENTWELL			

Each son of R. W. Holt had a life estate in one-third of the property. On the death of each son, the heirs of that son became the owners of the fee simple title to the particular one-third.

The first son to die was Owen J. Holt, who died on June 10, 1891, leaving the nine children above named. Thereupon each child became vested with a 1/27 interest in fee simple in these lands. James R. Holt was the next son to die. He died April 18, 1916, whereupon the title in fee simple to his one-third vested in the assigns of his heirs. John Dominis Holt, the father of petitioner Eliza R. P. Christian, was the last to die. He died April 10, 1922, and the fee simple title to his one-third thereupon vested.

THE PETITIONER

Eliza Holt (Eliza R. P. Christian, the petitioner) was born December 30, 1885, at Makaha, Waianae, Oahu. She is a daughter of John Dominis Holt, and of Kaahanui, a Hawaiian, his wife, and a granddaughter of R. W. Holt. Her mother died when she was about seven years old. She was brought to Honolulu in the early nineties by her father.

For five years, from eight to thirteen years of age (1894-1899), she attended school at the Catholic Convent in Honolulu and boarded there. Prior to that, in 1893, she had been given piano lessons at the Convent. After leaving the Convent and a year's interval in Honolulu, she spent a year with her cousin Annie Holt (Kentwell), in attendance at a Catholic Girls' School at San Jose, California, Notre Dame Convent. On her return to Honolulu she

was enrolled at the Priory (an Episcopal girls' school), from which she was required to withdraw before completing the term, by reason of giving birth to an illegitimate child. This was in 1902, and she was then sixteen years of age. A prosecution for rape in which she was the prosecuting witness was instituted, and her testimony is in evidence (Ex. 4).

Eliza Holt and her father went to live with her cousin Annie (Holt) Kentwell in July 1901, and lived with her from that time on, except for the time of her marriage, and a period of some six months with the Seas in Honolulu.

On January 26, 1903, Eliza Holt, then seventeen years of age, married Albert Christian in the Catholic Cathedral in Honolulu. The marriage ceremony was performed by the Reverend Father Clement, and the witnesses were Mamie Christian and John D. Holt, father of petitioner. Albert Christian's age is given as twenty-three in the marriage certificate, and his nationality Dane-Scot. The license for the marriage was duly issued and the record of the marriage with, among others, the foregoing facts, was duly recorded in the official record of marriages for Honolulu on February 26, 1903 (Ex. 8), the record likewise showing that John D. Holt, the father, consented to said marriage. After living with her husband for a few months, Eliza Christian returned to live with Annie Kentwell. Thereafter she never lived with Christian again, nor were they ever divorced. He died in 1919.

An action in the Circuit Court of the First Judicial Circuit (in Honolulu), entitled "Eliza R. P.

Holt, a Minor, by Annie Holt Kentwell, her Relative and Guardian, Plaintiff, vs. Albert Christian, Defendant," instituted to annul Eliza Christian's marriage upon the claim that she was a congenital imebcile and mentally incompetent to contract marriage, and upon the further ground that the marriage was part of a conspiracy to obtain her property, was decided adversely to those contentions on March 4, 1905, Judge Gear of such Circuit Court who heard the case, rendering an opinion refusing the annulment (Ex. 7).

In 1906, when Eliza R. P. Christian was twenty, she and her father left Honolulu for the mainland, with the Kentwells. For a short time they resided at Cambridge, Massachusetts, and then removed to Elizabeth, New Jersey, where they remained until 1909. While living with the Kentwells in Elizabeth at this time, a second illegitimate child was born to her. The child was born on an elevated railway platform while Mrs. Christian was on her way to a hospital in New York City. During this period Lawrence Kentwell pursued his studies at the Law School of Columbia University, receiving the degree of L.L.B. in June 1909.

The family then removed to Oxford, England, where Lawrence Kentwell continued the study of law, receiving the degree of B.A. in law in 1912 from Oxford University. He spent the next two years at Kings College, Cambridge University, and was called to the Bar in 1916.

Eliza R. P. Christian, with her father, continued to live with the Kentwells at Oxford. In 1915 her

third illegitimate child was born in a nursing home in London. This child is living in England. John Dominis Holt died on April 10, 1922, at Oxford. Eliza R. P. Christian has remained a member of the Kentwell household in Oxford. Lawrence Kentwell went to Shanghai, China, in 1919, and has remained there since.

In 1926 Eliza R. P. Christian was declared incompetent by a British Court, at the instance of Annie Kentwell, who was appointed receiver of her property in England.

On February 1, 1927, upon petition of George H. Holt, she was declared an incompetent by the First Circuit Court in Hawaii, and George H. Holt was appointed her guardian. Waialua was not a party to either the English or Hawaiian proceedings. On April 5, 1928, written demand was first made on Waialua, and on May 8, 1928, this action was commenced.

WAIALUA AGRICULTURAL COMPANY

Waialua Agricultural Company, Limited (for convenience called Waialua), is a Hawaiian corporation, incorporated October 12, 1898, to engage in the business of growing sugar cane and manufacturing the same into sugar. Upon its incorporation it took over the old Halstead plantation, a comparatively small plantation operating more particularly on the lower levels in the Waialua district. From time to time it acquired, by lease or purchase, additional contiguous lands, constantly enlarging its operations, the largest lease in the early days being

the first lease from the Bishop Estate of the Kawailoa lands (Ex. 5-J). The Holt lands adjoined the Kawailoa lands and were contiguous to other Waialua lands, and as early as 1900 the lands owned or controlled by Waialua surrounded the Holt lands, except in the upper forest portion. The Holt lands, from the time of the incorporation of Waialua until its lease later by Waialua, were wholly uncultivated.

On March 17, 1905, Waialua leased these lands for a period of twenty-five years from April 1, 1905, to April 1, 1930 (Ex. A-8), at a rental of $9,000 per annum. This lease was duly recorded on April 6, 1905, and is in evidence as Petitioner's Exhibit A-8.

On April 1, 1905, Waialua entered upon the lower tip of the Holt lands, started clearing the rocks, klu and guava, and has developed this property systematically ever since.

CERTAIN EXHIBITS AND FACTS ADMITTED BY STIPULATION AFFECTING TITLE AND INTERESTS IN THE "HOLT LANDS."

Certain exhibits and facts relating to interests, real and personal, in or in connection with the "Holt lands," were admitted in evidence by stipulation in the early part of the trial. The designation "Holt lands" refers to the lands a part of the R. W. Holt estate. The interest of Eliza R. P. Christian in these lands is the subject matter of this suit. The use of the word "recorded" throughout means recorded in the Hawaiian Registry of Conveyances in Honolulu, the official office of record for the Terri-

tory of Hawaii. The following are the exhibits and facts referred to, arranged largely in chronological order:

In the original hearings Petitioner's exhibits were designated by letters such as "E" or "A-8," and Respondent's by numbers such as "8" or "1-B"; at the accountings hearings all exhibit letters or numbers were prefixed by "AC," Petitioner likewise retaining the letters, such as "AC. B-1," and Respondent the numbers, such as "AC. 9"; and at the trial on remand Petitioner's exhibits were prefixed by the letter "R", as "R-1," and Respondent's by the letter "S", as "S-5."

1. By deed dated May 18, 1893, James L. Holt purchased of his brother Robert Holt all of grantor's (Robert's) interest, present or expectant, in all of the estate and property of grantor's father, James Robinson Holt, and also grantor's interest in the estate of his grandfather R. W. Holt, deceased. Release of dower by Hokela Holt, grantor's wife. Deed duly recorded. (Ex. 2-B)

2. By mortgage dated December 14, 1897, James Lawrence Holt and Lena Holt, his wife, mortgaged to W. R. Castle, Trustee, for a consideration of $2500, payable three years from date, all their interest in the property, premises and effects in the estate of his grandfather, R. W. Holt, deceased. Mortgage duly recorded. (Ex. 2-A.)

3. Waialua in 1899 purchased of Robert W. Holt, son of Owen J. Holt, for a consideration of $11,000, his 1/27 interest in the Holt lands, except-

ing his interest in Grant 973. The deed likewise covered the grantor's interest in Grant No. 1092 coming independently from the Owen J. Holt Estate, not a part of the Holt lands.

(By inadvertence, this deed was omitted, but the fact is set forth in the testimony of W. W. Goodale.)

4. By deed dated June 7, 1900, Waialua purchased of Christopher J. Holt, for a consideration of $20,000, his 1/27 interest in the Holt lands. The deed conveyed, as well, grantor's interest in Grant 1092, not a part of the Holt lands. Release of dower by Emma Holt, grantor's wife. Deed duly recorded. (Ex. A-7.)

5. By deed dated March 16, 1901, James L. Holt purchased of James R. Holt, his father, all grantor's right, title and interest of every nature and kind, in and to the various lands belonging to the R. W. Holt Estate. Release of dower by Rosalia M. K. Holt, grantor's wife. Deed duly recorded. (Ex. 2-C.)

6. By agreement dated March 16, 1901, between James L. Holt and his father, James R. Holt, and his (the father's) wife, Rosalia M. K. Holt, James L. Holt agreed to pay to his father and his father's wife 50% and 25% respectively of whatever net sum of money might be realized as income from the properties set forth in Exhibit 2-C, during the term of their natural lives. Agreement duly recorded. (Ex. 2-D.)

7. By deed dated July 1, 1902, James L. Holt purchased of James R. Holt, his father, and John

Dominis Holt, his uncle, in consideration of one dollar, love and affection, all of their interests of whatsoever nature, in the estate of R. W. Holt, including the Holt lands (the same being life interests). By this same document James L. Holt was created their attorney-in-fact Release of dower by grantor James R. Holt's wife. Deed duly recorded. (Ex. A-17.)

8. By agreement dated July 1, 1902, James L. Holt, in consideration of the conveyance made under deed of even date (Ex. A-17 above) agreed to pay to his father, James R. Holt, and to his uncle, John D. Holt, certain weekly sums for life, beginning at $25 per week in the event that the value of the property conveyed, after sale and the collection of the proceeds thereof, should exceed the sum of $100,000, and increasing to the sum of $50 each per week should the value exceed the sum of $200,000. It was recited in the agreement that the properties were of great but unknown or uncertain value; that it was the hope, desire and expectation of the parties that James L. Holt would take such measures as would greatly increase said value and that he would and might convert the same into cash or other securities, and invest and hold the reinvested proceeds for his own interests and that of his said father and uncle as in this instrument expressed. It was further recited that the sole heir of John D. Holt was Eliza R. P. Holt, and that upon the death of her father, James L. Holt should

convey to her, or her issue surviving her father if she predeceased her father, one-half of all property which might then be under his control by virtue of the conveyance (Ex. A-17). The instrument further provided for weekly payments of $25 after the death of James R. Holt to his widow (mother of James L. Holt) during her life or until remarriage. This agreement was signed and acknowledged by James L. Holt, but not recorded. (Ex. 2-E.)

9. By trust deed dated July 1, 1902, James L. Holt conveyed to John F. Colburn, Trustee, all of the interests of his father, James R. Holt, and his uncle, John Dominis Holt, in the R. W. Holt estate, each having a life interest in 1/3 of said estate and in the Holt lands, upon certain conditions and trusts. The instrument reads as follows:

> THIS INDENTURE executed this first day of July, in the year of our Lord one thousand nine hundred and two, by and between JAMES LAWRENCE HOLT, hereinafter called the Grantor, party of the first part, and John F. Colburn, hereinafter called the Trustee, party of the second part, both of the City of Honolulu, Island of Oahu, Territory of Hawaii:
>
> WHEREAS, by a certain instrument of even date herewith executed by JAMES ROBINSON HOLT, father of said Grantor, and JOHN DOMINIS HOLT, the Elder, uncle of said Grantor, and Lokalia Kahalaoaka Holt, the wife of said JAMES ROBINSON HOLT, and mother of said Grantor, there is conveyed

to said Grantor all and singular the property, rights, titles, equities, etc., etc., which have heretofore belonged or pertained to or been claimed by them, the said James Robinson Holt and John Dominis Holt, or either of them as a part of the estate left by their father, Robert W. Holt, deceased, and which pertained to them respectively or either of them under and by virtue of the Last Will and Testament of their said father, and

WHEREAS, therefore, to-wit, on or about the 16th day of March, A. D. 1901, said James Robinson Holt and his said wife, did by written instrument of record in Liber 222 on page 71 of the Hawaiian Registry of Deeds, in said Honolulu, convey to the said Grantor, all and singular the rights of him, the said James Robinson Holt in and to all of the real estate left by his said father, Robert W. Holt, under the terms of said Will, and

WHEREAS, by virtue of the two instruments of conveyance last aforesaid, the said Grantor is now the owner of all and singular the rights, properties and equities which prior to the execution and delivery of said instruments of conveyance, were owned or pertained to them, the said James Robinson Holt and John Dominis Holt, or either of them, in or under the estate of their said deceased father, or by virtue of the said Last Will and Testament of their said deceased father, and

WHEREAS, in partial consideration of the said conveyances to him, the said Grantor has executed to them, the said James Robinson Holt and John Dominis Holt, an instrument bearing even date herewith, wherein and whereby he, the said Grantor, makes certain covenants and assumes certain obligations for the payment to them, the said James Robinson Holt and John Dominis Holt, of certain sums and allowances for their maintenance during their respective lives, and has made certain other covenants and assumed certain other obligations in regard to the payment and delivery by him, said Grantor, of certain sums of money or property to Eliza R. P. Holt or her issue, in the event that she or her issue shall survive the father of said Eliza R. P. Holt, namely, John Dominis Holt aforesaid, and

WHEREAS, it is the intent and purpose of the parties hereto that all and singular the properties, rights and equities conveyed to said Grantor by either or both of the instruments of conveyance hereinabove mentioned as having been executed to him by his said father and mother, or by his said father and mother and uncle, or any or either of said instruments, shall be conveyed upon the trusts herein expressed, to said Trustee, and that the conveyance thereof by said Grantor to said Trustee, shall be as full, complete and effective as though said above recited instruments of conveyance had been made

directly to said Trustee instead of to said Grantor herein named.

NOW THEREFORE, This Indenture Witnesseth:

THAT said Grantor for and in consideration of the premises and of the covenants and agreements in this instrument expressed as on the part of the said Trustee, his heirs, executors, administrators, assigns and successors in Trust herein to be kept performed and executed, and of One Dollar ($1.00) to him paid by said Trustee, the receipt whereof is hereby acknowledged, hath bargained and sold, and doth by these presents grant, convey, confirm, release, remise, assign, transfer, set-over and deliver unto the said Trustee, all and singular the real estate, choses in action, goods, chattels, effects, rents, issues, profits, remainders, reversions, rights, titles, claims and equities of whatever name or nature and wheresoever situated, which are conveyed to him, said Grantor, in or by either or both of the instruments of conveyance hereinabove named, to-wit: the instrument executed by the said father and mother of said Grantor to said Grantor, the 16th day of March, A. D. 1901, of record in the Hawaiian Registry of Deeds aforesaid, in liber 222, on page 71, and also the instrument of even date herewith executed to said Grantor by the said father and mother and uncle of said Grantor.

TO HAVE AND TO HOLD all and singular

the premises, real estate, choses in action, goods, chattels, effects, rents, issues, profits, remainders, reversions, rights, titles, claims and equities hereinabove conveyed or intended to be conveyed, unto the said Trustee, and his heirs, executors, administrators, successors in trust, and assigns forever.

BUT in trust nevertheless for the uses and purposes hereinafter expressed and stipulated, that is to say

1. To reduce to his, said Trustee's, possession and control, in any manner or manners provided or permitted by law, the premises, property, real estate, claims, goods, chattels and effects herein conveyed or intended so to be, and thereafter and during the life of this trust, and subject to the terms thereof to hold, manage, control, sell, mortgage and dispose of the same, and after such sale or mortgage or disposition, to hold, manage, control, apply and dispose of the proceeds or results of sales, mortgages or dispositions in manner as herein provided.

2. And whereas, it is now claimed and asserted by Henry Smith, Esquire, who is now acting as Administrator, with-the-Will annexed, or as Trustee, or otherwise, in a fiduciary character by appointment of the Circuit Court for the First Circuit in and for said Territory, acting or purporting to act under the terms of

the Last Will and Testament of said Robert W. Holt, that a trust exists in favor of said Henry Smith, by virtue of the said Last Will and Testament and of his appointment as aforesaid, in, of and over all and singular the property and property rights and interests which pertain to them, the said James Robinson Holt and John Dominis Holt, under and by virtue of said Will,

AND WHEREAS, further, he the said Henry Smith, under such claim and appointment as aforesaid, has in his possession and control a large sum of money, or securities representing such money, or both such money and securities, and also claims to be in possession of all of the real estate now belonging or appertaining to the estate of the said Robert W. Holt, which said money, securities and real estate or part thereof, or certain undivided interests therein constitute the subject of this conveyance,

NOW THEREFORE, said Trustee shall be at liberty, and he is hereby expressly authorized and directed to take such measures, either by way of suit or suits at law, bill or bills in equity, or otherwise, as in his discretion shall be or appear expedient, to test the validity of the said claim of said Henry Smith Esquire and of any and all other persons claiming or to claim any of the property or rights which are the subject of this conveyance, adversely to the claim of

said Trustee to the same or to any of them, and in that connection, and for that purpose, to bring and maintain and prosecute to final judgment, decree and execution any and all actions at law, in equity or otherwise, which in the discretion of said Trustee, or his successors in interest herein, of any or all of the property and property rights, in and by this instrument conveyed or intended to be conveyed unto said Trustee.

3. To invest and re-invest and keep invested in secure investments such money as shall come to his (said Trustee's) hands or control by virtue of this instrument, and to change such investments at his discretion.

4. To hold, manage and control such securities and representations of money as reach his hands by virtue hereof, and to collect the interest and income thereof, and to sell, exchange or otherwise dispose of the same, in his discretion and to account for the income and proceeds thereof.

5. To hold, manage and control all real property, or mixed property, and all rights, privileges and easements pertaining thereto, which shall come to his possession or ownership by virtue hereof, and in his discretion to make and execute such lease and leases thereof, or of any part or parts, portion or portions thereof, as, in his judgment may or shall be or appear expedient, and upon such terms, and for

such rentals as to him shall appear proper and expedient, provided that no such lease shall be made for more than fifty years.

6. To sell and dispose of in such manner and for such price, and upon such terms as to him (said Trustee) shall be or appear expedient, any or all of the real estate, or (and) of the rights, easements or privileges in any-wise pertaining to any of the real estate herein and hereby conveyed or intended to be conveyed, or to exchange the same, or any part or portion of the same, for other real estate, either in whole or in part, and to hold, manage, control and invest the proceeds of any such sale or sales, exchange or exchanges, as hereinabove provided.

7. It is especially hereby intended and provided that such power to convey and dispose of real or personal property hereunder, shall include the authority to make such, or any such conveyance or disposition to any corporation or corporations which shall be organized for the purpose, (either solely or principally) of receiving such conveyance, and of managing and controlling the property so conveyed, or any part thereof, or any other corporation, and upon any such conveyances or disposition to such corporation, said Trustee shall be authorized in his discretion, to accept payment therefor, either in whole or in part, in the paid-up shares of the capital stock of such corporation

or corporations, and thereafter to hold such shares of capital stock upon the trusts herein expressed.

AND WHEREAS, in and by that certain instrument of covenant and agreement, bearing even date herewith, which has been executed to them, the said James Robinson Holt and John Dominis Holt by said Grantor, it is provided among other things, that he, said Grantor, shall pay and cause to be paid to said James Robinson Holt, and John Dominis Holt, and to each of them on the Monday of each week during their respective natural lives, the sum of Twenty-five dollars ($25.00) in United States Gold Coins, or such greater sum or sums as shall, under the conditions in said instrument expressed, become or be due and payable to them in the premises.

NOW, THEREFORE, said Trustee doth hereby covenant and agree, as well to and with said James Robinson Holt and John Dominis Holt, as with the said Grantor herein, that he, said Trustee, upon the execution and delivery to him of this indenture, will effectively provide for the payment of, and will well and truly pay and continue to pay and cause to be paid during the continuance of this trust, the said several weekly sums so, in said last recited instrument, agreed and covenanted to be paid to said James Robinson Holt and John Dominis Holt, and to each and either

of them, he, the said Trustee, rendering an account of all such payments, at intervals of not more than six months, to said Grantor, and his assigns herein.

AND said Trustee doth further covenant and agree to and with the said Grantor, and his personal representatives and assigns in the premises, as follows:

(A) THAT he, said Trustee will well and truly exercise his best efforts and judgment, and will continue in the vigilant endeavor to reduce to his control and possession all and singular the property rights and benefits, the rents, claims, demands and credits of every name and nature to which said Trustee is entitled by virtue of this instrument.

(B) THAT he will, with a view to the legitimate interest of all parties concerned, and especially of said Grantor, hold, manage, control, sell, dispose of, invest, re-invest and change the investments of any and all moneys, funds, securities and other property whether real, personal or mixed, which shall come to his hands by virtue of this instrument, and will faithfully, and at stated intervals of not more than six months, account to said Grantor, for and in respect of all such property, investments and receipts, and the disposition thereof.

(C) THAT he will be vigilant and energetic in the investigation of the rights and titles hereby conveyed or intended to be conveyed,

and that he will promptly and energetically, and in every manner, and to the utmost extent provided by law, enforce each and all of such rights and titles by proceedings in Court, or otherwise, as shall seem most expedient, it being understood, however, that he, said Trustee shall be at liberty to select such counsel, learned in the law, as he shall from time to time see fit, to advise him in the premises, and to conduct or defend any suit or suits in law or in equity that arise in the course of the administration of this Trust, and that while in good faith following the advice or relying upon the services of such counsel in the premises, he, said Trustee, shall for the purposes of this Trust, and of his accountability hereunder, be held and considered to have proceeded and acted herein, in all respects legally and according to the true intent and purpose hereof.

(D) THAT he will, at his own proper cost and charge, pay and discharge the legal and professional fees of such counsel as he shall employ herein, without charge to said Grantor.

(E) THAT he will, in particular, manage, control, deal with, rent, sell and dispose of the real estate and real interests hereby conveyed to the best and utmost of his ability and judgment, and will promptly and faithfully render to said Grantor full and true reports and accounts of such transactions and control, and will faithfully invest and re-invest, keep in-

vested and in his discretion charge the investments of all proceeds of such control or dispositions.

(F) THAT he will effectively provide and furnish, advance and pay all sums of money which shall, in his discretion, become or be necessary for the best and most effective carrying out of this trust, including such weekly stipends to said James Robinson Holt and John Dominis Holt, also all necessary Court costs and expenses, the cost of the inspection of or surveying of lands or premises, recording of instruments, etc. etc. as shall, in his discretion, appear expedient. It being understood that said Trustee is hereby vested with all controlling discretion in this regard, and that any and all sums that he shall, in good faith, pay or agree to pay hereunder (except as provided in paragraph "D" hereof), shall be a valid charge and credit in his favor herein.

(G) THAT he doth hereby accept and assume and covenant and agree faithfully to execute all other the conditions of this trust, as herein expressed, and on his part to be performed, whether the same are specifically enumerated in the six paragraphs hereof next preceding this paragraph, or are elsewhere herein expressed.

AND the said Grantor, in further consideration of the premises, and for the more effectual carrying out of the purpose of this Trust, doth

hereby further covenant and agree to and with the said Trustee, that he, said Grantor, will pay and allow said Trustee, to retain from such funds and property as shall come to his possession by virtue hereof, a compensation for his said Trustee's services herein, as follows:

FIRST: For and in respect of the moneys and securities of a personal and portable character, to-wit: of the sum or value of Twenty-seven Thousand Dollars ($27,000.00), or thereabouts, (or such lesser sum or proportion thereof as shall belong or pertain to said Trustee by virtue of this conveyance,) now under the control of said Henry Smith, by virtue of the facts hereinabove recited, no fee or commission upon its income or earnings which shall reach the hands of the said Trustee.

SECOND: Upon and in respect of all and singular the balance of the property and property rights hereby conveyed, whether real, personal or mixed, said Trustee shall receive and be entitled to retain and said Grantor doth covenant and agree to pay, convey and deliver to said Trustee, discharged of this trust, a sum and sums of money, and a proportion of said property other than money during the administration of this trust, (a) with respect to such money as shall constitute a part or the whole of the corpus of the estate and property herein conveyed, or to which such estate and property, or any part thereof, shall be converted, one-quarter, to wit: twenty-five percent thereof,

(b) with respect to any and all securities, shares of capital stock in corporations, notes, bonds, mortgages, etc., one-quarter in value of the whole thereof, each series or lot thereof, so far as practicable to be divided between said parties in the proportion of three-quarters thereof to said Grantor, and one-quarter thereof to said Trustee, (c) with respect to any and all real estate, or chattels, real, or rights pertaining thereto that shall not be reduced to cash or portable securities during the administration of this Trust, one-quarter of the whole, or the entire value of the whole thereof, provided, that in case of any failure of the parties hereto or of their representatives in the premises, to agree upon such division, appraisers of such property so to be divided between the parties hereto may be appointed one by each party hereto, or his representative, and a third by the two so appointed. and the three appraisers so appointed shall by either award, to be signed by any two of them, assign to and between the parties hereto, and their respective successors in interest, such real estate, chattels real, and rights pertaining thereto as aforesaid, in the proportions of three-quarters in value thereof to said Grantor, and one-quarter in value thereof to said Trustee, and the expenses of such appraisement and division shall be borne by the parties hereto, and their respective successors in interest, in the proportion last aforesaid.

AND it is mutually understood and agreed between the parties hereto, that all sums prop-

erly chargeable against and upon this trust, under the terms of the paragraph of this instrument marked "F" shall be first paid and discharged, or the payment thereof provided for from and out of the said trust funds, and also that said Trustee shall retain out of the same a general administrator's commission of five percent (5%) upon all sums which shall be or shall have been received and disbursed by him on account of said trust, (and other than the sum referred to in the paragraph numbered "First" hereof), before the division of said Trust Estate between the parties hereto as contemplated in and by the next preceding paragraph hereof numbered "Second."

AND it is further expressly understood and agreed by and between the parties hereto, that, whereas, said Trustee has hereby obligated himself to perform and cause to be performed the several covenants of said Grantor to said James Robinson Holt, John Dominis Holt and Eliza R. P. Holt, as in said instrument of covenant and agreement bearing even date herewith, expressed, a control of said trust funds, or sufficient thereof to enable him to respond to said obligation, is essential to his security, during and throughout the period of trust hereby contemplated.

THEREFORE, and in order to the effective carrying out of said covenants, by both of the parties hereto, said Trustee, upon selling said trust property, or any thereof, and receiving

the price or proceeds of the same, shall thereafter retain in hand for investment and reinvestment by him, such proportion and so much thereof as, computing interest thereon (if it be money or property readily convertible into money) at the rate of six per cent per annum, will yield sufficient to pay and discharge not only the general commission of five per cent, provided for in paragraph numbered "Second" hereof, but also sufficient to pay the incidental costs of the administration and maintenance thereof, and the payment of taxes and other charges of a fixed nature, but, in addition thereto, sufficient to provide for any and all payments of weekly stipends to said James Robinson Holt and John Dominis Holt, and each and either of them, as provided by the said covenants of said James Robinson Holt or John Dominis Holt, the portion of said trust property theretofore retained by said Trustee for the purpose of providing funds for the payment of the weekly stipends of such deceased, shall be as early as may be thereafter delivered by said Trustee to said Grantor, or his successor in interest, he, said Trustee, continuing to retain sufficient thereof to meet the charges which shall then still exist, by reason of said covenants of said Grantor.

Provided, However, that in the event of death of said John Dominis Holt, while said Eliza R. P. Holt, or any of the issue of said Eliza R. P. Holt, survive, said Trustee shall convey, pay or deliver to said Eliza R. P. Holt, or to

her issue, (she being dead) or to the personal or legal representative of either, a sufficient sum of money, or sufficient of the property of said trust, to fully comply with the terms of the covenant and obligation of said Grantor to said Eliza R. P. Holt, and her issue, as expressed in the said instrument of covenant and agreement so executed by said Grantor of even date herewith, as aforesaid,

PROVIDED, however, that nothing herein shall be construed to oblige said Trustee to deliver to said Grantor any portion of the property pertaining to this trust, the delivery whereof would or reasonably might leave said Trustee without sufficient means to adequately protect him in the premises, and enable him to effectively discharge, from the income of said trust property still to remain in his hands, the covenants so, as aforesaid, made by said Grantor, and assumed by said Trustee, and which shall then remain unfulfilled.

AND upon the death of the Survivor of said James Robinson Holt and John Dominis Holt, and further upon the conveyance, payment or delivery by said Trustee to said Eliza R. P. Holt, or her issue, or the legal representative of either, of the property or money necessary to effect a compliance with the said Grantor's said covenant in the premises this trust shall be determined and extinguished by the conveyance, payment and delivery by said Trustee, or his successors in trust herein, to said Grantor, or

his successors in interest herein, of all money and property which shall then remain to the credit of said trust funds, after payment out of said fund, of the commissions, general and special, and all other charges and expenses herein provided for.

It is further provided, that said Trustees may at any time hereafter resign from said trust, and so determine his liability hereunder, by appointing, (with the written consent of said grantor or his successor in interest,) a successor or successors herein, and by fully accounting to said Grantor, or his successor in interest, for all money and property pertaining to said trust, up to the time of such resignation.

AND in the event of the death of said Trustee, while still holding such trust, such person or persons shall succeed thereto as said parties shall, in the meantime, by separate writing agree upon for such purpose, and any such successor or successors shall have all the privileges and assume all the obligations herein bestowed or imposed upon the Trustee named in this instrument.

It is a further provision of this instrument, that no purchaser from said Trustee of any of the property hereby conveyed, or intended to be conveyed shall be in anywise answerable for or chargeable with the proper, or any, application of the money or property given, or which shall be given by such purchaser in payment or exchange for the property, or any of the prop-

erty so purchased by him. And, in like manner, no lessee of said property or any part or portion thereof, shall be answerable for the application by said Trustee of the money or property paid, or which shall be paid as rental for any property so leased.

AND said Trustee shall be at liberty to accept from the heirs of the late Owen J. Holt, deceased, or from any of them, (who are in somewise amicably interested with said Grantor in and under the said Will of Robert W. Holt), such, and so many agreements for said Trustee to represent their or any of their interests in the premises, as he, said Trustee, shall see fit, and shall think compatible with his own interest and interests of said Grantor, and no compensation which said Trustee shall agree for and receive from any of said heirs shall in any event be chargeable to him as a set-off or otherwise in favor of said Grantor hereunder.

IN the event that the rents, issues and profits of the property and rights hereby conveyed shall exceed the sum required for the payment of said weekly stipends, and all other, the expenses and outgo herein provided for, then such surplus shall, at periods of not more than six months be paid by said Trustee to said Grantor, or his assigns.

AND WHEREAS, in and by said instrument of covenant and agreement, said Grantor has assumed the further obligation to pay and cause to be paid to his mother Lokalia Kahalao-

aka Holt, wife of his said father, from and after the death of his said father, and thence during her natural life, (or during such lesser period as she shall remain the widow of her present husband, and sole and unmarried,) the sum of Twenty-five Dollars ($25.00) per week.

NOW THEREFORE, said Trustee doth hereby, in addition to all other obligations on his part hereinbefore expressed, assume the performance and fulfillment of said last mentioned obligation of said Grantor, and it is mutually agreed that the trust hereby created may and shall continue until such obligation is fully performed, and said Trustee and his successor and successors in said trust property, and of the proceeds thereof, to enable him and them to effectively discharge said covenants and obligation toward her, the said Lokalia Kahalaoaka Holt, from and out of the income thereof, anything contained or expressed in any other part or paragraph of this instrument to the contrary notwithstanding.

AND I, Lena Steineck Holt, wife of said Grantor, in consideration of the premises, and of the sum of one dollar, ($1.00) to me paid by said Trustee, the receipt whereof is hereby acknowledged, do hereby release to said Trustee his successors and assigns, all and singular my right and possibility of dower in any and all the property whether real or personal, conveyed or intended to be conveyed, in and by the foregoing instrument.

IN WITNESS WHEREOF, the said parties of the first and second parts, and the said wife of the said party of the first part, have hereunto set their hands and seals, at Honolulu aforesaid, the day and year first herein above written.

JAMES LAWRENCE HOLT (Seal)
JOHN F. COLBURN (Seal)
LENA STEINECK HOLT (Seal)

Signed, sealed Executed and Delivered in the presence of

C. W. ASHFORD.

(Acknowledgment Clause)

Trust deed duly recorded. (Ex. A-18.)

10. By agreement dated March 4, 1905, between James L. Holt and John F. Colburn, the trust agreement of July 1, 1902 (Ex. A-18 next above), was modified in part as follows:

"AND WHEREAS, the experience of the parties hereto, under said last recited instrument, during the period which has elapsed since its execution, has suggested the wisdom of some modification and alteration of the general plan of disposition and control of the interests aforesaid on the part of the said TRUSTEE, and, in particular has suggested and now suggests the expedience of leasing the realty and real interests in said recited instrument referred to and contemplated, instead of effecting an immediate or early sale thereof, or partition thereof among the persons legally entitled thereto, or otherwise as is in said instrument especially contemplated,

"NOW, THEREFORE, this AGREEMENT WITNESSETH:

"That said Agreement of July 1, 1902, is hereby modified and extended, so that, if said TRUSTEE SHALL effect and procure to be executed a lease or leases of said realty, or of any part thereof, and of the interests therein conveyed by said last recited instrument to WAIALUA AGRICULTURAL COMPANY, LIMITED, or other responsible tenant or tenants which said proposed lease or leases shall be executed by the Administrator-de-bonis-non with the Will annexed of the Estate of Robert William Holt, and approved and executed by the Grantor herein named, then all and singular the rents and income which shall be derived from and by virtue of such lease and leases shall be subject, in all respects, to disposition and division between the parties hereto, and otherwise, as is provided in and by said instrument of July 1, 1902 (referring to said Ex. A-18) . . ."

Agreement executed and acknowledged but not recorded. (Ex. 2-F.)

11. On March 17, 1905, Waialua entered into the following lease on the Holt lands for a term of 25 years from April 1, 1905, at a rental of $9,000 per annum. This lease was duly recorded April 6, 1905, and is in evidence as Petitioner's Exhibit A-8. Cancellation of this document is prayed for in Petitioner's second amended petition so that the docu-

ment is set forth in full except as hereinafter indicated:

THIS INDENTURE made and executed this 17th day of March, 1905, by and between Carlos A. Long, in his capacity as administrator-de-bonis-non-with-the-Will-annexed of the Estate of Robert William Holt, Deceased, Robert L. Colburn, R. William Holt, George H. Holt, Edward S. Holt, Helen A. Holt; individually, and also in her capacity as Guardian of each and all of the minor children of James R. Holt, the Younger, Deceased, said children being by name Valentine S. Holt, Wattie E. Holt, Amelia A. Holt, Helen A. Holt, James R. Holt and Irene N. Holt; Elizabeth K. Richardson, wife of Edward Vivian Richardson, and Hawaiian Realty & Maturity Company, Limited, an Hawaiian Corporation, hereinafter named the Lessors, parties of the first part; and, Waialua Agricultural Company, Limited, an Hawaiian corporation, party of the second part; and John F. Colburn, James Lawrence Holt, and Eliza R. P. Christian, wife of Albert Christian, parties of the third part:

WHEREAS, all and singular the lands hereinafter described and demised, are now held and claimed in fee simple in certain proportions by and between said parties hereto (except said James Lawrence Holt and said Eliza R. P. Christian), as tenants in common, in fee,—BUT IT IS UNDERSTOOD that nothing herein contained by way of recital of any claim or

interest in said premises or any thereof, shall be either herein or in any other transaction or proceeding between the parties hereto or any of them, or between any of the parties hereto and any third party or parties, construed to either limit, extend, or otherwise affect the real title or interest in or to any of the lands or property herein described and demised, as now existing in or on the part of any party or parties to this Instrument; and,

WHEREAS, the titles of the respective parties hereto, in and to said premises have been, and are considered, solely for the purposes of this transaction, to exist in the following proportions that is to say:

(1) Of said Carlos A. Long, (hereinafter individually referred to as said Administrator,) in his said representative capacity, two-thirds (2/3) of the whole;

(Paragraph 2 stricken out, same being lined out in original lease.)

(3) Said R. William Holt, one undivided twenty-seventh portion and interest of and in that portion of said demised premises covered by Royal Patent (Grant) 973, and known as the Wahiawa Lands;

(4) Said Robert L. Colburn an undivided two twenty-sevenths (2/27) portion and interest of and in all of said demised lands;

(5) Said George H. Holt, an undivided one twenty-seventh (1/27) portion and interest of and in all of said demised lands;

(6) Said Edward S. Holt, an undivided one twenty-seventh (1/27) portion and interest of and in all of said demised lands;

(7) Said Elizabeth K. Richardson, an undivided one twenty-seventh (1/27) portion and interest of and in all of said demised lands;

(8) Said Hawaiian Realty & Maturity Company, Limited, an undivided one twenty-seventh (1/27) portion and interest of and in all of said demised lands;

(9) Said Waialua Agricultural Company, Limited, an undivided one twenty-seventh (1/27) portion and interest of and in all of said lands described in Royal Patent (Grant) No. 973, and known as the Wahiawa lands,—together with an undivided two twenty-sevenths (2/27) portion and interest of and in all and singular other, the lands herein demised;

(10) Said Helen A. Holt, individually, and in her capacity as Guardian as aforesaid, (said interests not being herein segregated for the purpose of fuller description,) One undivided Twenty-seventh, of all and singular the lands herein demised;

WHEREAS, heretofore, to-wit, prior to the 4th day of March, 1904, said R. William Holt, George H. Holt, Edward S. Holt, Elizabeth K. Richardson, Helen A. Holt, (in her individual and representative capacity as aforesaid,) Hawaiian Realty & Maturity Company, Limited, and said Lessee,—together with John D.

Holt to whose inserests therein said Robert L. Colburn has since succeeded, and one Hannah Kaulani Holt, then the widow of Owen J. Holt, and who has since deceased owned in common certain interests in a certain lease which was, on or about the ..... day of November, 1862, executed by one W. A. Aldrich, as Executor of the Last Will and Testament of said Robert William Holt, to James Robinson Holt and Owen J. Holt aforesaid,—which said interest in said lease, at the date last aforesaid, covered and affected an undivided moiety of all and singular the premises herein demised, to extend for and during the natural life of James Robinson Holt aforesaid, and,

WHEREAS, on said 4th day of March, 1904, in a certain action then pending in and before the District Court in and for the District of Waialua, in the Island of Oahu, wherein one, Henry Smith, Administrator-with-the-will-annexed of said Estate of Robert William Holt, was Plaintiff, and said Lessee, and others then claiming under said last mentioned Lease were Defendants,—a certain Judgment was rendered wherein and whereby it was adjudged and decreed that said last mentioned lease was and is forfeited; which said judgment still stands and obtains, in all its original force and effect; —and,

WHEREAS it has been agreed by all the parties hereto, that said Lessors shall demise,

and said parties of the third part, shall assent to the demise by said Lessors of said lands to said Lessee, for the term, and upon the covenants and conditions hereinafter more particularly set forth; and that notwithstanding any and all doubts that may have heretofore prevailed among the parties hereto as to the legality, sufficiency and effect of said judgment of forfeiture as rendered as aforesaid, by said District Court in and for said District of Waialua, on said 4th day of March, 1904, said judgment and the forfeiture thereby declared is and are, and the same is by all the parties hereto, and for all the purposes hereof, hereby recognized, acknowledged, assented to, and concurred in;

NOW THEREFORE THIS INDENTURE WITNESSETH:

That said Lessors for and in consideration of the premises, and of the rents herein reserved, and the covenants herein expressed as on the part of said Lessee to be observed and performed hath let, and they do hereby lease and demise unto said Lessee, all and singular those certain lands and premises situated in the District of Waialua, Island of Oahu, more particularly described as follows, that is to say;

1. Royal Patent (Grant) 235, and Royal Patent (Grant) 238, being of lands now held by said Lessee under a Lease W. A. Co. No. 108 executed by and on behalf of the estate of

Robert William Holt, to Robert Halstead, dated January 13, 1893, and whereof said Lessee is not the Assignee, and the term whereof is still unexpired. But it is agreed between the parties hereto, that said last mentioned Lease is hereby surrendered by said Lessee, such surrender to take effect upon the First day of April, One Thousand Nine Hundred and Five; and the term hereby in and to the lands therein demised, shall then begin.

2. All and singular those Twelve (12) pieces or parcels, (be the number more or less,) of Apana 34 of Royal Patent (Grant) 4475, Land Commission Award 7713, of the Ahupuaa of Paalaa.

3. Royal Patent (Grant) 431 of the Kaheeka Tract.

4. Royal Patent (Grant) 973 known as the lands of Wahiawa.

Together with all and singular the rights, easements and appurtenances to said lands, or any thereof, legally belonging and appurtenant.

To have and to hold unto the said Lessee and its assigns, for and during the full and *and* term of Twenty-five Years, (25) beginning with the First day of April, in the year A. D. One Thousand Nine Hundred and Five.

The said Lessee Yielding and Paying rent for said premises in the sum of One Thousand Five Hundred Dollars, ($1500.00) for and in respect of said lands of Wahiawa covered by

said Royal Patent (Grant 973,—and the further sum of Seven Thousand Five Hundred Dollars ($7500.00) for and in respect of all and singular the lands herein demised other than the lands of Wahiawa,—and said Lessee further Yielding and Paying, by way of additional rent, any and all such sums as shall, for taxes and other imposts from year to year and from time to time, commencing with the levy and assessment in and for the year 1905, be levied upon, or assessed against said demised premises, or (and) any and every part and portion thereof by any and every competent authority, whether the same be a State, or Territorial Municipal, or pertaining to or levied or assessed by any other political subdivision of this Territory, whether under the name of a County, City, Town, or any Board or other Governmental Body thereof, or of any thereof, and for whatever purpose or purposes the same or any thereof shall be levied or assessed.

And said Lessee doth hereby covenant and agree with said Lessors, and with each and all of said Lessors, that it will, and its assigns shall well and truly pay and discharge the rent herein and hereby reserved, in respect of each of said tracts, in manner and amount as the same is hereinabove assigned; and that it will make such payments only in United States Gold Coin of the present Standard of weight and fineness; and that it will divide such payments, and pay said rent to said Les-

sors respectively, and to their respective heirs, executors, administrators and assigns, in the aggregate annual sums, and in the proportion hereinafter expressed and stipulated, that is to say:

(a) To said Administrator, and to his successor and successors in said trust, if any and to his successor and successors in title, Two-thirds of the annual rental hereby reserved to-wit, the sum of Six Thousand Dollars ($6000.00).

(b) To said Robert L. Colburn, and his heirs, executors, administrators and assigns, Two Twenty-sevenths (2/27) of the rent hereby reserved, to-wit, the sum of $666.67.

(c) To R. William Holt and his heirs, executors, administrators and assigns, the sum of Fifty-five and Fifty-five Hundredth Dollars ($55.55).

(d) To said George H. Holt, and his heirs, executors, administrators and assigns, the sum of $333.33.

(e) To said Edward S. Holt and his heirs, executors, administrators and assigns, the sum of $333.33.

(f) To said Elizabeth K. Richardson, and her heirs, executors, administrators and assigns, the sum of $333.33.

(g) To said Hawaiian Realty & Maturity Company, Limited, and its assigns, the sum of $333.34.

(h) To said Helen A. Holt, individually, and in her representative capacity as aforesaid and to her heirs, executors, administrators and assigns, and successors in said Guardianship, and to said minor children respectively, upon their attaining majority their personal representatives and assigns, the aggregate sum of $333.34.

Said Lessee reserving to itself, or paying to its own assigns in respect of its ownership in said premises as aforesaid, the aggregate annual sum of $611.11.

The said Lessee doth further covenant to pay said Lessors respectively, and their respective heirs, executors, administrators and assigns, the annual aggregate sums hereinabove expressed as being payable to them respectively, in equal quarterly installments, in advance, upon the first days of January, April, July and October, of each year during the term of this Lease, and beginning with the first day of April, in the year One Thousand Nine Hundred and Five.

And said Lessee doth hereby further covenant and agree to and with said Lessors, and to and with each of them, and to and with their respective successors in trust, heirs, executors, administrators and assigns, as the case may be, that it, said Lessee at the end, or other earlier termination of the term hereby limited, will peaceably and quietly quit, yield up, and re-

deliver the possession of said demised premises, together with all and singular the buildings, and improvements that shall then be upon said demised premises, to said Lessors, and their respective successors in trust, heirs and assigns —such re-delivery of possession to be made to the said parties hereby contemplated, in undivided parts or portions according to the proportions hereinabove declared to pertain to them respectively, except as the same, or any part thereof, shall in the interval, be definitely partitioned between said Lessors and said Lessee as owners thereof in fee.

It is a condition of this Lease that, at any time before the determination, (either by efflux of time, Judicial decree of forfeiture, or mutual agreement of parties), of the term hereby limited, said Lessee and its assigns shall be at liberty to deal as by general law existing at the date of this Lease permitted, with respect to fixtures and the removal thereof from said premises; Provided However, that said Lessee shall not in any event be permitted to demolish, destroy, impair, or remove any permanent improvements of the general character of ditches, sluices, embankments, dams, runways, trestles, bridges, culverts, houses, fences, or other similar structures or excavations which shall be dug into, or built into or upon the earth, in a manner calculated and intended to be permanent, or which shall be built upon foundations

or piers of cement, masonry, or other similarly durable and permanent foundations. But Provided Further that nothing herein contained shall operate to prevent the Lessee from making such changes and alterations in the improvements, and in the method of development of the resources of the demised premises as it shall from time to time elect, and excepting perishable structures such as laborers' houses and similar wooden buildings.

And said Lessors, and said parties of the third party, do hereby covenant each for himself, herself, and itself to and with said Lessee and its assigns, that said Lessee, while paying said rent, (including taxes and other imposts), as herein reserved at the times and in the manner herein specified for the payment of the same, and observing and performing all other the conditions and covenants of this Lease as on its (said Lessee's) part to be observed and performed, shall peaceably and quietly hold and enjoy the use and possession of said demised premises, free from let or hindrance from any other person or persons having lawful claim or title to the same, or to any thereof. Provided However, and it is an express limitation upon this covenant, that said Lessors respectively shall be bound hereby only to the extent of their, and each of their respective shares and interests in said demised premises as hereinabove set forth; or shall hereafter be found to exist by any competent court or authority.

But if said Lessee or its assigns shall make default in the payment of said taxes or other imposts, and permit the same or any part thereof to become delinquent and to become a charge or lien upon the premises hereby demised, or any part or portion thereof; or if said Lessee or its assigns shall fail or neglect to pay to said Lessors, or to any or either of them or their respective successors in trust, heirs, executors, administrators and assigns as the case may be, the rent herein reserved and made payable to said Lessors respectively, at the time or times and in manner whereon and wherein the same is hereby made payable—and further if such failure or neglect to pay rent shall continue for and during ten days after any installment thereof, by the terms of this Lease, shall become and be due and payable—then, and in either such event, and at any time thereafter, while such or any such default shall continue, the said Lessors, and their respective successors in interest hereunder, or any one or more of such Lessors or successors in interest, concerning whom such default shall so exist and continue, may, either in person or by authorized agent, enter upon said premises and by such entry terminate this Lease as to the undivided part or parts, portion or portions, interest or interests which shall then belong or pertain to the person or persons concerning whom such default shall then exist, and who shall make such

entry and declare such forfeiture as herein contemplated.

And, (or) any one or more of such Lessors or their successors in interest hereunder may, either with or without having first made such entry and declaration, at any time while such default shall continue with respect to such Lessor or successor in interest so acting, proceed by action at law, or otherwise, as may be at the time of such proceeding permitted by any Statute in force upon the Island of Oahu, and in any Court or Courts, and before any tribunal having jurisdiction of the cause, to avoid, terminate and have forfeited this Lease, and all rights of said Lessee and its assigns hereunder, in respect of the part and parts, portion or portions, interest and interests of the person and persons so acting as is in this paragraph contemplated.

And whenever and as often as any such action as is contemplated in or by the last two preceding paragraphs or either of them shall be taken, the person or persons so taking such action shall be entitled to a restitution of the possession of such undivided (or divided as the case may be) part, portion, and interest, of and in said demised premises as shall then belong and pertain to the person or persons so proceeding;—or to the possession of which, he, she, it or they shall then be legally entitled.

And it is further understood and agreed between the parties hereto, and made a condition of this Lease, that any Declaration, or Judgment or Forfeiture of this lease or of any interest herein or hereunder, which shall be made, decreed, or rendered, in pursuance of the three next preceding paragraphs hereof, or of any or either of said three paragraphs, shall be considered a termination of this Lease, to the extent, and for the purpose of thereupon absolutely terminating the right of said Lessee to demolish, impair, or remove from said premises, any of the fixtures, including buildings, machinery pumps, mills, and milling, and (or) pumping plant which shall then be upon said premises, the intent hereof being to expressly negative the right of said Lessee and its assigns, to demolish, impair, or remove such fixtures, buildings, mills, pumps, etc., etc., from said premises during any interval that may elapse between the date of such Declaration, Decree or Judgment of Forfeiture, and the date whereon a final judgment concerning the same may or might be obtained in any Appellate Court or Courts.

It is a further condition of this Lease, that the rentals, and all and singular the different sums and installments hereinabove provided to be paid by way of rent hereunder to the respective Lessors herein, shall be payable to them and their respective successors in interest, heirs, executors, administrators and assigns, as the case may be, in the City of Honolulu, at

the Office of the Lessee or of its agent from time to time, and that the ten days period of default hereinbefore provided shall not begin to run as to the several shares or interests hereinbefore provided for until demand for such share or shares of rent respectively shall have been made at said office, by the persons thereunto respectively entitled, or their respective agent, authorized in writing, or their respective attorneys.

It is a further condition of this lease that in any action which shall be brought to terminate this Lease, or declare, or have adjudged a forfeiture thereof, service of process upon the Manager of said Lessee's plantation, or upon any other person who shall for the time being, be in charge and control of the property of said Lessee, within said District of Waialua shall be deemed sufficient service of process (which terms shall be construed to embrace all legal writs and documents that shall be involved) upon said Lessee, and said Lessee hereby expressly waives any statutory right or benefit that shall exist in its favor as to such service, and which shall be different from, or opposed to the condition in this paragraph expressed.

In witness whereof the said Hawaiian Realty & Maturity Company, Limited, and said Lessee have caused this Instrument to be signed by their appropriate officers, and their respective corporate seals to be hereto attached; and said

Lessors other than said Hawaiian Realty & Maturity Company, Limited, and said parties of the third part, have hereunto set their hands and seals the day and year first hereinabove written.

CARLOS A. LONG,
Administrator-de-bonis-non-with-the-Will-annexed of the Estate of Robert William Holt, deceased.
ROBERT L. COLBURN.

.....

.....

EDWARD S. HOLT.
HELEN A. HOLT.
HELEN A. HOLT,
As Guardian of Valentine S. Holt, Wattie E. Holt, Amelia A. Holt, Helen A. Holt, James R. Holt, and Irene N. Holt.
ELIZABETH K. RICHARDSON.

[Corporate Seal]

HAWAIIAN REALTY & MATURITY COMPANY, LTD.
By L. K. KENTWELL,
Its President.
By HENRY P. KAOHI,
Its Secretary pro tem.

[Corporate Seal]

WAIALUA AGRICULTURAL
COMPANY, LIMITED.
By G. P. CASTLE,
Its President.
By W. A. BOWEN,
Its Treasurer.
JOHN F. COLBURN.
JAMES L. HOLT.
ELIZA R. P. CHRISTIAN.

Executed in presence of

Territory of Hawaii
Island of Oahu
First Judicial Circuit,
City of Honolulu.—ss.

On the eighteenth day of March, one thousand nine hundred and five, before me, N. Fernandez, a Notary Public in and for said Territory, Island, Circuit and City, duly commissioned and sworn, personally appeared Carlos A. Long, Administrator-de-bonis-non-with-the-Will-annexed of the Estate of Robert William Holt, deceased; and John F. Colburn; and James Lawrence Holt; and L. K. Kentwell, President, and Henry P. Kaohi, the Secretary pro tem of Hawaiian Realty & Maturity Company, Limited, an Hawaiian Corporation; and Eliza R. P. Christian, wife of Albert Christian, each of said persons being personally known to me, and further known to me to be

the persons described in, and who executed the foregoing instrument; and they, and each of them acknowledged to me that they executed said instrument freely and voluntarily, and for the uses and purposes therein set forth. And said L. K. Kentwell, and said Henry P. Kaohi, further acknowledged to me that they executed said instrument as and for the free act and deed of said Hawaiian Realty & Maturity Company, Limited, and said Eliza R. P. Christian, upon an examination by me held separate and apart from, and out of the hearing of her husband, the said Albert Christian, further acknowledged to me that she signed and executed said instrument freely and without compulsion, fear, or constraint from her said husband.

And on the 20th day of March, one thousand nine hundred and five, at the Territory, Island, Circuit and City, aforesaid, personally appeared before me Robert L. Colburn, George P. Castle, the President, and W. A. Bowen, the Treasurer of Waialua Agricultural Company, Limited, an Hawaiian Corporation, each and every of said persons being personally known to me, and further known to me as the persons described in, and who executed the foregoing instrument; and they, and each of them, acknowledged to me that they executed the said instrument freely and voluntarily and for the uses and purposes therein set forth. And said George P. Castle, and said W. A. Bowen fur-

ther acknowledged to me that they executed said instrument as and for the free act and deed of said Waialua Agricultural Company, Limited.

And on the twenty-second day of March, one thousand nine hundred and five, at the Territory, Island, Circuit and City aforesaid, personally appeared before me Edward S. Holt, he being personally known to me, and further known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the said instrument freely and voluntarily, and for the uses and purposes therein set forth.

And on the twenty-third day of March, one thousand nine hundred and five, at the Territory, Island, Circuit and City aforesaid, personally appeared before me Elizabeth K. Richardson, wife of Edward Vivian Richardson, she being personally known to me, and further known to me to be the person described in and who executed the foregoing instrument, and she acknowledged to me that she executed the said instrument freely and voluntarily, and for the uses and purposes therein set forth. And said Elizabeth K. Richardson upon an examination by me held separate and apart from, and out of the hearing of her husband, the said Edward Vivian Richardson, further acknowledged to me that she signed and executed said instru-

ment freely and without compulsion, fear or constraint from her husband.

And on this twenty-seventh day of March, one thousand nine hundred and five, at the Territory, Island, Circuit and City aforesaid, personally appeared before me Helen A. Holt, widow, in her own behalf and as Guardian of Valentine S. Holt, Wattie E. Holt, Amelia A. Holt, Helen A. Holt, James R. Holt and Irene N. Holt, minor children of James R. Holt, the Younger, deceased, she being personally known to me, and further known to me to be the person described in and who executed the foregoing instrument, and she acknowledged to me that she executed the said instrument freely and voluntarily, and for the uses and purposes therein set forth, individually and in her capacity as Guardian aforesaid.

And I do hereby further certify that the following changes and alterations were made in the Text of said instrument before the execution and acknowledgment of the same, by the parties aforesaid, that is to say: On page two thereof, one entire paragraph consisting of the fourth line to the twelfth line of said page two inclusive, numbered from the top, was expunged and stricken out. On page eight thereof, in the fifth line from the top, the word "and" was interlined between the words "herself" and "itself".

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last in the foregoing Certificate above written.

[Seal] N. FERNANDEZ,
Notary Public, First Judicial Circuit, Territory of Hawaii.

12. By deed dated August 4, 1905, J. R. Galt, acting for Waialua, purchased of George H. Holt his 1/27 interest in the Holt lands at Waialua and his 1/9 interest in Grant 1092 for a consideration of $6,000. Title to these interests was taken in the name of J. R. Galt, Trustee. Deed duly recorded. (Ex. A-11.)

13. By deed dated August 5, 1905, J. R. Galt, acting for Waialua, purchased of the Hawaiian Realty & Maturity Company and Annie Holt Kentwell all of their right, title and interest in the Holt lands at Waialua and in Grant 1092, for a consideration of $6,000, this being the Annie Kentwell 1/27 interest in the lands of the R. W. Holt estate, and a 1/9 interest in Grant 1092. Title to these interests was taken in the name of J. R. Galt, Trustee. Deed duly recorded. (Ex. A-12.)

14. By deed dated May 7, 1906, J. R. Galt, acting for Waialua, purchased of Helen A. Holt, individually and as guardian of her minor children, a 1/27 interest in the Holt lands at Waialua, and a 1/9 interest in Grant 1092, for a consideration of $6,300. Title to these interests was taken in the

name of J. R. Galt, Trustee. Deed duly recorded. (Ex. A-13.) Attached to said Exhibit, and a part of the same, are (1) affidavit of the auctioneer conducting the sale, which states in part that the upset price was $6,000 and that "said premises were offered for sale and a number of bids received therefor"; (2) Notice of guardian's sale of real estate; (3) account of sale of lands; and (4) order confirming sale of real estate.

15. On August 31, 1906, Eliza R. P. Christian executed a document assigning to Annie Holt Kentwell, for the considerations therein set forth, rents and profits accruing as therein specified. This document, duly recorded June 17, 1907, was first offered in evidence by petitioner and later by respondent, and bears the designation "Exhibit 2-G." Cancellation of this document is prayed for in Petitioner's second amended petition, so the document is set forth in full.

> THIS INDENTURE—made this 31st day of August, A. D. 1906, by and between—ELIZA R. P. CHRISTIAN—(the only child and heir of John Dominis Holt, the elder) of Honolulu, Island and County of Oahu, Territory of Hawaii, of the first part, and—ANNIE HOLT KENTWELL—of the same place, party of the second part.
>
> WITNESSETH—WHEREAS the party of the first part has for many years last past been supported and maintained at the home of the party of the second part, and at the cost and

expense of the said party of the second part, and

WHEREAS—the said first party is the only child and heir of John Dominis Holt, the elder, being also a devisee under the Will of R. W. Holt, deceased, and is entitled in expectancy to a certain undivided interest or moiety in certain lands situate at Waialua, Oahu, now leased to the Waialua Agricultural Company, Limited, by lease dated the 17th day of March, 1905, and recorded in the Hawaiian Registry of Deeds in Liber Folio , and

WHEREAS—by virtue of being such heir of John Dominis Holt, the elder, and such devisee under the will of R. W. Holt, deceased, aforesaid, she, the said party of the first part, shall upon the death of him, the said John Dominis Holt, the elder, be entitled to her share of the rents reserved in said lease aforesaid, which share of said rents aforesaid is now enjoyed by her father, the said John Dominis Holt, the elder, and

WHEREAS—the party of the second part has agreed to support and to maintain the party of the first part for and during the period of the natural life of her, the said party of the first part,

NOW THEREFORE THIS INDENTURE WITNESSETH—That the said ELIZA R. P. CHRISTIAN in consideration of the premises and of One Dollar to her in hand paid by

ANNIE HOLT KENTWELL of Honolulu aforesaid, the receipt whereof is hereby duly confessed and acknowledged and for other and valuable consideration to the said ELIZA R. P. CHRISTIAN, moving from said ANNIE HOLT KENTWELL, she, the said ELIZA R. P. CHRISTIAN, does hereby give, sell, assign, release, transfer and set over unto the said ANNIE HOLT KENTWELL, her heirs executors and administrators, all her title and interest in and to any and all rents issues and profits to which she may hereafter be entitled or which may be due and payable to her by, through or under the lease to the Waialua Agricultural Company, Limited, dated the 17th day of March, 1905, and recorded in said Liber Folio or by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to demand, receive, collect and receipt for all such rents, issues and profits from whomsoever due during the term of the natural life of her, the said ELIZA R. P. CHRISTIAN.

AND—it is expressly agreed and understood between and by the parties hereto that the party of the second part shall support and maintain her, the party of the first part, for and during the natural life of said first *part*.

AND— it is further agreed and understood

by and between the parties hereto that in case the party of the first part shall survive the party of the second part, the heirs of said second party shall be entitled to perform the covenant of this agreement on the part of said second party to be kept and performed, and they shall during the life of said first party be entitled to the benefit or benefits thereof.

IN WITNESS WHEREOF the said ELIZA R. P. CHRISTIAN and ANNIE HOLT KENTWELL have hereunto set their hands and seals the day and year first above written.

ELIZA R. P. CHRISTIAN
ANNIE HOLT KENTWELL

Executed in the presence of:
JOHNN D. HOLT

Territory of Hawaii,
County of Oahu,
District of Honolulu—ss:

On this 31st day of August, A. D. 1906, personally appeared before me ELIZA R. P. CHRISTIAN (w) and ANNIE HOLT KENTWELL (w), both known to me to be the persons described in and who executed the foregoing instrument, who severally acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein set forth.

[Notarial Seal] N. FERNANDEZ,
Notary Public, First Judicial Circuit, Territory of Hawaii.

16. By deed dated June 29, 1907, M. T. Simonton, Commissioner, under decree of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, conveyed to D. L. Withington, acting for Waialua, the lands covered in a petition for foreclosure of mortgage filed June 6, 1905, entitled "August Dreier v. John D. Holt, Jr., et al," and including the Waialua Agricultural Company as respondent, for a consideration of $9,000; the interest in the lands and the apportionment of consideration being $8,000 for a 2/27 interest in the lands of the R. W. Holt estate at Waialua and $1,000 for the 2/9 interest in Grant 1092. Title to these interests was taken in the name of D. L. Withington, Trustee. Deed duly recorded. (Ex. A-14.)

17. On May 21, 1908, James L. Holt, as mortgagor, and John F. Colburn, as trustee, conveyed by way of mortgage to William R. Castle on a five-year mortgage to secure a loan of $12,500, all of the interest of the mortgagor, James L. Holt, in and to the estate and property, both real, personal and mixed, of the R. W. Holt Estate, either in Waialua or in Waianae or elsewhere on the Island of Oahu, and covering specifically the Holt lands at Waialua, such interests of the mortgagor covering all his rights and interests by virtue of his title as heir at law of R. W. Holt or by purchase of any interest therein, and whether the interest be present or expectant, and also all of the

trustee's interest in said property under the deed of trust of July 1, 1902 (Ex. A-18), as well as any other interest therein, whether the same was prior or subsequent to said deed of trust. The mortgage set forth covenants of title and a covenant that the premises were free and clear of any encumbrances except a certain lease of March 17, 1905 (Ex. A-8) to Waialua, and a certain lease on the Waianae property not here involved. Mortgage duly recorded.

This mortgage was assigned by W. R. Castle on May 21, 1908, to Castle & Cooke, Limited, and was later satisfied by the payment of moneys as set forth in Exhibit 2-L. (Ex. A-16.)

18. Agreement dated March 25, 1910, by which Albert Christian, husband of Eliza R. P. Christian, in consideration of the payment to him of $100, covenants that upon payment to him of $2500 he will consent to the sale by his wife, Eliza R. P. Christian, and will release and quitclaim to L. L. McCandless of Honolulu, all his right, title and interest in the Holt lands at Waialua, as may be conveyed to said McCandless by Eliza R. P. Christian within one year from date. Agreement duly recorded. (Ex. A-19.) The agreement in full follows:

> THIS INDENTURE made and entered into this Twenty-fifth day of March, A. D. 1910, by and between ALBERT CHRISTIAN, husband of ELIZA HOLT CHRISTIAN, of Ewa, City and County of Honolulu, party of the first part, and L. L. McCANDLESS, of Honolulu, City

and County of Honolulu aforesaid, party of the second part:

WITNESSETH:

That the party of the first part, in consideration of the sum of ONE HUNDRED DOLLARS ($100.00) to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does hereby covenant and agree to and with the party of the second part that, upon the request of the party of the second part, and upon paying to him, the party of the first part, of the further sum of Two Thousand Five Hundred Dollars in United States Gold Coin, he the party of the first part, will consent to and release and quitclaim all his right, title and interest in such lands, situate, lying and being within the District of Waialua, City and County of Honolulu aforesaid, as may be conveyed to the party of the second part by said Eliza Holt Christian, wife of the party of the first part, within one year from date hereof.

And the party of the first part further covenants and agrees to and with the party of the second part that, upon request of the said party of the second part as aforesaid, and upon the payment to him, the party of the first part, of the said sum of Two Thousand Five Hundred ($2500.00) Cash in United States Gold Coin as aforesaid, he the party of the first part, will sign, seal, acknowledge and deliver to the party of the second part such instrument or instru-

ments in writing as may be necessary or requisite in the premises.

IN WITNESS WHEREOF said party of the first part has hereunto set his hand and seal this 25th day of March 1910.

(Signed) A. CHRISTIAN.

In presence of

(Signed) WILLIAM SAVIDGE

19. Agreement dated April 7, 1910, by which Albert Christian, husband of Eliza R. P. Christian, in consideration of the payment to him of $300, covenants that upon payment to him of a further sum of $2300, he will consent to the sale by his wife, Eliza R. P. Christian, and will release and quitclaim to William R. Castle, all his right, title and interest in the Holt lands at Waialua as may be conveyed to said William R. Castle or such person as he may designate; the agreement to be binding for one year from April 7, 1910, or unless a sale of the Eliza R. P. Christian interests in the Holt lands at Waialua was made to L. L. McCandless one year from March 25, 1910. Agreement duly recorded. (Ex. A-20.) The agreement follows in full:

THIS AGREEMENT, made this 7th day of April, A. D. 1910, between ALBERT CHRISTIAN, husband of Eliza Holt Christian, now residing at Ewa, City and County of Honolulu, Territory of Hawaii, of the first part, below referred to as "Christian," and WILLIAM R. CASTLE, of said Honolulu, of the second part, below referred to as "Castle,"

WITNESSETH:

That the said Christian, in consideration of Three Hundred Dollars ($300.00) to him paid by said Castle, the receipt whereof is acknowledged, does hereby promise, covenant and agree with said Castle that, in case his said wife shall sell or agree to sell her interest in all or any portion of the property generally known as the HOLT ESTATE PROPERTY, in Waialua, in said City and County, he, the said Christian, will, at the request of said Castle or of such person as said Castle shall designate, and upon the further payment to him, the said Christian, of the sum of Twenty three hundred DOLLARS ($2300.00) consent to the sale of said wife's interest or property, and will sign such agreement of sale or deed for such interest, thereby evidencing his said consent, and will release and quitclaim all of the right, title and interest in such property which he now has or may hereafter become entitled to; and that upon such signature by him so placed he will properly acknowledge and deliver such deed or agreement of sale, or, if so requested, shall and will, at the expense of said Castle or of the purchaser of said interest, sign, execute, acknowledge and deliver such other instrument as may be necessary to carry out and effectuate his said consent and release and quitclaim of all of the right, title and interest in said property which he now has or may hereafter become entitled to.

PROVIDED, HOWEVER, that this instrument will become null and void and of no effect whatsoever unless such sale or agreement of sale shall have been made within one year from the date hereof;

AND PROVIDED FURTHER that this instrument shall not be binding if he shall, within one year from the 25th day of March, 1910, sign a deed of his said wife's interest to L. L. McCandless in accordance with an agreement by him made and entered into to such effect on said date.

IN WITNESS WHEREOF, the said ALBERT CHRISTIAN has hereto set his hand the day and year first aforesaid.

(s) ALBERT CHRISTIAN.

Witness:

MISS M. CHRISTIAN.

Territory of Hawaii
Island of Oahu—ss:

On this 7th day of April A. D. 1910 personally appeared before me Albert Christian known to me to be the person described in and who executed the foregoing instrument and who acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein set forth.

(s) CARLOS A. LONG,
[Notarial Seal] Notary Public, First Judicial Circuit.

20. During 1909 and 1910 certain cablegrams and letters showing the course of negotiations leading up to and culminating in the execution of the deed of May 2, 1910, (Ex. A-21), cancellation of which is prayed for in Petitioner's petition, and of the deed of May 28, 1910, (Ex. A-22), were introduced by Petitioner. With the exception of D-37, all such cablegrams and letters were, upon demand of Petitioner, produced from the files of Waialua and Castle & Withington, the then attorneys for Waialua. The exhibit designation is hereinafter indicated, though as a whole they are referred to as the "D series." The following cable addresses appear in the D series: "Lothrop"—D. L. Withington in London; "Shermipple"—D. L. Withington at the firm of Whipple, Sears & Ogden in Boston; "Ola"—Castle & Withington, in Honolulu; and "Osco"—James L. Holt in Honolulu.

(Certain cables were in code and certain not in code. The cables or the copies thereof which were in code have on the face of the cables themselves a decoding by Castle & Withington. In the following list are given the cabled words and such decoding, but as it is impossible to describe accurately the face of all such cables, the cables numbered and lettered D-10, D-11, D-13, D-15, D-16, D-19, D-21, D-22, D-25, D-27, D-28, D-29 D-30 and D-32, being original exhibits, are also by the order of the Supreme Court

of Hawaii made a part of this record and incorporated herein by reference.)

D-1: Original letter dated April 19, 1909, Lawrence Kentwell to James L. Holt.

Western Union Code: Cable Address: Kentwell, Elizabeth, New Jersey.

Letterhead
Livingston Hall
Columbia University

New York City
April 19 '09

My dear James.

We are so glad to hear from you, and I have shown your letter to Uncle John and Liza. We talked the matter over, and I explained your proposition to him, and he requests me to inform you as follows:

1. He is willing to sign a release to the effect that he will not demand more than what he is now entitled to, that is, $35. per week. 2. He wants to know in case you can give Liza $15,000 cash, when the papers are signed (meanwhile the balance to be a lien on the land, payable after his death) he would be willing to release, say $50. a month, that is, he would draw $100. per month, instead of $150, as heretofore.

From the contents of your letter, I understand that the Waialua Sugar Co. would give $75,000. cash, that is, three-fourths, as you said

they are willing to pay $100,000 for the interest of uncle John and your father, this is not so clear to me, please explain.

If you cannot give $15,000 cash, then the price for Liza's interest will be $45,000, balance payable after uncle John's death, that is, $10,000 cash, balance $35,000. payable as above, but we would like to have $15,000.

We are all going to England in the early part of June, and please cable us if you accept the above offer when you receive this letter, and if so, please prepare papers as soon as you can and send them on through a bank down there to their New York correspondent here, with instruction to pay the amount to uncle John and Liza upon their signing the necessary papers.

Our family is all well, Annie is feeling fine, so is Uncle John and Liza they all wish to be kindly remembered to your family, and send their aloha nui, including myself.

Very Sincerely yours,

Lawrence K. Kentwell.

P.S. If you are going to give $15,000 cash, then, say in your cable "fifteen", and if $10,000 cash, then say "ten" and I shall know what you mean, you may also add the word "accept" to either "fifteen" or "ten".

D-2: Original letter dated September 27, 1909, James L. Holt to W. R. Castle, enclosing foregoing original letter

Letterhead

Office Supply Co., Ltd.

Honolulu, T. H. September 27, 1909.

Mr. W. R. Castle,
Honolulu, T. H.

Dear Sir:

Knowing the interest you have taken in my affairs through securing from Castle & Cooke Ltd., that loan of $12,500.00 on all my right, title and interest in the R. W. Holt estate, and believing it is both to our mutual interest as mortgagor and endorser to at once purchase the undivided one-third interest of Eliza P. Christian in the Ahupuaas of Halemano and Wahiawa including several parcels in Kamananui, District of Waialua, Oahu, now under lease to the Waialua Agricultural Co., for 25 years from April 1/05 @ $3000.00 per annum.

Eliza is the only child and direct heir at law of my uncle John Dominis Holt Sr., whose life interest in the estate I bought out in 1902 under an agreement that he was to receive a weekly stipend of $35.00 per week during the term of his natural life.

I have offered to buy my cousin's undivided third interest in the above lands for the sum of $50,000.00, $10,000.00 in cash upon the execution of a deed duly acknowledged and delivered, and the balance at the death of her father.

She and her father fully approve of the proposition as per enclosed letter from Mr. L. K. Kentwell with whom they are at present residing in Oxford, England.

Now my proposition to you is this, knowing that Mr. Goodale has recommended to the directors of the W. A. Co., if I am correctly informed, the immediate acquisition of these interests, as being of vital importance to the plantation, I believe now is our opportunity to secure this one-third interest from my cousin at a very reasonable figure.

Will you undertake to secure the money for me on my cousin's interest in the above lands for a contingent fee of 10% of the purchase price, I want $15,000.00 @ 6% interest per annum, payment of interest to be secured by my uncle relinquishing $50.00 per month of his allowance, and the balance to be advanced by myself; unless the W. A. Co., will come forward with the cash on the proposition submitted to them by my Trustee Mr. J. F. Colburn and which no doubt has received your firm's consideration. The interest under which Mr. Colburn is acting for me are simply the life estate of my father and my uncle, and it does not under any circumstances include my prospective interest nor my cousin's.

Trusting that you will give this matter your earnest consideration and treat it as confidential,

I remain,

Yours sincerely,

JAMES L. HOLT.

D-3: Copy letter dated March 31, 1909, John F. Colburn to E. D. Tenney.

Honolulu, T. H. March 31st, 1909.

E. D. Tenney, Esq.,
Pres., Waialua Agricultural Company, Ltd.,
Honolulu.

Dear Sir:

Referring to previous written and oral suggestions in this connection, I now propose an offer, in my capacity as Trustee of James L. Holt, under his Deed of Trust dated July 1st, 1902, to convey to the Waialua Agricultural Company, Ltd. all of the so-called Holt lands in the District of Waialua, and which are now under lease to your Company, that is, all of the interests therein of James R. Holt and John D. Holt, as the said interest have here-to-fore united in me, in said Trust Deed,—and also in and all further interests therein which may hereafter be acquired by Lokalia Holt—(wife of James R. Holt,) and James L. Holt, or either of them.

The price at which I am willing to so convey is One Hundred and Twenty Thousand ($120,000) Dollars, and the times and methods of payments which I propose are as follows:

I. IN RESPECT OF THE JAMES R. HOLT INTEREST. Three quarters of the proportionate price of this interest or Forty-five Thousand Dollars in all to be paid by your Company in cash upon delivery of the documents as

hereafter proposed. The remaining one quarter Fifteen Thousand ($15,000) Dollars to be held by your Company in the nature of a guarantee or an insurance fund, and interest thereon at the rate of 5% per annum to be paid to me by your Company during the life of James R. Holt. Upon his death (and the execution by the said Lokalia and James L. Holt) of any further assurance that may be deemed necessary the remaining sum of Fifteen Thousand Dollars to be paid to me, or my successors in trust.

II. AS TO THE INTEREST OF JOHN D. HOLT. The entire proportionate value of this interest, Sixty Thousand ($60,000) Dollars to be held by your Company during the life of John D. Holt and interest thereon, at the rate of 5% per annum to be paid by your Company to me. Upon his death or as soon thereafter as questions of title can be settled, your Company shall pay to me or my successor in Trust such proportion of said sum of Sixty Thousand ($60,000) Dollars as shall be determined I shall represent the legal interest (if any) of James L. Holt, or his heirs if he be then deceased, in and to the Estate of his uncle J. D. Holt.

III. I propose that said Lokalia Holt, James L. Holt, and the wife of the latter shall join with me in the proposed conveyances, and shall severally covenant, that they and their respective heirs, shall execute and deliver to your Company or its successors any interest, any and

all such further assurances and conveyances as shall be requisite to fully convey in and all interests that they, or any of them, shall acquire upon, or by reason of, the death of the said James R. and John D. Holt or either of them, as the case may be.

Awaiting your reply, I am

Yours truly,

JOHN F. COLBURN

D-4: Original letter dated April 3, 1909, E. D. Tenney to John F. Colburn.

Letterhead

Castle & Cooke, Ltd.

Honolulu, Hawaii, April 3, 1909.

Mr. John F. Colburn,
Honolulu.

Dear Sir:

I now own receipt of your letter of the 31st Ult., in re Holt lands in the District of Waialua.

Your proposition will be taken under consideration, although I am inclined to think that it will be impracticable, or perhaps a better word would be "impossible", for the Waialua Agricultural Co., Ltd., to accept the proposition as outlined by you.

Very truly yours,

E. D. TENNEY,
President, Waialua Agr'l Co., Ltd.

AK

D-5: Copy letter dated February 17, 1910, James L. Holt to Lawrence Kentwell.

Honolulu, T. H., Feby. 17, 1910.

Mr. L. K. Kentwell,
159 Woodstock Road,
Oxford, England.

Dear Sir:

Your letter under date of the 28th of January received and noted.

The Waialua proposition has narrowed itself down to a point whereby I forwarded you a cable yesterday which I trust I will be in receipt of an answer before many hours. The address Woodstock was transposed whereby on perusing the cable after it had gone read Stockwood which I hope has not brought an inability to deliver the message promptly. The situation is this. The Waialua Agricultural Company Ltd. have concluded not to buy the two-thirds interest in Waialua lands unless yourself and wife and Eliza and Colburn have signed a contract whereby you folks will accept a certain amount of money for said two-thirds interest in the event that the Supreme Court of this Territory will decide that you folks are entitled to your one-third and Colburn holding in trust for me my one-third. The money to be paid immediately upon the decision being rendered as above and the delivery of the deed. Therefore if you and Annie and Eliza will undertake to contract

with me to sell to me or such person as I may name your one-third interest of the Waialua Lands upon a final decision of the Supreme Court deciding in your favor for the sum of Thirty Thousand Dollars ($30,000.00) to be paid upon delivery of deed the matter will be immediately taken into Court under a submission between all parties concerned; ostensibly being a friendly suit to determine the rights of the parties in interest and in a short while we will know where we are at.

This offer I make you now is final and if the sale goes through it means that upon the payment to you folks the sum of Thirty Thousand Dollars you are out of it holus-bolus. In other words you will have to provide for Uncle John as far as his weekly stipend is concerned.

You will bear in mind that the trust deed and agreement I have with Uncle John it is provided that should Eliza survive her father she shall receive one-half of the total that I can get for the one-third. Now it is an open question as you know whether she will survive him or not if she does you may be able to get more for her share than this amount I offer. if she should happen to die before Uncle John you would be shut out of it entirely. Now you know that a bird in hand is worth a great many in the bushes so therefore I apprehend you will look this question squarely in the face and cable a reply without delay. Cabling

will save at least 21 days' time and we can get the matter before the Court and decide in that time.

In reference to Albert Christian I think that it will be futile to oppose him in the method proposed such as you al' oming home here and bring divorce proceedings against him. If however you will permit Eliza and Uncle John to come home here, in that event if you will cable your assent to this and the amount required for their trip I will cable it to you expressly for this purpose.

The Waialua people have intimated strongly that should this attempt upon their part to buy fail they will resort to a suit in partition for the sale of the land at Public Auction. You can appreciate what that will mean, they will acquire the same at any old price they feel like paying; who can oppose them successfully, we all have not got the money.

Yours very truly,

J. L. HOLT.

D-6: Copy letter dated March 8, 1910, Lawrence Kentwell to James L. Holt.

Oxford, 159 Woodlock Rd., March, 8, 10.

Dear James:

Liza and I have just got your letter, and after a long consultation with Annie & Uncle John,

they have concluded to sell for $30,000—or a little more for cash, as you said they offer you $75000 cash and after settling up with Albert Christian $5000 and Colburn there ought to be something left, and some must be paid over to Liza.

With regard to our releasing you from paying to Uncle John the $150 a month which we are now getting from Colburn, Annie said she would do so, upon paying her $5000 and I think the sum is reasonable because Uncle might live for 5 or 10 years, and you get your money back in less than 3 years—so that the whole thing will amount to $35000 cash, and if upon receipt of this letter, you have sent on the papers, but with no instructions to pay us upon the signing of the deeds, you will please do so at once. I suppose the W. A. Co. will send on the papers thro' the Bank of Hawaii to their London agents, and they will notify us when same have arrived. You will please inform the W. A. Co. that the cash must be paid over to us thro' their agents or the agents of the Bank of Hawaii in London when the deeds and all necessary papers are signed by us, or else there will be nothing doing.

Cabling is too expensive for me, and so I can only cable the word "proceed" as arranged; and I hope the papers will soon be on their way here.

The money I hope will help you out in your business, and all around.

With Aloha from all of us

Same as ever,

LAWRENCE.

D-7: Copy letter dated March 30, 1910, John F. Colburn to W. W. Goodale.

Honolulu, T. H., March 30, 1910.

Mr. W. W. Goodale,
Manager, Waialua Agricultural Co.,
Waialua, Oahu.

Dear Sir:

It appears that Mr. Withington has wirelessed that the message sent to him the other day by Mr. Castle is not entirely intelligible, but he favors that portion of the message sent which he understands to be a suit of divorce to be instituted against Christian. Since receiving Kentwell's letter of the 10th inst. wherein he suggests that Eliza and John D. return at once if money is forwarded for their passage and etc. to institute divorce proceedings, I have come to the conclusion that it would be the most unwise way of expediting the closing of the transaction we have been talking about so long. Mr. L. L. McCandless I am informed has made a definite offer to the Kentwells without any strings and if your Company fails to act promptly your opportunity to buy the Lands will be nil.

I fail also to know why it is necessary to go through all the formality of Court proceedings, as it may tie up the matter for a longer time than we anticipate,—just as a divorce proceeding against Christian could be appealed to the Supreme Court at Washington which means at least three years loss of time. James L. and I are willing to deal with you, as against McCandless but your action must be prompt and decisive. I therefore suggest the following programe.

FIRST: We to at once secure the necessary Document from Albert Christian to effectuate the execution of his name to such Document as might be wanted later. You to advance a sum not greater than Five Hundred Dollars ($500.00) to carry this into effect and to be deducted from the purchase price.

SECOND: Mr. Withington to be authorized to proceed to England as fast as his time will permit and secure from all concerned their signatures to an out and out Deed of Conveyance. Your Company cabling him the necessary amount for the purchase, namely Thirty Thousand Dollars ($30,000.00). Cost of exchange and cable to be chargeable against purchase price.

THIRD: After the completion of the above, your Company to then pay over to me the balance of the purchase price agreed upon as one hundred and twenty thousand dollars ($120,000.00).

There should be a reply in writing by you definitely binding your Company to pay $120,000.00 for the 18/27 undivided interest or in other words paying over to me as Trustee for James L. the difference after Eliza and the Kentwells have been paid together with the advances and expenses.

Yours truly,

JOHN F. COLBURN.

D-8: Copy letter dated March 30, 1910, Lawrence Kentwell to James L. Holt.

Oxford, 159 Woodstock Rd., March 30-'10

Dear James:

We got your cable this day saying you have received my letter of the 10th inst., and that you would take immediate action and would advise by cable—money—I assume then that the offer we made is satisfactory to you, i.e. $35,000 cash to be paid us upon our signing all the necessary papers. If that's the case, please cable when this reaches you, as there is someone else in the field and has offered Liza a better proposition, and Annie and Uncle John are not required to release the $150 a month, which she now gets from Colburn. I presume you have an idea who the party is, he is rather unfriendly to the Waialua Agricultural Co. and of course he wants the land too. His name is—McCandless.

You can arrange with the Waialua Agri. Co. to instruct their agents in Honolulu to notify their London agents to send for us when they've received your papers, then we will proceed to London and sign them. We want to stand by you and you must act at once.

Uncle John and Liza are not particularly anxious to come back now, since you have arranged matters. Be sure and get the matter fixed as soon as you can as a delay will not be beneficial to either of us. Aloha to all and love from Liza & Uncle to self and family,

Sincerely yours,

LAWRENCE K.

D-9: Copy unsigned letter dated April 8, 1910, to W. W. Goodale

Note: This letter was an office letter, Castle & Withington to W. W. Goodale. It was agreed however that the cable referred to in the letter is a correct copy and sent on by James L. Holt.

Honolulu, Oahu, T. H., April 8, 1910.

W. W. Goodale, Esq.,
Mgr. Waialua Agcl. Co. Ltd.,
Waialua, Oahu.

Dear Sir:

Enclosed please find besides the abstract of the deed as requested by you the following, Deed, Paakonia to Mahelona, recorded Liber

210 page 405, Deed, Luahiwa to Mahelona, recorded Liber 216 page 102, Deed Luahiwa to Ahia, recorded Liber 217 page 70 and an agreement between John Emmeluth and John and Annie Keahipaka; also an agreement (copy of) between Christian and W. R. Castle to dispose of and consent to any conveyance of his and her interests in the Holt lands within one year. We have paid John Colburn the Three Hundred Dollars and a further sum of $70 being the expenses incurred in automobile hire and other expenses incurred in Colburn's going to Ewa to secure Christian's signature, which $70 will be deducted from the amount to be paid upon final settlement being made. The following is a copy of the cable sent on last night.

To Kentwell,

159 Woodstock, Oxford, England.

Divorse is not necessary, Christian settled in friendly manner—await arrival of Withington about the last of this month.

sgn. Holt

Very truly yours,

D-10: Copy unsigned cablegram dated April 8, 1910, sent to D. L. Withington from the office of Castle & Withington.

SHERMIPPLE BOSTON April 8, 1910
WITHINGTON

JOHN ISODYNAMIC KENTWELL IMPOSIBLES WITH CHRISTIAN ADVISED KIESWEGEN WITHINGTON BIDBANK EXALTMENT LINK GEGRIMBEKT EGRATIGNER

(John telegraphed full particulars to Kentwell. The matter is settled with Christian. Advised wait until Withington arrives. Terms of agreement are well known Link. Full particulars follow by mail. Go as soon as possible.)

D-11: Copy unsigned cablegram dated April 11, 1910, sent to D. L. Withington from the office of Castle & Withington.

S262Ny o 9 1111p Honolulu Apr 11-10
Shermipple, Boston

WITHINGTON TRENT EXHARANET ESFOLAGATO LINK BEUGLE EXEMPTORUM.

Trent (left yesterday) (in the interest of) Link. (Advise you to) (leave as soon as possible).

D-12: Original letter dated April 12, 1910, John F. Colburn to W. R. Castle.

Letterhead

Kapiolani Estate, Limited

Honolulu, T. H., April 12, 1910.

Mr. W. R. Castle,
Atty. for the Waialua Agricultural Co.,
City.

Dear Sir:

As Trustee of James L. Holt I will convey to such person as the W. A. Co. will name, all the interest acquired by me under the Trust deed from said Holt dated July 1, 1902, of the Lands of Halemano and Wahiawa in the District of Waialua for the sum of Sixty Thousand Dollars ($60,000.00) payable upon the execution of the Deed and an agreement to pay a further consideration immediately that the said Company has acquired from Mrs. Eliza Christian her anticipatory interest in said Lands the difference between what said Company shall pay to said Mrs. Christian and the sum of Sixty Thousand Dollars said sum to be so paid to her not to exceed the sum of Thirty Thousand Dollars.

In the event however that the said Mrs. Christian shall convey her interest in said Lands to L. L. McCandless or some one else not named by the Company then the Company shall pay to me a further sum of Thirty Thousand Dollars.

Upon the payment of Sixty Thousand Dollars one-half of the present rental of said Lands payable to me shall cease to be paid by said Company and upon its having acquired the interest of said Mrs. Christian and paid me the difference of the purchase price or have paid me the further sum of Thirty Thousand Dollars then the whole of the present rent shall cease to be paid.

James L. Holt will if desired join with me in the Conveyance.

You will appreciate the fact that Mr. Holt's interest in these Lands are greater than Mrs. Christian's owing to the fact that John D. Senior had a child with a former wife and lived before its death which interest I take it, has been inherited by John D. Senior and is included in his Conveyance to James L. and then to me.

Expense of papers and stamps to be borne by the Company.

All advances made by you or the Company and the indebtedness to Castle & Cooke Ltd. to be deducted from purchase price.

Yours very truly,

JOHN F. COLBURN.

D-13: Copy unsigned cablegram dated April 12, 1910, from the office of Castle & Withington to D. L. Withington in Boston.

SHERMIPPLE BOSTON April 12, 1910.
WIKINIKONA PIANOTALS DEOXIDATE LARNACH WAIALUA CONDULCAVI BOTELLON LINK FLODDEN CAPILE AMERICA WHERE FILCHED TRENT CARAMILLAR KENTWELL BULLETOUW BLUEHWEISS MOVEMENTS.
(Have received your letter of the 4th.) (Employ only if necessary) Larnach. Waialua (depends upon you.) (Have every reason to believe) Link (will keep them supplied with money) (provided they can come) America, where (expect to meet) Trent. (Why do you not communicate with) Kentwell (by cable.) (Try to ascertain) movements.

D-14. Original letter dated April 13, 1910. John F. Colburn to W. R. Castle.

Letterhead

Kapiolani Estate, Ltd.

Honolulu, T. H., April 13, 1910.

Mr. W. R. Castle,
City.

Dear Sir:

Mr. Holt informs me that he has exhibited to you the cable received by him from Mr.

Kentwell of this a. m. The same is an answer to the cable sent by Holt and I yesterday afternoon which reads as follows:

Honolulu, April 12, 1910.

Kentwell,

159 Woodstock, Oxford.

Await Withington arrival with cash—terms your letter March 8th accepted—cable immediate acceptance.

Signed, HOLT.

and his answer is:

Osco, Honolulu.

Accept—when did sail Withington.

Signed, KENTWELL.

therefore the matter is up to you to instruct Withington to advise Kentwell when he can sail for England and if possible to proceed forthwith and you should make your financial arrangements whereby Mr. Withington will get the requisite amount $30,000.00 to pay Mrs. Christian and the Kentwells and secure their deed.

I take this to be exceedingly good prospects for the W. A. Co. to clinch this matter if there are no further delays upon the part of your principals.

I think it would be a good plan to suggest to Withington in your cable that John D. Sr. the father of Eliza Christian to sign the Deed

also for what he might inherit from Eliza in the event that he survives her.

Yours truly,

JOHN F. COLBURN.

D-15: Copy unsigned cablegram dated April 13, 1910, from office of Castle & Withington to D. L. Withington.

SHERMIPPLE, BOSTON April 13, 1910
WIKINEKONA KENTWELL FINGRIGO HOLT ACCEPT HULAGU WITHINGTON BULLENKOPF HULPZAAH CICALATURO NACHTWORM KNABENBANK BESEEMED BELLHUND GUINCHEUR BRANDIMES INDIGENOUR.

Withington. Kentwell (sends the following message to) Holt. Accept. (When did ..... sail) Withington. (Cable immediately) (date of sailing.) (Credit has been increased to) ($40,000.) (Are quite willing) (advance at once) (on account of) (proposed purchase) (in order to bind.) (Must get all to sign.)

D-16: Original cablegram dated April 14, 1910, from D. L. Withington to the office of Castle & Withington.

Received 3:12PM-P- April 14th/10
SF 55 Via San Francisco April 14
Boston, Mass. 10

Ola Honolulu.

LUSITANIA TWENTIETH EROTESIS FROLADO CERTONUS PROFESSOR GRAY.

WIKINEKONA.

(Lusitania twentieth (Must have more definite instructions) (What is the offer) (May we consult) Professor Gray)

D-17: Original letter dated April 15, 1910, D. L. Wthiington to Prof. John C. Gray.

Boston, Mass., April 15, 1910.

John C. Gray, Esq.,
60 State Street,
Boston, Mass.

Dear Professor:

The question which arises under the will of R. W. Holt, who was an American citizen of the Hawaiian Islands, married to an Hawaian wife, and who died about 1860, leaving four children, —one daughter, to whom he left 1/4 of his estate, and three sons, to each of whom he left a quarter for life with a remainder to their heirs.

There have been changes in the estate but the court has held that such changes did not affect the rights under the will nor work a conversion of property from personal to real estate or vice versa, and the present situation is that the property in question, the daughter having been eliminated is held by three interests. John D. Holt and whoever will succeed to his 1/3, James R. Holt, and whoever will succeed to his 1/3, and the other third having vested by the death of Owen J. Holt, in his nine children, is held by various parties, the whole property being leased to the Waialua Agricultural Company. James R. Holt and John D. Holt have conveyed their interests to one John F. Colburn, and J. Lawrence Holt and Robert Holt, sons ond only heirs, should James R. Holt now die, of James R. Holt, have joined in this conveyance; John D. Holt is living in England, has been married twice; by his first wife he had a child who outlived the mother by a few hours and died leaving him its only heir. He married again and has one child who is living with him in England. It is proposed to purchase the interest of this child, assuming that should John D. Holt die at this time, she would succeed for $30,000.

The will is to be found in the case of Long v. Holt, 18 Hawaii 290. That case, and the case of Estate of Holt, 19th Hawaii 78 refer to prior cases in which this will, or some controversy growing out of it was before the Hawaiian Court and with the cases of Carter v.

Davis, 18 Hawaii 349, and Fitchie v. Browne, 18 Hawaii 69, the latter being the case which you argued in the Supreme Court of the United States, will I think contain all that is necessary to understand the state of the Hawaiian law. The value being over $5,000, as you know, the question would come before the Supreme Court of the United States and therefore its decisions would be conclusive.

I hope to have an answer to my cable requesting authority to secure your opinion this evening or tomorrow morning. I expect to leave for England on Wednesday by the Lusitania, leaving London Monday night.

The points are these: First, what is the character of the remainder in the heirs of John D. Holt?

Second, subsidiary to this, did John B. Holt inherit from his deceased child any interest in that reversion?

Third, if John B. Holt's daughter has a contingent remainder, what form of conveyance should we take as best calculated to secure the title upon the death of John B. Holt.

Fourth, there is a subsidiary question, as the daughter is married, the husband is in Hawaii, but he has agreed to sign the deed, and I may, in case I get authority, ask a question as to the best method of dealing with this situation.

Very sincerely yours,

DAVID L. WITHINGTON.

D-18: Opinion of Prof. John C. Gray dated April 16, 1910, addressed to D. L. Withington.

Letterhead

Ropes, Gray & Gorham

Boston, April 16, 1910.

David L. Withington, Esq.,
c/o Whipple, Sears & Ogden,
Tremont Building,
Boston, Mass.

Dear Mr. Withington:

To answer your questions concerning the Holt property:

First: I am of the opinion that the devise to the heirs of the testator's children is a contingent remainder. Since the decision in Carter v. Davis, 18 Haw. 439, I do not think there is any doubt on this.

Second: This contingent remainder can be conveyed or released, by any ordinary deed.

Third: Should Mr. John D. Holt adopt a child, could such child take as one of his heirs under his father's will?

I believe the chances to be that the Court would hold that he could not.

The present Chief Justice, in the Estate of Hannah Maughan, 3 Haw. 262, and Estate of Nakuapa, 3 Haw. 342, after very elaborate consideration, was of opinion that an adopted child could not inherit as heir, and I know of no reason to suppose that he has changed his

mind. His dissenting opinion in Estate of Nakuapa is very weighty.

In Re Estate of Wilhelm, 13 Haw. 206, the court decided, that unless the articles of adoption expressly provide that the adopted child shall inherit, he cannot do so. Whether he can do so, if the articles do so expressly provide, the court leaves undetermined, but it is impossible to read the opinions without feeling that they do not view Hartwell, C. J.'s doctrine with disfavor.

Of course this is not a case of inheritance. It is a case of the interpretation of a testator's will.

"Heirs" means, in the Law, those who inherit real estate.

If I am right in believing that an adopted child cannot inherit, then when the testator made a devise, to the "Heirs" of his son adopted children of the son were not included in the devise.

The testator might have said, "In the word 'heirs' I mean to include my son's adopted children." But he did not say it. The only person who will have said it, if there is an adoption, will be the son. Now, nothing that the son can say can affect the interpretation of the father's will. Suppose the son should say, "Whereas there is a devise in my father's will to my heirs, I hereby declare that Mr. Roosevelt shall be taken to be my heir." Mr. Roosevelt

assuredly would not take; and it is just the same if he says, "My adopted children shall be my heirs."

The language in Section 1 of the Revised Laws, establishing the Common Law "except as fixed by Hawaiian judicial precedent," does not, I think, mean that the Supreme Court cannot overrule one of its own decisions, but only that a decision of the Court, before the introduction of the Common Law, shall have the weight that a precedent has in the Common Law.

My charge is $300. I have to go away after writing this before the stenographer has copied it, and I have left word that it should be signed for me.

Yours very truly,

JOHN C. GRAY.

RG

D-19: Copy unsigned cablegram dated April 15, 1910, from office of Castle & Withington to D. L. Withington.

SHERMIPPLE BOSTON (Sent April 15th) WIKINEKONA PHOENICATO CERTAZIONE HOLT ABSTRACT DUFTENDU PENNELLARE ERTOSENDE PENNIFORME.

(In answer to your telegram of the 14th) (advise you to consult—at once) Holt abstract (was forwarded by express company) (April 9th) (will give you definite instructions on or before) (April 18th)

D-20: Original cablegram dated April 16, 1910, from D. L. Withington to the office of Castle & Withington

Boston-Mass 9

11 VIA SF April 16th.
Ola Honolulu

Gray advises contingent remainder transferable approves insuring.

D-21: Copy unsigned cablegram dated April 16, 1910, from office of Castle & Withington to D. L. Withington

April 16th 1910

NYG 43 HONOLULU 27/26
SHERMIPPLE BOSTON

WIKINEKONA ELIZA AND JOHN D ACCEPT NACHTSTOEL ENSAYALEIS PROSPECTIVE INTEREST, ANNIE KENTWELL WANTS MUSIQUETA HER INTEREST MAKE EXOBSECRAS DELATANDOS NACHTVOLK PRICE TO WAIALUA IDEATION

(Eliza and John D. accept $30,000. Must be inclusive of prospective interest. Annie Kentwell wants $5000 her interest. Make less if possible. Must not exceed $35,000. Price to Waialua must be kept secret.)

D-22: Copy unsigned cablegram dated April 19, 1910, from office of Castle & Withington to D. L. Withington

April 19, 1910.

SHERMIPPLE BOSTON

FORWARD WIKINEKONA KENTWELL FINGRIGO HOLT BIBILEM YOU THOUGH LINK OFFERS GRIFFINISM.

Forward Withington. Kentwell fingrigo (sends following message to) Holt. Biblem (will agree to abide by) you, though Link offers griffinism (a better proposition).

D-23: Original letter and envelope April 25, 1910, L. K. Kentwell to D. L. Withington

Oxford 159 Woodstock Rd

Apr. 25th, '10

Dear Mr. Withington:

I have just received your message ex Lusitania and am glad to hear of your almost—sure arrival at London tonight (*baring* shipwreck and disastrous railroad mishap) and I hope this will find you (in both terra firma and terra cotta) in your usual good spirits, the latter, according to recent Honolulu papers is rather rare in the Paradise of the Pacific, and evidently was the cause of agitation for government by commission, but *no* so in gay London.

Your departure was cabled to us by J. L. Holt and of course we were expecting you on the Lusitania, but now that the expectation has materialized we all extend you our heartiest welcome and bid you goodspeed and welcome to Oxford, especially when you have the ready cash—the latter intelligence also came by a cable message, but of course it requires your confirmation and willingness to shell out as soon as you get up here, at any rate we shall all be mighty glad to see a KANAKA.—aloha.

Very sincerely your

L. K. KENTWELL

(Copy of face of envelope)

L. K. Kentwell

Postmarked
Oxford Ap. 2 5'10

D. L. Withington Esq.
30 Little Russel Street
London W. C.

Passenger
Ex Lusitania

D-24: Original letter dated April 25, 1910, John F. Colburn to W. A. Greenwell

Letterhead

Kapiolani Estate, Ltd.
Honolulu, T. H., April 25, 1910.

Mr. W. A. Greenwell,
Representing Mr. W. R. Castle,
City.

Dear Sir:

I am in receipt of a copy of the proposed agreement between J. L. Holt, myself and Mr. Castle together with a copy of the proposed deed to be executed by us. Speaking for myself I want to say that I will not consent to sign this Deed carrying with it as it does a warranty upon my part for the title. I want to say again right here that Mr. Holt and I have agreed to sell to Mr. Castle for account of the Waialua Agricultural Company the lands in the District of Waialua at present held by said Company under lease from myself and other interested ones of the Holt Estate upon the following terms namely, for the sum of One Hundred and Twenty Thousand Dollars ($120,000.00) Mr. Holt and I convey all our interest in said lands free and clear of all incumbrances, such as the lien upon said lands made to said Castle and now held by Castle & Cooke Ltd., and as well as the interest of Eliza Christian and her husband, and also John D. Holt Sr. and also Mrs. Annie Kentwell.

Mr. Castle is well aware of the title that we offer to sell viz. 18/27 of the Holt Lands at Waialua such as we have it, a warranty if any extending only to any and all persons claiming by or through us. Therefore there must be a modification in your Document.

Yours truly,
JOHN F. COLBURN

D-25: Original cablegram dated April 26, 1910, from D. L. Withington to the office of Castle & Withington.

Received 2:16PM. April 26th 1910.

F. HU. 33. LONDON, 11,
OLA,
HONOLULU.

Demand payment in cash are now objecting
CACABABUNT FREGARONO
INSURANCE
we do not consider it advisable
BETUTORING WITHOUT TRENT
will not arrive until
BLOCKSHUR MONDAY.
LOTHROP

D-26: Unsigned copy of letter dated April 28, 1910, James L. Holt to L. L. McCandless.

Honolulu, April 28, 1910.

Hon. L. L. McCandless,
Honolulu.

Dear Sir:

You are hereby notified that under date of March 8, 1910, I received, in writing, an offer from Eliza Christian, J. D. Holt and Annie Kentwell, offering to sell and convey to me their respective interests in the lands of the Estate of R. W. Holt, deceased, situate in the District of Waialua, for a specified sum of money, which offer, as made, was duly accepted by me on the 12th day of April, A. D. 1910; and the contract of sale so made is now being closed in England, I having sent an agent to England for that purpose. And you are further notified that, in other ways, I have expended and am expending large sums of money on the faith of the said contract and have claimed and continued to claim that said contract covering said transaction is in force and effect, and being informed that you personally or through your agents are seeking to purchase some or all of the interests in question, which are under contract of sale to me as aforesaid, I hereby notify you, your agents and whom it may concern of the existence of a valid contract of sale in my favor covering the property in question, and warn

you from purchasing or attempting to purchase or otherwise contract for any of the lands in question from any of the parties to said contract.

Yours very truly

D-27: Copy unsigned cablegram dated April 28, 1910, from office of Castle & Withington to D. L. Withington

April 28, 1910.

LOTHROP
LONDON (ENGLAND)

CLEAVER (a delay is dangerous) BETUTORED (we consider it advisable) CANCEROUS (close immediately) BLISSLESS (before arrival) TRENT ERUSCORUM (excluding insurance) CLAUSE. COLIFLOR (Have deeds executed at once and forwarded) GELOTIANOS (Authorize you to pay) LIZA NACHSTOEL ($30,000.), ANNIE, MUSIQUETA ($5000), JACHERANT (on terms specified in their letter of) PENDONES (March 8th) HIPPODOCE (Must have a definite reply) McCANDLESS FRANJES (have been notified) HORSINESS (Our rights must be upheld)

D-28: Original unsigned cablegram dated April 28, 1910 from D. L. Withington to the office of Castle & Withington

Received 3.15PM-S-

28th, April, 1910

35 LONDON 3
OLA HONOLULU. . .
BIPATENTEM
(Awaiting answer)

D-29: Original unsigned cablegram dated April 29, 1910, from D. L. Withington to the office of Castle & Withington

Received 2.22 PM 29t. April 1910.
F. HU. 37. OXFORD, 8,
OLA,
HONOLULU. . .

Deeds will be executed
COLICOS MONDAY
as far as we can understand
KALKLEBER
have instructions to pay
GEMEAUX
without signature of
INDVULSOS HUSBAND.

D-30: Copy of cablegram not dated, James L. Holt to L. K. Kentwell

KENTWELL:
159 WOODSTOCK, OXFORD

Withington Leave Twentieth Lusitana to settle Execute all conveyance to me for $3500.

HOLT

Note: The above proposed cable is in J. L. Holt's handwriting and the coding in the handwriting of W. R. Castle, and the cable as sent appears below:

Cabled as above address

(will leave)
WITHINGTON EXERTMENT

(Apr 20)
LUSITANIA PENNILESS
(must get all to sign) (deed of conveyance)
INDIGENOUS COLEPIN TO ME
HOLT

D-31: Original cablegram dated April 29, 1910, L. K. Kentwell to James L. Holt.

(Osco being J. L. Holt's cable address)

Apl 29th 10

Received 2.15 AM XC
3 Oxford 4 Osco Honolulu
Agreeable

Kentwell

D-32: Copy cablegram dated April 29, 1910, from office of Castle & Withington to D. L. Withington.

April 29/10

LOTHROP
OXFORD
KALMUCOS
(Your understanding is correct)
BEMODDEREN
(Act accordingly)
OLA

D-33: Original cablegram dated April 30, 1910, from D. L. Withington to the office of Castle & Withington

Apl 30th 10

3 London 3 Ola Honolulu
Grantee.

D-34: Copy cablegram dated April 30, 1910. from office of Castle & Withington to D. L. Withington

April 30/1910

Lothrop
London.
James Lawrence Holt
Ola

D-35: Original letter dated May 19, 1910, together with Bank slips and receipts enclosed, D. L. Withington to Castle & Withington.

Boston, Mass., May 19, 1910.

Messrs. Castle & Withington,
Honolulu, T. H.

Gentlemen:

I enclose an account of my expenditures on the trip abroad, worked out as well as I can in pounds. I am not at all sure about this account to the cents or shillings, as I changed money at 4.85 or 4.85 and 4.88½, and I converted some money the other way, on which I lost quite a large amount.

I have returned to Welch & Company my letter of credit, with balance of £617. The account will then stand: Received £8,000; paid Eliza Holt Christian $30,000 at 4.88½, £6,141.5: Annie Holt Kentwell, $5,000 at 4.88½, £1,023.10.10. John C. Gray's fee £61.17.6. Expenses to and from New York, including hotel and steamer fare to London, and expenses both ways £41.15.3. Steamer fare returning £28. Expenses while in London, exclusive of the execution of the deed, £18.7. Cablegrams paid in London, £7.15. Paid in America by self, J. B. Castle, Whipple, Sears & Ogden, £6.5. Expenses incident to deed, including American Consul, solicitor, hotel and hack bills, £5.15. Balance

spent by myself on personal account, £48.9.6, which should be charged up to me at a rate of about 4.85 or $235.20.

I did not pay quite as much as we could have been forced to pay, possibly. The figure 4.88½ included exchange, which I charged to them. They agreed to take it as if it were paid in New York on that day and it was figured out by the Canadian Bank. Outside of Gray's fee, all the expenses of the trip amounted to about $500, and as the expenses over and back by this fast line were about $325, and this includes two trips to Oxford, cabling and wireless and telegrams which amount to nearly $100, I do not think it excessive. I was assisted by a young man who works for my brother. My brother would take no pay for him but I shall make him a present. I had him at my service all the time and took him with me a large part. I was going at such a rate that it required someone who knew London and the country.

I enclose the only receipts which I have with me,—Professor Gray's, the solicitor's and a memoranda given me by the Canadian Bank.

In reference to insurance, I fear we will have trouble. I urged insisting on that in my cablegrams and have written pretty comprehensively about it. It does not seem to me to be advisable to write without hearing further from you. My suggestion would be that we pay Kentwell a small sum to get the insurance effected. I think I wrote you what it could be done for,—a com-

paratively small sum, and think that the best plan would be to insure on payments for, say, 15 years, as it is not likely that the old man will live beyond that time. The difference is not very great, however, between that and the plan you suggest, namely, for life insurance.

I desire to acknowledge the receipt of your letter of May 7th, enclosing copy of letter to Chickering. My cable must have been misinterpreted about the execution in duplicate.

Very truly yours,

DAVID L. WITHINGTON

(Enclosed slips are as follows:

(1) Undated slip on a blank of The Canadian Bank of Commerce, London, in longhand, reading:

$30,000	@	488½	=	£ 6141- 5- 0
$ 5,000		do	=	£ 1023-10-10
Cash				45- 4- 2
				£7210:-

61-16-6

Holt

(2) Undated slip of The Canadian Bank of Commerce, London, showing various figures, apparently an attempt to arrive at the figure in English money of Prof. John C. Gray's fee of $300.

On the back of this slip are the words in longhand:

Mrs. Annie Holt Kentwell 5,000
Mrs. Eliza R. P. Christian 30,000

the "Mrs." in each instance being in another hand.

(3) Receipt dated May 2, 1910, by Messrs. Hewitt, Urquhards & Woolacott of London for £1:9:0.

(4) Receipt dated May 14, 1910, by Prof. John C. Gray for $300.

The foregoing slips marked (1) and (2), being original exhibits, are, by order of the Supreme Court, made a part of this record and statement.)

D-36: Original letter dated April 21, 1910. James L. Holt to Waialua Agricultural Company, Ltd., et al.

Honolulu, April 21, 1910.

To the Waialua Agricultural Co., Ltd.,
W. R. Castle, Trustee,
and Whom it may Concern.

Dear Sirs:

You are hereby notified that the temporary agreement in reference to the sale of certain interests in the Holt lands at Waialua, dated the 15th day of April, 1910, and signed by me on that date, was signed by me upon the express condition and understanding that John F. Colburn, Trustee, should also sign the same and

that if he failed or refused to sign, that said instrument should have no force or effect whatsoever and should be held to be an uncompleted instrument, never having taken effect.

This notice is given to save my rights and to avoid all misunderstanding as to the paper above referred to pending further negotiations with you as to the sale of the lands in question.

Yours very truly,

JAMES L. HOLT

D-37: Original unsigned draft of agreement dated April 15, 1910, between James L. Holt, John F. Colburn and William R. Castle, Trustee, regarding sale of two-thirds interest in Holt lands for $120,000.

(This original exhibit, being impossible to describe accurately, is by order of the Supreme Court of Hawaii made a part of this record and incorporated herein by reference.)

THIS AGREEMENT, Made this 15th day of April, A. D. 1910, between JAMES L. HOLT, of the City and County of Honolulu, Territory of Hawaii, of the first part, hereinafter referred to as "Holt" or "J. L. Holt," JOHN F. COLBURN, of said Honolulu, of the second part, hereinafter referred to as "Colburn" or "John F. Colburn," and WILLIAM R. CASTLE, TRUSTEE, of said Honolulu, of the third part, hereinafter referred to as the "Buyer,"

WITNESSETH THAT:

Whereas, upon an understanding and agreement that said Holt should acquire all of the rights, interests or shares of Eliza Christian, John D. Holt and Annie Kentwell, present or prospective, in and to the lands of the Estate of R. W. Holt, Deceased, situate in the District of Waialua, in said City and County of Honolulu, and should convey such rights, interests and shares to such person or persons, association or associations, corporation or corporations as the said Buyer should direct; and that said Holt and Colburn (the latter acting under a trust deed) should convey all of the right, share or interest, present or prospective, of said Holt in and to said lands of said Estate of R. W. Holt, Deceased, in said District of Waialua, which interests, shares and estates shall not be less than two (2) full thirds of said property, free from all life or other intermediary estates or incumbrances; and said Buyer has already expended and will hereafter expend large sums of money to secure the said shares and interests as aforesaid, or part of them, and to perfect all titles thus acquired or to be acquired which are to be sold and conveyed as upon the above understanding and agreement:

NOW, THEREFORE,

Said Holt and Colburn, in consideration of such expenditure so made and to be made hereafter at their or either of their requests, and of One Dollar to each of them paid by said

Buyer, the receipt whereof is acknowledged, do hereby promise, covenant and agree to and with said Buyer:

1st. To proceed without delay and as rapidly as possible with all and every negotiation and proceeding necessary to secure such shares, titles and interests of said Eliza Christian, John D. Holt, Annie Kentwell, and all and every intermediate estate and other title necessary to be acquired, secured or extinguished in order to vest a full two-third (2/3) share or interest, free from all incumbrances, in said James L. Holt, either personally or as trustee; and *to expend if necessary up to $40,000 in so doing and

2nd. That, when so secured, all of said shares or interests, or, if not so fully secured, then such part or portions thereof as may be possible to secure and to be conveyed to said Holt personally or as Trustee, to sell and convey by good and sufficient deed or deeds of conveyance, with full releases of dower, at the expense of said Buyer, to such person or persons, association or associations, corporation or corporations, as said Buyer shall direct, for the consideration of One Hundred Twenty Thousand Dollars ($120,000) for such full two-thirds (2/3) unincumbered interest, at and after said rate for any part thereof which may be secured.

2.

From the consideration to be paid by such persons, associations or corporations as afore-

*Beginning with "to" and to end of paragraph written in ink in longhand.

said the said Buyer may first deduct all moneys by him paid, or paid on his account, or to be paid hereafter, including the legal interest, on account of these proceedings from the inception thereof until every title shall be secured as aforesaid, and also all moneys due to him, the said Buyer, for loans and advances made to or on account of either said Holt or Colburn; excepting, however, the expense of the trip of David L. Withington to England in this behalf, such trip to be made in or about the month of April, 1910.

AND THE SAID BUYER agrees that upon notice by him received that said shares or interests in said lands in said Waialua have been secured by said James L. Holt, either personally or as trustee, or in any way in his behalf, he will then and thereupon give notice to said parties of the first and second part to what persons, associations or corporations the said property and interests in property shall be conveyed, and will then present a deed or deeds containing full warrants of title, free from incumbrances and other matters, to convey a complete title, which the said parties of the first and second parts agree shall be duly executed, in accordance with this agreement *~~a copy of a draft of which deed is hereto attached, and the original~~ upon the execution thereof will pay

*Interlineation written in pencil and then lined out.

over or cause to be paid over all moneys which may be due hereunder to the persons entitled to receive the same.

IT IS AGREED that the term of this agreement shall be ONE YEAR from date hereof, and that if said parties of the first and second part cannot then be prepared to make conveyances hereinbefore agreed to be made, they shall, upon the request of the said Buyer, refund to the Buyer all moneys advanced upon the consideration of this agreement, together with legal interest, as well as refund all amounts due by either of said parties to or on account of said Buyer, with interest.

(BUT THIS AGREEMENT shall not be
(enforcible against the said Buyer unless he
OUT (shall be fully satisfied with the title offered
(to be conveyed to him by said parties of the
(first and second part.

IN WITNESS WHEREOF, the said parties of the first, ~~and second part~~ second and third part have hereunto set their hands, the day and year first aforesaid.

.....

.....

.....

(NOTE: In paragraph "2nd" of the instrument the words "when so secured" are underscored in pencil, "at the expense of the Buyer" in red ink over pencil, and "until every title shall be secured as aforesaid" in pencil; and the numbers "2" and "1" in the margin are in

red ink over pencil. Against the next to last paragraph appears a bracket with "OUT" written in longhand, both in blue pencil.)

21. Deed dated May 2, 1910, John Dominis Holt, Eliza R. P. Christian, Annie Holt Kentwell, Lawrence Holt Kentwell, and Albert Christian by way of consent, to James Lawrence Holt. Deed duly recorded June 23, 1910, and being in evidence as Petitioner's Exhibit A-21, and being also Exhibit B to the original petition herein. This is the deed cancellation of which, as to Eliza R. P. Christian, has been prayed for in the original and amended petitions. It is an original exhibit, a part of this record and statement by order of the Supreme Court of Hawaii, a photostatic reproduction of the page bearing the signatures being incorporated herein at the end of this volume. It follows in full:

Stamp $50 Stamp $50 Stamp $10 Stamp $10

KNOW ALL MEN BY THESE PRESENTS that we JOHN DOMINIS HOLT Widower, ELIZA R. P. CHRISTIAN Wife of Albert Christian daughter ~~of~~ and sole heir ~~and~~ of said John Dominis Holt ANNIE HOLT KENTWELL and LAWRENCE K. KENTWELL Husband of the said Annie Holt Kentwell all now commorant at Oxford in the County of Oxford in the United Kingdom of Great Britain and Ireland hereafter termed the Grantors, in consideration of the sum of Thirty-five Thousand dollars ($35,000.00) to them in hand paid by James Lawrence Holt of Honolulu in the Territory of Hawaii in the

United States of America, hereafter termed the Grantee the receipt of which sum is hereby acknowledged have given granted bargained sold and conveyed and by these presents do give grant bargain sell and convey unto the said James Lawrence Holt the said grantee one undivided third part or interest in and to the following parcels of land and each of them namely:

1. Ahupuaa of Paalaa being Apana 34 of L.C.A. 7713, R.P. 4475 to V. Kamamalu, containing an area of 12237 acres, more or less.

2. Ahupuaa of Wahiawa being R.P. (Grant) 973, containing an area of 1924 acres more or less.

3. R.P. (Grant) 235 to Jerome Topliffe and Louis Johnson containing an area of 36 acres more or less.

4. R.P. (Grant) 238 to J. F. Anderson and F. Davis containing 25.8 acres more or less.

5. R.P. (Grant) 431, containing an area of 100 acres more or less.

Stamp $10 Stamp $10

All of said lands being situated in the district of Waialua in the Island of Oahu and Territory of Hawaii aforesaid; intending hereby to convey all the interest of the said Grantors whether present prospective or in remainder vested or contingent, of every name and description in and to said lands or which they or either of them may hereafter acquire in and to the said

lands and particularly every interest which the said Grantors or either of them may now have or may hereafter acquire under the Will of R. W. Holt deceased the father of said John Dominus Holt and grandfather of said Eliza

R.W.—V.C.

not including Makaha R. P. Christian and Annie Holt Kentwell / subject however to a certain deed of trust made by said James Lawrence Holt, the Grantee, to John F. Colburn, and to a certain Lease dated the First day of April One thousand nine hundred and five made by Carlos A. Long Administrator and others including the Grantors herein to the Waialua Agricultural Company, Limited, both of which instruments are of record in the Registry Office of said Territory but intending to convey all the rights of the Grantors and each of them against said Trustee and said Company and under said Deed and Lease the said Grantors assigning and setting over to the said Grantee all claims and demands which they may have arising out of either said instruments or in any other way against the said James Lawrence Holt the said Waialua Agricultural Company Limited or the said John F. Colburn said Trustee save and except the right to the personal estate of the said R. W. Holt which may be in the hands of said John F. Colburn Trustee it being the intention to convey all the interests of the said Grantors in the estate left by said R. W. Holt

or the property into which it has been
R.W.—V.C. not including Makaha
converted / with the exception of the said personal estate.

To have and to hold to the said James Lawrence Holt the Grantee his heirs and assigns to his and their use and behoof for ever.

The said Grantors for themselves their heirs executors and administrators covenant with the said Grantee his heirs executors administrators and assigns that they have good title in and to the described premises that they have good right to convey the same that the same are free from incumbrances except as aforesaid and that they will warrant and defend the same against the claims and demands of all persons except as aforesaid and that they and their heirs executors and administrators will on demand of said Grantee his heirs executors administrators or assigns execute to him or them such instruments or instrument as may be necessary or by him or them deemed advisable at any time to perfect the title in the Grantee his heirs executors administrator and assigns in and to that portion of the estate of R. W. Holt devised by his Will to John Dominus Holt and at his death to his heirs and assigns.

IN WITNESS whereof the Grantors have set their hands and seals this second day of May One Thousand nine hundred and ten, the said Albert Christian Husband of said Eliza R. P. Christian joining in consent hereto by a

separate instrument executed within said Territory of Hawaii.

JOHN D. HOLT (Seal)
ELIZA R. P. CHRISTIAN "
ANNIE HOLT KENTWELL "
ALBERT CHRISTIAN "
LAWRENCE K. KENTWELL "

Witness
DAVID L. WITHINGTON

Witness to signature of Albert Christian
W. H. CHICKERING
ROBERT L. COLBURN

Kingdom of Great Britain and Ireland
City of London, England,
United States Consulate General.

On this the 2nd day of May A. D. 1910, personally appeared before me John Dominus Holt, widower, Eliza R. P. Christian wife of Albert Christian, Annie Holt Kentwell and Lawrence K. Kentwell, her husband, satisfactorily proved to me to be the persons described in and who executed the foregoing Instrument by the oath of David L. Withington, a credible witness for that purpose, to me known and by me duly sworn, and they the said John Dominus Holt, Eliza R. P. Christian, Annie Holt Kentwell and Lawrence K. Kentwell acknowledged that they executed the same freely and voluntarily for the uses and purposes therein set forth.

Witness my hand and seal of office at London, England this the 2nd day of May A. D. 1910. #2579

[Seal] RICHARD WESTACOTT
Vice Consul of the United States of America at London, England.

UNITED STATES CONSULATE GENERAL, LONDON
STAMP
$2 Consulate General.

State of California
City and County of San Francisco—ss:

On this sixteenth day of May A. D. 1910 before me personally appeared Albert Christian to me known to be one of the persons referred to in the within instrument and therein described as the husband of Eliza R. P. Christian and being one of the persons who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

[Notarial Seal] CHARLES EDELMAN
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 9, 1914.

I hereby certify that the words "of" and "and" line three page one were struck out and the words "and" and "of" inserted respectively in their place and the words "not including Makaha" line eight page two and the words

"not including Makaha" line twenty-six page two were respectively interlineated, all before signature and execution by Albert Christian.

[Notarial Seal] CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires April 9, 1914.

And I further certify that the words "and" and "of" in the third line of page one and the words "not including Makaha" in the eighth line of page two, and the words "not including Makaha" in the twenty-sixth line of page two were made before the execution of said instrument by the said Albert Christian.

[Notarial Seal] CHARLES EDELMAN,
Notary Public.

State of California,
City and County of San Francisco.—ss.

I, H. I. MULCREVY, Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, which Court is a Court of Record having a seal, do hereby certify that Charles Edelman, by and before whom the foregoing acknowledgment was taken was, at the time of taking the same, a Notary Public residing in said City and County, and duly authorized by said State to take and certify acknowledgments or proofs of deed of land in said State; and further, that I am well

acquainted with the handwriting of said Charles Edelman, and that I verily believe that the signature to said certificate of acknowledgment is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed he Seal of said Court, this 16th day of May, 1910.

[Seal of the Court] H. I. MULCREVY,
County Clerk and Ex-Officio Clerk of the Superior Court.

22. . Deed dated May 28, 1910, James Lawrence Holt and John F. Colburn Trustee to William R. Castle Trustee, conveying everything acquired by said James L. Holt by virtue of the deed of May 2, 1910 (Exhibit A-21 next above) and his own and the Colburn interest as trustee in the lands as well, being in all an undivided 2/3 share or part in fee of said Holt lands. Deed duly recorded May 31, 1910, being in evidence as Petitioner's Exhibit A-22, and being also Exhibit C to the original petition herein. The deed reads as follows:

Stamp. Stamp Stamp Stamp Stamp
$50 $50 $50 $50 $50
Stamp Stamp Stamp
$50 $50 $50

THIS INDENTURE, made this 28th day of May, A. D. 1910, by and between JAMES LAWRENCE HOLT, party of the first part, JOHN F. COLBURN, TRUSTEE for James Lawrence Holt, party of the second part, and

WILLIAM R. CASTLE, TRUSTEE, party of the third part, all of Honolulu, City and County of Honolulu, Territory of Hawaii:

WITNESSETH:

Stamp Stamp Stamp Stamp
$50 $50 $50. $50

That in consideration of ONE HUNDRED TWENTY THOUSAND DOLLARS ($120,000) to the said JAMES LAWRENCE HOLT and JOHN F. COLBURN, TRUSTEE, in hand paid by the said WILLIAM R. CASTLE, TRUSTEE, the receipt whereof is hereby acknowledged, the said JAMES LAWRENCE HOLT and JOHN F. COLBURN, TRUSTEE, do, and each of them does, give, grant, bargain, sell and convey unto the said WILLIAM R. CASTLE, TRUSTEE, his heirs and assigns, a two-thirds (2/3) undivided share or part of all those certain pieces or parcels of land lying and situate in the District of Waialua in the City and County of Honolulu aforesaid, known as the "Holt Estate Lands," to-wit:

1. The land known as the Ahupuaa of Paalaa, being Apana 34 of the land described in Royal Patent 4475, on Land Commission Award 7713 to V. Kamamalu.

22. The land at Wahiawa mentioned or described in Royal Patent (Grant) 973 to James Robinson, Robert Lawrence and Robert W. Holt.

3. The land at Paukauila mentioned or described in Royal Patent (Grant) 431 to Kauohanui.

4. The land at Kamananui mentioned or described in Royal Patent (Grant) 235 to Jerome Topliff and Lewis Johnson.

5. The land at Kamananui mentioned or described in Royal Patent (Grant) 238 to John F. Anderson and Franklin Davis.

6. And all Kuleanas or Grants lying within the above lands and premises, or any or each of them, to which the said James Lawrence Holt and John F. Colburn Trustee, or either of them, claim title or ownership.

Together with all the rents, income, right, title, interest, estate, property, claims and demands, in law or in equity, vested, contingent or in expectation, of the said James Lawrence Holt and John F. Colburn, Trustee, and each of them, in and to or arising out of or in connection with said pieces or parcels of land hereinbefore described.

TO HAVE AND TO HOLD all and singular the above mentioned and described premises, properties and rights, together with all and singular the tenements, rights, easements, privileges and appurtenances to the same belonging or appertaining or held or enjoyed, unto the said William R. Castle, Trustee, his heirs and assigns forever.

And the said James Lawrence Holt, for himself and for his heirs, executors and administrators, covenants and agrees with the said William R. Castle, Trustee, his heirs and assigns, that he and the said John F. Colburn, Trustee, are seized in fee of an undivided two-thirds (2/3) part or share of the said pieces or parcels of land hereinbefore described, with the appurtenances thereunto belonging; that the said undivided two-thirds (2/3) part or share of the said pieces or parcels of land hereinbefore described are free and clear of all incumbrances of whatsoever nature or kind; that they have good right to sell and convey the same as aforesaid; that he, the said James Lawrence Holt, will and his heirs, executors and administrators shall warrant and defend the same to the said William R. Castle, Trustee, his heirs and assigns, against the lawful claims and demands of all persons whomsoever; and further, that the said James Lawrence Holt and John F. Colburn, Trustee, and all persons claiming by, through or under them and each of them, will do and execute, acknowledge and deliver all such further deeds, transfers and assurances for the better and more effectually assuring, conveying and confirming unto the said William R. Castle, Trustee, his heirs and assigns, all and singular the property hereby conveyed or intended to be conveyed, as by him or them or by

his or their counsel shall be required, and that the said William R. Castle, Trustee, his heirs and assigns, shall be held harmless and shall not be liable or responsible in any manner to see to the application of the purchase price hereof.

And James R. Holt, of said Honolulu, in consideration of the premises and of the sum of One Dollar to him paid by the said William R. Castle, Trustee, the receipt whereof is hereby acknowledged, does bargain, sell, remise, release, quitclaim, convey and confirm to the said William R. Castle, Trustee, his heirs and assigns forever, all his estate, right, title, interest, claim and demand of whatsoever nature or kind, and whether present, prospective, in expectancy or otherwise, in, to or arising out of or in connection with the premises and property hereby conveyed or intended to be conveyed.

AND Lokalia Holt, wife of said James R. Holt, in consideration of the premises and of the sum of One Dollar to her paid by said William R. Castle, Trustee, the receipt whereof is hereby acknowledged, does bargain, sell, remise, release, quitclaim, convey and confirm to him, his heirs and assigns, all her estate, right, title, interest, claim and demand of whatsoever nature or kind, and whether present, prospective, in expectancy or otherwise, including dower, in, to or arising out of or in connection with the premises and property hereby conveyed or intended to be conveyed.

And Lena S. Holt, wife of said James Lawrence Holt, in consideration of One Dollar to her paid, the receipt whereof is hereby acknowledged, does remise, release, quitclaim and convey to the said William R. Castle, Trustee, his heirs and assigns, all her right, title, interest or claim of dower in and to the premises and property hereby conveyed or intended to be conveyed.

IN WITNESS WHEREOF, the said James Lawrence Holt, John F. Colburn, Trustee, James R. Holt, Lokalia Holt and Lena S. Holt, have hereto set their hands and seals the day and year first above written.

JAMES LAWRENCE HOLT
JOHN F. COLBURN,
Trustee for James L. Holt.
JAMES R. HOLT,
LENA S. HOLT,
LOKALIA HOLT.

Territory of Hawaii,
City and County of Honolulu,
District of Honolulu—ss.

On the 28th day of May, A. D. 1910, personally appeared before me James Lawrence Holt and Lena S. Holt, his wife, both known to me, and on this 31st day of May, A. D. 1910, personally appeared before me John F. Colburn, Trustee for James L. Holt, and James R. Holt and Lokalia Holt, his wife, also known to me to be the persons described in and who exe-

cuted the foregoing instrument, who severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth. And the said John F. Colburn, further acknowledged to me that he executed the said instrument as such Trustee.

[Notarial Seal] N. FERNANDEZ,
Notary Public First Judicial Circuit.

23. May 17, 1920. The Helemano Real Estate Trust is organized under a trust declaration between J. R. Galt, A. L. Castle, T. H. Petrie, R. A. Cooke and R. B. Anderson as Trustees. Indenture duly recorded. This real estate trust was organized for the purpose of taking over the Holt lands (or interests in Holt lands) described in Exhibit A-22 above, and of owning, holding, selling, leasing and otherwise dealing in contiguous lands, and in all matters connected therewith, giving the Trustee broad powers of sale, resale, investment, reinvestment, mortgage, lease, or otherwise dealing in real property and interests therein, the shareholders to have no legal or equitable title in the lands. (Ex. A-1.)

24. A direction or instruction to Willian R. Castle dated May 17, 1920, in accordance with his declaration of trust of May 28, 1910, to convey to the Helemano Real Estate Trust the premises conveyed to him by James L. Holt and John F. Colburn, Trustee, under deed dated May 28, 1910, (Ex. A-22) upon payment of all sums of money expended

by said Castle on account of said purchase or in connection therewith. Signed by Charles H. Atherton, T. H. Petrie and E. D. Tenney by his attorney-in-fact. (Ex. A-32.)

25. Deed dated May 17, 1920, William R. Castle, Trustee, to the Trustees of the Helemano Real Estate Trust, conveying to said Trustees the 2/3 interest in the Holt lands at Waialua and being the interest conveyed to said William R. Castle, Trustee, by deed of James L. Holt and John F. Colburn, Trustee, dated May 28, 1910 (Ex. A-22). Consideration $127,912.49. Deed duly recorded and being in evidence as Petitioner's Exhibit A-2. A copy of this deed is Exhibit D attached to the original petition herein.

26. Lease dated June 23, 1920, from the Trustees of the Helemano Real Estate Trust and the Hawaiian Trust Company, Limited, Trustee of the R. W. Holt Estate, to Waialua Agricultural Company, Limited, of the Holt lands at Waialua. Lease duly recorded, and being in evidence as Petitioner's Exhibit A-3. The lease follows in full.

> THIS INDENTURE in quadruplicate made this 23rd day of June, 1920, by and between J. R. GALT, A. L. CASTLE, T. H. PETRIE, R. A. COOKE and R. B. ANDERSON, all of Honolulu, Territory of Hawaii, Trustees of the Helemano Real Estate Trust, hereinafter called "the parties of the first part," HAWAIIAN TRUST COMPANY, LIMITED, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, Trustees

under the Will of R. W. Holt, deceased, hereinafter called "The party of the second part," and WAIALUA AGRICULTURAL COMPANY, LIMITED, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, hereinafter called "the party of the third part,"

WITNESSETH:

That the party of the third part is the lessee of certain lands which are described in a lease under which it claims from Carlos A. Long in his capacity as administrator-de-*bonis-with* the-will-annexed of the Estate of R. W. Holt and others to said Waialua Agricultural Company, Limited, dated March 17, 1905, recorded in Liber 263, page 365, Hawaiian Registry of Deeds, leasing the said lands therein described for a term of twenty-five years from the first day of April, 1905.

That the said party of the second part is the duly appointed Trustee of the Estate of R. W. Holt, deceased, by an order duly entered in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, on the 7th day of November, 1910, and as such Trustee is entitled to have paid to it the rent provided for in said lease for the interest held in trust by it for John D. Holt, son of said R. W. Holt, deceased, during his life time, to-wit, one-third of said rent, or the sum of Three Thousand Dollars each year in quarterly payments.

That said parties of the first part have acquired by deed from William R. Castle, Trustee, dated May 17, 1920, and recorded in Liber 553, page 103, said Registry, all and every his estate, right, title and interest in the lands mentioned and described in said lease, and are entitled to have paid to them one-third of the rent provided for in said lease, and are also entitled to have paid to them by the party of the second part the rent paid to it under said lease less commissions during the continuance of the term of said trust, to-wit, the life of said John D. Holt.

That the said parties of the first and third part and the said party of the second part in so far as may be in its power are desirous of extending the term of said lease for a further period of twenty years from the expiration of the same, namely, April 1, 1930.

NOW, THEREFORE, the said parties of the first part, do lease and demise to the said party of the third part, its successors and assigns and the said party of the second part in so far as may be in its power does lease and demise to the said party of the third part, its successors and assigns, all and singular the lands and premises leased and demised by Carlos A. Long in his capacity as administrator-de-*bonis-with*-the-will-annexed of the Estate of R. W. Holt, in said lease dated March 17, 1905, and particularly described in said lease, all being

situated in the District of Waialua, Island of Oahu, Territory of Hawaii, for the remainder of said term under said lease of March 17, 1905, and for the further term of twenty years from the expiration thereof, namely, to the first day of April, 1950, upon all the terms and conditions set forth in said lease as if the same were repeated and re-incorporated in this instrument.

TO HAVE AND TO HOLD the same for said term of twenty-nine years and nine months from July 1, 1920, at an annual rental of Twenty-five Thousand Two Hundred Dollars ($25,200.00), said Twenty-five Thousand Two Hundred Dollars to include during the term of said lease dated March 17, 1905, the sum of Six Thousand Dollars ($6,000.00) payable under said lease to the said Carlos A. Long in his capacity as administrator-de-bonis-non-with-the-will-annexed of the Estate of R. W. Holt.

Provided, however, that in case the trust under the will of R. W. Holt, deceased, under which the party of the second part holds said premises as Trustee shall terminate and for that reason such lease shall cease and determine during such extended term, the party of the third part will not hold the party of the second part responsible or liable for any claim or demand for damages for or on account of such termination.

And said party of the third part for itself, its successors and assigns covenants with the

parties of the first part, their successors in trust and assign and with the party of the second part and its successors that it and they will pay as rent during the remainder of the term of said lease of March 17, 1905, the sum of Nineteen Thousand Two Hundred Dollars ($19,100.00) per annum in addition to the sum of Six Thousand Dollars ($6,000.00) per annum payable by said lessee and from and after the first day of April, 1930, the sum of Twenty-five Thousand Two Hundred ($25,200.) Dollars per annum, said rental to be payable in equal quarterly installments in advance on the first day of April, July, October and January of each year beginning with the first day of July, 1920, in the following proportions, that is to say:

To the said parties of the first part, their successors and assigns, one-half of the annual rental hereby reserved, to-wit, the sum of Twenty-five Thousand Two Hundred Dollars ($25,200.) and

To the said party of the second part and its successors during the continuance of the term of said trust, to-wit, the life of said John D. Holt, one-half of the annual rental hereby reserved, to-wit the sum of Twenty-five Thousand Two Hundred Dollars ($25,200.00) and thereafter in whole or in part to the said parties of the first part, their successors and assigns as their interests may appear.

The intention of this instrument being that if, at any time, during the term of the present lease, or extension thereof, the title and estate of the parties of the first part to their full 2/3 interest in the demised premises becomes lessened in any manner thus reducing their interest or estate then the rental herein reserved to be paid shall be correspondingly reduced.

IN WITNESS WHEREOF the said parties of the first part have set their hands, the said parties of the second and third part have caused their corporate names to be signed and the corporate seals hereto affixed by their proper officers thereunto duly authorized to this and three other instruments of like date and tenor the day and year first above written.

(Execution signatures and acknowledgments follows.)

27. Original document dated July 14, 1921, executed by the owners of not less than three-fourths in value of all the shares of the Helemano Real Estate Trust, terminating said trust and directing the sale of the property of said trust (being the Holt lands) to the Waialua Agricultural Company, Limited, and the distribution of the proceeds of said sale proportionately among the owners of said shares. Document duly recorded. (Ex. A-23.)

28. Original deed dated July 20, 1921, from the Trustees of the Helemano Real Estate Trust to the Waialua Agricultural Company, Limited, convey-

ing a 2/3 interest in the Holt lands in Waialua for a consideration of $128,045.49, and being the same property conveyed (Ex. A-2) by William R. Castle, Trustee, to said Trustees. Deed duly recorded. (Ex. A-24.) A copy of this deed is attached to the original petition as Exhibit E.

29. Lease dated January 10, 1923, by Waialua Agricultural Company, Limited, as Lessor, to the Hawaiian Pineapple Company, Limited, as Lessee, demises 12,150 acres of land, including 6,475.45 acres of Holt lands for a term of 17½ years from January 1, 1923, to June 30, 1940, inclusive, for a paid up rental of $2,109,179.25, with an option of extension for twenty years upon a rental to be agreed upon. The lease reserves to the Lessor all water rights appurtenant, waters above and below the surface including freshet and storm waters, together with the right to take, store, develop or divert the same, reserves existing bridges, roads, railroads, etc., and all improvements theretofore erected on the property, and rights of egress and ingress for various purposes; taxes and all governmental assessments to be paid by Lessee. The habendum clause reads:

> "TO HAVE AND TO HOLD, free of rent other than the aforesaid paid up rent, such of the demised premises as are owned by the Lessor in fee simple and also such of the demised premises in and to which the estate of the Lessor is held as Lessee of others over periods

having more than seventeen and a half (17½) years yet to run, for and during the term of seventeen and a half (17½) years from the 1st day of January, 1923, to the 30th day of June, 1940, both days inclusive, and such of the demised premises in and to which the estate of the Lessor is held as Lessee of others over periods having less than seventeen and a half (17½) years yet to run, for and during the unexpired terms of said periods respectively and for and during the terms of any renewals or extensions of the respective leases thereof up to and including June 30, 1940."

Then follow the Lessee's covenants including the following:

"11. That it will, in so far as applicable to the land hereby demised, in all respects keep, observe and perform all the terms, covenants, conditions, stipulations and agreements on the part of the tenant to be kept, observed and performed (except as to the payment of rent reserved thereby which shall be paid by the Lessor) as set out and contained in the following leases, to-wit: (a) George Galbraith to J. B. Atherton, made September 7, 1900, recorded in Book 211, page 227, Hawaiian Registry of Deeds; (b) Carlos A. Long et al. to Waialua Agricultural Company, Limited, made March 17, 1905, recorded in Book 263, page 365, said Registry, * * *."

Then follows a mutual covenant.

"IT IS HEREBY MUTUALLY COVENANTED AND AGREED (a) that from time to time and as often as the estate hereby created in the Lessee in the lands in or to which the estate of the Lessor herein is that of Lessee, shall cease by limitation of time or because of the intervention of a paramount title holder and/or for any other reason said lands pass out of the control of the Lessor prior to the expiration of this lease, or as the estate hereby created in the Lessee in any other lands demised by this lease shall cease because of the intervention of a paramount title holder and/or for any other reason said lands shall pass out of the control of the Lessor, except as herein provided, the Lessor will so often as the same shall happen forthwith as to each and every acre of pineapple land so lost secure to and place the Lessee in the possession of equal acres of pineapple land for the remainder of the term of this lease, provided it then has them, and if it cannot then so provide them, then the Lessee may upon the expiration of the term of seventeen and a half (17½) years hereby created continue in the possession of similar land rent free and under the terms and provisions of this lease, to be carved out of the other land covered by this lease as mutually agreed upon, for a further term, the area so to be occupied and the term of such occupa-

tion to be determined by computing in each case the number of years and/or fractional part of a year lost and multiplying such by the area lost in that particular instance; * * *."

Then follow examples for computing the "acre year basis."

The lease contains cancellation clauses and is binding on and inures to the benefit of the Lessor, its successors and assigns, and the Lessee, its successors and permitted assigns. It is provided in the lease that the Lessee shall pay, when due, all taxes, including taxes for 1923, future assessments, rates, charges, and other outgoings of every nature and kind whatsoever, excepting such as are payable by other tenants of the Lessor, which shall during the term of the lease be charged, assessed, imposed, or grow due and payable upon or account of the demised premises or any part thereof, and upon the improvements and buildings both on and hereafter erected upon the lands and the crops growing thereon by virtue of or under any present or future law or requirement of any Governmental authority and which the Lessor shall or might be required to pay or discharge under any obligation to any Government or to any lessor of land leased to the Lessor and subleased hereby. The lease is not recorded, and is in evidence as Exhibit Ac-B-1.

It was stipulated that the following parties, who otherwise might have been witnesses, were unable to testify, either through death or otherwise:

Death:

Albert Christian
Clarence W. Ashford
W. A. Bowen
Arthur K. Brown
May K. Brown
Father Clement
John F. Colburn
N. Fernandez
Judge Gear
W. A. Greenwell—(Testified at first hearings, but died October 29, 1931.)
W. W. Goodale—(Testified at first hearings, but died April 4, 1929.)
Hanakaulani Holt
Mother Judith
Sister Marcelline
George Sea
Robert Steele
Richard Westacott, American Vice-Consul at London
David L. Withington

Old age or illness:

Sister Albertina
William R. Castle
Sister Beatrice of the Priory

Absent from jurisdiction:

Judge Frank Andrade

The foregoing facts, stipulations and exhibits, in full or condensed form, are incorporated in this record and statement of evidence and made a part

hereof just as if specifically set forth in the further narrative and condensed statement of the evidence.

Where the term "Respondent" is used herein, it refers to the Respondent Waialua Agricultural Company, Limited, unless otherwise specifically pointed out.

NARRATIVE STATEMENT OF FURTHER EVIDENCE

On January 31, 1929, this cause came on for hearing in Honolulu before the Circuit Court for the First Judicial Circuit, Territory of Hawaii, Judge Cristy presiding. Petitioner was represented by Barry S. Ulrich and Charles M. Hite, of the firm of Ulrich & Hite of Honolulu; Respondent Waialua Agricultural Company, Limited, by Alfred L. Castle and Arthur Withington, of the firm of Robertson & Castle of Honolulu, and George S. Leisure, of New York City; and Respondent James L. Holt by John R. Desha, of Honolulu.

Thereupon, both sides announcing that they were ready, the trial proceeded as follows:

The opening statement was made by Mr. Ulrich, on behalf of Petitioner. Respondent reserved its statement until the opening of its case.

JOHN R. GALT

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am president and manager of the Hawaiian Trust Company and have been its manager for about twenty-four years. I have likewise been a director of the Waialua Agricultural Company for some five years. I do not have an independent recollection of the transaction whereby the deed dated August 5, 1905 Ex. A-12) for a recited consideration of $6,000 conveyed to me the interest of Annie Holt Kentwell in the estate of Robert William Holt covering lands at Waialua, but upon being shown the deed I recognize that such a transaction took place, and I do know that I held such property solely as trustee for the Waialua Agricultural Company and subject to its order. I do not have an independent recollection of the transaction whereby the deed dated August 4, 1905 Ex. A-11) for a recited consideration of $6,000 conveyed to me the interest of George H. Holt in the estate of Robert William Holt covering lands at Waialua, but upon being shown the deed I recognize that such a transaction took place, and I do know that I held such property solely as trustee for the Waialua Agricultural Company and subject to its order. I do not have an independent recollection of the transaction whereby the deed dated May 19, 1906 (Ex. A-13) for a recited consideration of $6,300 conveyed to me the interest of Helen A. Holt individually and as guardian of

(Testimony of John R. Galt.)

minors in the estate of Robert William Holt covering lands at Waialua, but upon being shown the deed I recognize that such a transaction took place, and I do know that I held such property solely as trustee for the Waialua Agricultural Company and subject to its order. I know that I held these lands in trust for Waialua Agricultural Company, but I do not know of any written document which defined the terms of my trust, and know that I dealt with the properties exactly as directed by the Waialua Agricultural Company.

I was one of the trustees, but not a shareholder, of the so-called Helemano Land Trust, and, together with A. L. Castle, T. H. Petrie, R. A. Cooke, and R. B. Anderson, also signing as trustees, I executed the declaration of trust dated May 17, 1920 (Ex. A-1). This trust acquired the interests in the Holt lands at Waialua previously conveyed May 28, 1910 to William R. Castle, Trustee, by deed of James L. Holt and John F. Colburn Trustee (Ex. A-22). I knew this property was being held for the ultimate benefit of Waialua Agricultural Company. That was the thought with which I acted as trustee in the matter. The trustees under the trust were required to dispose of the land under the directions of the stockholders of the trust.

I know of no agreement, oral or written, entered into by the shareholders of the Helemano Trust with Waialua placing any terms whatever on the manner in which they should hold or continue to hold their interest in that trust, and, on the contrary, we advised one or two purchasers that we had their

(Testimony of John R. Galt.)

interests to do with, under the terms of the trust, whatever we saw fit, and it would be passed on to their heirs.

Waialua had outstanding bond issues from 1901 to 1916, and the Hawaiian Trust Company was the trustee under the mortgage deed of trust. During that time a great many business transactions were had between the Trust Company and Waialua, and in many instances where the Trust Company couldn't act, I acted individually. I do not have specific recollections of various conveyances of lands at Waialua, but I do recollect, in general, the fact that there were such conveyances. Where I purchased as trustee for Waialua, such money was furnished by Waialua and the amount charged against me as trustee. I remember a letter from John F. Colburn to me, relating to the Holt Estate lands at Waialua.

(Said letter was thereupon received in evidence, without objection, as Petitioner's Exhibit B-1, and is in words as follows:

Letterhead of
Kapiolani Estate Ltd.

Honolulu, T. H.
Aug. 23 1905.
Recd Aug 23 1905

Mr. J. R. Galt
City

Dear Sir:

Although my petition is ready to file in Court asking for the sale of the Waialua lands in ac-

(Testimony of John R. Galt.)

cordance with my conversation with E. D. Tenney, it is inexpedient however to do so until I have your offer in writing in the hands of C. A. Long, the administrator. Therefore I again remind you of the matter.

Yours truly

JOHN F. COLBURN.

(The witness also identified a copy of his reply to Mr. Colburn, which was thereupon received in evidence, without objection, as Petitioner's Exhibit B-2, and is in words as follows:

Aug. 23 1905

Carlos A. Long, Esq
Administrator of the Estate of R. W. Holt
Honolulu, T. H.

Dear Sir:

I will pay One hundred and eight thousand dollars ($108,000) cash upon the execution and delivery of deed upon the fulfillment of the conditions, below set forth for an undivided eighteen twenty-sevenths (18/27) interest in fee simple in the lands of the Estate of R. W. Holt whether devised by him at the time of his death or acquired by W. A. Aldrich, Executor, by purchase or otherwise, in the partition suit of Aldrich v. Robinson in the Supreme Court of the Kingdom of Hawaii, and particularly the following described lands situated in the District of Waialua, Island of Oahu, Territory of Hawaii, namely:

(Testimony of John R. Galt.)

1. Royal Patent (Grant) 235 and Royal Patent (Grant) 238;

2. All and singular those twelve (12) pieces or parcels (be the number more or less) of Apana 34 of Royal Patent (Grant) 4475, Land Commission A ward 7713, of the Ahupuaa of Paalaa;

3. Royal Patent (Grant) 431 of the Kaheeka Tract;

4. Royal Patent (Grant) 973 known as the lands of the Wahiawa;

The conditions upon which I will purchase are as follows:

First: The title to the above lands and your right to convey a fee simple title to an eighteen twenty-sevenths (18/27) interest therein free from all encumbrances excepting a lease to the Waialua Agricultural Company, Limited, to be satisfactory to my attorneys Castle & Withington.

The deeds to be warranty deeds made at your expense and to be satisfactory to my said attorneys and to be made to such person, persons or corporations and in such proportion as I may direct, it being my intention that such deeds when made, at my option, may be made of several portions or of undivided interest, to myself, or to such persons or corporations as I may direct.

This offer to hold good for sixty (60) days from this date unless sooner withdrawn by me.

Yours truly

J. R. Galt)

(Testimony of John R. Galt.)

WITNESS RESUMES: I was not familiar with the subject matter itself of the transaction we were engaging in. I made no investigation. I simply knew that Waialua wanted to acquire the land.

In connection with the interests of Annie Holt Kentwell, George H. Holt, and Helene A. Holt in the R. W. Holt Estate conveyed to me as Trustee (being Exhibits A-12, A-11 and A-13), I conveyed such interests to various subsidiary land holding companies at the instigation of the Waialua Agricultural Company. There was issued to me stock in these subsidiary companies which I later transferred direct to the Waialua Agricultural Company.

In connection with the shareholders of the Helemano Trust, Mr. A. L. Castle was attorney for the Waialua Agricultural Company, Mr. Petrie was an officer and director of Waialua, Mr. R. A. Cooke was one of the stockholders in the C. M. Cooke, Limited, and they were one of the heaviest holders in Waialua, and Mr. R. B. Anderson came into the picture largely through his connection with the Hawaiian Trust Company as attorney for said Company.

(Following the testimony of J. R. Galt, there was received in evidence, without objection, as Petitioner's Exhibit A-34, a statement giving a summary of the pineapple leases made by Waialua as Lessor on the lands of the Holt Estate at Waialua,

and in existence as of May 2, 1910, such statement showing:

1. Three leases in 1907 of a total area of 208.94 acres at a total annual rental net above taxes of $2039.40;

2. Four leases in 1908 of a total area of 338 acres at a total annual rental net above taxes of $3195;

3. Eighteen leases in 1909 of a total area of 2025.40 acres at a total annual rental net above taxes of $17,104.80;

4. No leases from November 1, 1909 to May 2, 1910;

5. Average length of leases, approximately ten years;

6. Total rentals due annually from Holt pineapple lands at time of execution of deed of May 2, 1910, $22,339.20.)

(The following then transpired: Counsel for Petitioner then requested of counsel for Waialua the Declaration of Trust of W. R. Castle referred to in Exhibit A-32, to which Waialua counsel replied that they would produce it.

"Mr. Ulrich: The declaration of trust executed by W. R. Castle upon the acquisition of these properties.

Mr. Castle: It is not here now.

The Court: We will reserve A-33 for it.")

W. W. GOODALE

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am a stockholder in Waialua and was manager of Waialua Agricultural Company from November 17, 1898, until February 23, 1924. I was not a director.

(Witness thereupon identified a map of the so-called Holt lands cited in the petition in this case, and which was introduced in evidence, without objection, as Petitioner's Exhibit C; the areas designated as Grants 431, 235 and 238 are also portions of the Holt land but are set forth on an enlarged scale. This map is an original exhibit, a part of this record by order of the Supreme Court of Hawaii, a reduced reproduction being incorporated herein at the end of this volume.)

WITNESS RESUMES: Referring to the map, the portion colored in yellow was under cultivation for cane on May 2, 1910, being those lands makai (Hawaiian word for "towards the sea") of the Wahiawa Ditch at an elevation of approximately 700 feet, the Wahiawa Ditch being here indicated on the map as the Wahiawa Extension Ditch. On May 2, 1910, there were approximately 1618.48 acres of the land indicated on the map in cane, including 33 acres of cane land abandoned when the crop of 1910 was harvested. These 33 acres were experimental lots above the Wahiawa Extension Ditch to find out whether sugar cane would grow

(Testimony of W. W. Goodale.)

without irrigation, and after taking off the 1910 crop they were not used again. The total area, therefore, after 1910, was 1585.48 acres of cane land which were cropped according to Hawaiian methods of cultivation.

On the 1st day of April, 1905, that was practically a waste, covered—the greater part of it—with a dense growth of lantana and klu and guava. The Waialua Agricultural Company, Limited went into possession of that land under its lease on the 1st day of April, 1905, and I began work to clear that land and prepare it for cultivation the 1st day of April, 1905, and began clearing from that point, (indicating), and from that time on until the crop of 1910 was planted, and cleared and cultivated that land, proceeding systematically without any break.

As manager of the Waialua Agricultural Company I attended to the making of any pineapple leases. On May 2, 1910 Waialua had leased to various pineapple companies and pineapple growers for the cultivation of pineapples a total area of Holt lands of 2572.34 acres, from which leases the said Waialua Company was entitled to receive an annual rental of $22,339.20, net above taxes. That would represent the net income to Waialua from those lands. That acreage was actually under lease, though I don't know that it was actually under cultivation. The 1905 lease, for the entire Holt area, carried a total rental of $9,000, of which Waialua paid its proportionate share.

(Testimony of W. W. Goodale.)

I was a director of the Wahiawa Water Company, and in 1910 some of the water from the Wahiawa Reservoir, when it reached a certain level, flooded back onto the lower portion of Grant 973, which I am marking as A to B on the map, Exhibit C, and when it passed a certain point then it came onto the lands of Grant 1092, the Owen J. Holt Estate property. In 1910 we had the right to flood these lands, due to our purchase of a lease of R. William Holt, son of Owen J. Holt, who happened to have a lease on this particular part, which later expired. Waialua Agricultural Company was the principal stockholder in the Wahiawa Water Company.

In 1908 and 1909 Waialua constructed the Helemano Ditch, including the Helemano Branch, so designated on the map, on the Holt lands down to the lower lands, and in 1910 Waialua constructed the Poamoho Branch of the Upper Helemano Ditch, being likewise designated on the map, Exhibit C. Such ditches are separate from the Wahiawa water system. In my report of February 13, 1911, I stated as follows:

> "This ditch, now combined with the new Poamoho ditch, has given us 3,433,102,000 gallons of water for use on Helemano and the upper Kawailoa land. A reservoir should be built to store the night and flood waters of these ditches. Surveys of available sites, estimates of costs of construction have been made; dams that will impound several hundred million gallons can be built at moderate cost."

(Testimony of W. W. Goodale.)

The figure of 3,433,000,000 odd gallons of water I think was intended to cover the total amount of water that had been delivered since the ditch was constructed and not the year. I have no way of giving you an idea of the annual or daily water production. It varies greatly from nothing at all to a large flow. We found our weir measurements were very greatly in excess of the actual flow. They were taken and figured on the maximum and not on the fluctuating flow, so that after that we had to make very material corrections in our weir measurements. These waters were not impounded on the lands, but were taken in ditches as they run. I said it would have been possible to impound several hundred million gallons but we had only made one dam for that purpose which was built in a dry ravine. By "impounding" I mean "to make available."

The Opaeula Ditch is entirely on the lands of the Bishop Estate, and no part of the water collected by the Opaeula Ditch drains from the Holt lands. The Wahiawa Ditch extension which follows the upper part of the cane area, shaded in yellow on the map, was for the purpose of carrying water from the Wahiawa Water Company reservoir across the lands of Helemano (Holt lands) over to the Bishop Estate lands which were under lease to the Waialua Company; that is to say, it was the Waialua Company's ditch used for the purpose of carrying waters across the Holt lands to other lands under cultivation by it to the north. The Wahiawa Extension Ditch belonged to the Waialua Agricultural Com-

(Testimony of W. W. Goodale.)

pany and was constructed in 1906. It likewise delivered water coming from the Wahiawa Reservoir to a reservoir on the Holt lands for the purpose of storage of night water, and no part of the water collected for such storage purposes was water collected from the Holt lands until after 1910 when other ditches were constructed. The Helemano Ditch was eventually continued to connect with the reservoir. The water in the Poamoho Stream, marked on the map, comes from the watershed above the Holt lands. Except for the water of the Poamoho Stream which is taken by the Poamoho Branch; the balance is not utilized by Waialua.

The average yield per acre of the sugar crop of 1910 for the entire Waialua Plantation was 6.10 tons; for 1909 6.32; and 1908 6.28. The Holt lands compared fairly closely with the Bishop Estate lands and other lands of the Plantation of similar elevation. I tried to experiment of growing sugar cane on the lands above the Wahiawa Extension Ditch and not subject to irrigation, and it was an absolute failure. It was not entirely a question of irrigation, but the weather on those upper lands is so cold that they are not adapted for sugar. The limit of elevation for lands suitable for the cultivation of sugar would be, on the Holt property, about 700 feet.

(At this point, Petitioner's Exhibits F-1 to F-5, inclusive, were received in evidence, over Respondent's objection, the same being certain statements showing areas harvested, the tons of sugar produced,

(Testimony of W. W. Goodale.)

and the average tons of sugar per acre, on the Holt Estate lands for the crops of 1908 to 1912, inclusive, briefly as follows:

Exhibit F-1: Crop 1908, area 946 acres, production 6038.76 tons, average 6.38;

Exhibit F-2: Crop 1909, area 559.66 acres, production 3847.19 tons, average 6.87;

Exhibit F-3: Crop 1910, area 1023.75 acres, production 7441.62 tons, average 7.26;

Exhibit F-4: Crop 1911, area 594.73 acres, production 3763.80 tons, average 6.32;

Exhibit F-5: Crop 1912, area 817.45 acres, production 5538.99 tons, average 6.77.

Petitioner's Exhibit F-6 was likewise received in evidence, over like objection, the same being a statement showing the cost to Waialua Agricultural Company of clearing the Holt lands from April 1, 1905, to May 2, 1910, of $43,350.59.

Petitioner's Exhibit F-7 was also received in evidence, over like objection, the same being a statement of the moneys expended by Waialua in making improvements on the Holt lands as follows:

(Testimony of W. W. Goodale.)

STATEMENT SHOWING COST OF IMPROVEMENTS ON HOLT LANDS TO MAY 2, 1910.

Date	Description	Original Cost
1906	Helemano 3 Reservoir	(2,299.70
1908	" 6 "	(9,396.05
1905	Helemano Lower Ditch	7,022.70
1907	Helemano Upper Ditch	22,708.35
1906	Wahiawa Extension Ditch ⅓	4,791.54
1909-10	Poamoho Branch—Helemano Ditch	6,563.40
1906	Helemano 54" Siphon	16,098.49
1906	Opaeula 54" Siphon ½	4,869.97
	Waterways	5,875.10
	Flumes	299.35
	Roads, Bridges and Fences	3,532.35
	Development Upper Lands	2,192.95
	Telephone Lines	719.60
	Railroads	30,922.52
	Buildings (including Domestic Water Sys.)	19,051.08
	TOTAL	$136,843.15

(Counsel for Petitioner asked to prove the value of the Holt cane lands by showing the net profit which Waialua Agricultural Company realized from said lands after allocating to said lands charges for plant, labor and all other items of expense. The Court ruled that unless Petitioner could show that the Holt cane lands were unique in character, and different in character from other cane lands, such method was improper for showing value; that a method of showing value which involved the question as to whether Waialua Agricultural Company itself, or through its organization, was getting all it could out of the particular lands, was improper.

(Testimony of W. W. Goodale.)

Counsel for Petitioner thereupon stated that he would prepare an offer of proof and present it in formal order.

Thereafter on further discussion between the Court and respective counsel, the Court sustained objections to a question on the cost of production per ton of sugar on the Holt lands; to a question as to what proportion of the total revenue derived from the sale of sugar on such lands would be represented by the cost of producing that revenue; and to the foregoing question, to assume a company with a reasonably efficient business management.

The Court further ruled that it would have to be shown that witness was an expert on the average expense of a normal raising of sugar cane, and that a foundation would have to be laid as to whether the Holt lands were average cane lands for the Territory.

WITNESS RESUMES: I have been manager of Waialua for twenty-five years. In my work as such I have not had occasion from time to time to confer with persons interested in other plantations as to the costs and expenses incurred by them and the comparing of results. I think those figures would not become public knowledge or subject to inspection. I am fairly familiar with cost of production on Waialua, but not what our cost of production bears to the cost of production in other plantations. I see the published figures in the annual reports of plantations, but I do not know

(Testimony of W. W. Goodale.)

that any of those plantations state their cost of production in such reports. I was manager of Onomea for thirteen years and familiar with the cost of production there while I was there. I have made no general study of costs of production, except as relates to Waialua and at Onomea while I was there. I could not testify what a reasonably efficient business management should require, in the way of general costs of production.

The Waialua Plantation is divided into very many sections. No two of them are alike as to conditions and they are not the same in any two sections of that plantation. The sugar lands indicated on the map were lands between other lands of Waialua likewise in sugar. Waialua itself, having bought sugar lands, did not resell them. There was no other sugar company purchasing sugar lands in Waialua in 1910, but there were private buyers of such lands in the market, such as landed proprietors, buying either for sale or lease. I do not know of any sale, in Waialua or elsewhere, that has been made of improved sugar lands as between plantations.

The only existing railroad line from the mill to the farthest point of cane under cultivation was about eight miles. It would be about two miles from the mill to the Holt lands, but the only way to get at those lands would be to go around through the gulches indicated on the map. The Wahiawa Ditch Extension is at an elevation of about 700 feet. The

(Testimony of W. W. Goodale.)

pineapple area would begin at a point of about 1,000 feet, and the average elevation at around 1400. (The elevations 350, 700, 1000, 1400 and 1616—the highest point on the Holt property on a sort of ridge—are marked on the map, Exhibit C.) There are some very deep ravines in the cane area, cutting the cane lands into sections; for instance, the one marked "Helemano Stream" is a very deep ravine, the contour line somewhat indicating its depth. The cultivated lands are only up to the edges of the ravines and never down into the same. The cane lands are situated in a dry belt, the average being possibly 35 or 40 inches rainfall per annum, including the heavy storms. It is not well distributed. The elevation of the Holt lands at the lowest tip, as indicated on the map, is about 20 feet. Waialua had sugar cane lands completely surrounding the Holt lands except at the upper area where sugar ceased to grow.

The water on the Holt lands came down through the Helemano Gulch, rising on the lands above the Holt lands, namely, the lands owned by the Bishop Estate. There is artesian water in some places in the Holt lands, and in 1916 in one place I put in three wells. Correcting my testimony heretofore given, I would like to state that whereas the first substantial harvest of sugar on the Holt lands was in 1908, in 1907 Waialua harvested 45 acres at the lower end of the Holt lands that I planted in 1905 and irrigated from a ditch which we later aban-

(Testimony of W. W. Goodale.)

doned, namely, the Lower Helemano Ditch. That particular ditch was never used after 1907. In my report as manager for the year ending December 31, 1911, under the title "Helemano Ditch", I reported as follows: "The Helemano and Poamoho ditches, the combined flow being required by one weir has delivered 3,827,865,384 gallons during the year." That was intended to report an annual flow and although I am not quite sure of the weir measurements that is what I thought it was at the time.

The Holt lands lie upon the slopes of the Koolau Range, which is the backbone of that section of the island, and the Koolau being an elevation, back of the Holt lands, of about 2500 feet. (Witness indicates on the map, roughly, the 1000-foot elevation on the Holt lands.)

In 1910 we had a lease with the Bishop Estate under which we paid a minimum rental of $13,500 a year, plus 2½% of the sugar produced from the land. This lease covered between 18,000 and 20,000 acres, of which perhaps 3500 acres were cane land; it also leased a right to the waters of the lands of Kawailoa and the lands above the Holt lands. I would estimate that of this minimum rental of $13,500 about $10,000 should be considered as rental for the forest lands, that is the right to take the waters from those lands. About 40% of the waters went down to Helemano and about 60% to the Kawailoa lands, which were not Holt lands.

(Testimony of W. W. Goodale.)

Cross Examination.

In my direct examination I referred to a $13,500 minimum rental plus 2½%. I did not mean by that that the rental was $13,500 to which we would add 2½% of the products of the land. As an example, assume the $13,500 as the minimum rental. If 2½% of the returns of the land amounted to $17,500 we paid the Bishop Estate $4,000 additional, according to the terms of the lease.

(Counsel for Respondent offered, and there were received, as Respondent's Exhibits 1-A, 1-B, 1-C and 1-D, for identification, the following typewritten copies of purported letters:

1-A: Letter, Dec. 7, 1909, addressed to James L. Holt and signed "Eliza Holt Christian."

1-B: Letter, Dec. 7, 1909, addressed to "Dear Cousin Jimmie" and signed "Eliza."

1-C: Letter, January 29, 1910, addressed to "Dear Jimmie" and signed "Eliza."

1-D: Letter, March 11, 1910, addressed to "Dear Jimmie" and signed "Eliza."

HORACE N. CRABBE

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am 66 years of age. I work for the Territorial Government in charge of its powder magazine on

(Testimony of Horace N. Crabbe.)

Sand Island; I was born in Hawaii, and knew Eliza and her father first at Makaha and later in Honolulu. I also knew Eliza's mother. I first became acquainted with Eliza when she was four or five years of age. Later, when she was seven or eight, I knew her in Honolulu when she began to go to school. She always played with children smaller than herself—kind of an idiot way she was. When I would endeavor to talk to her she would stutter and walk away, although sometimes she would come to me. I would question her upon her return from school as to her alphabet, in answer to which she would begin, "a, b," and would then go off into numbers, "one, two," etc. She could not say her alphabet nor could she count. She could not count to ten. I endeavored to get her many times to say her alphabet, but she could not. This at a time when she was ten or eleven years of age. I never could carry on a rational conversation with her, and could get nothing intelligent out of her. She would walk away from me as I would talk to her. When she was living at Makaha as a small girl I visited the family home three or four times, and on these occasions stayed there sometimes a week, sometimes two weeks. I lost sight of Eliza when she began living with the Kentwells. Her condition, however, as I observed it from the time I first saw her until she went away with the Kentwells, remained the same. When I last saw her she must have been about thirteen because she had gone to school at the Priory with my own daughter. Her condition was one of stupidity—com-

(Testimony of Horace N. Crabbe.)

pared with the statue worshipper the latter was brighter than she.

Cross Examination.

I am not related to any of the Holt family. When I visited at Makaha, Eliza's father and mother and a couple of Hawaiians were there. I could see that Eliza was not all right from the very first occasion that I saw her; that she acted silly. I knew other children, my own included, who were much brighter than Eliza. She could not answer intelligent questions and her actions showed that she was a kind of an idot, though I cannot remember what those actions were. I told her father that she wasn't right. No suggestions were made to me that Eliza did not know her alphabet. She never improved in her condition. She would not play with large girls but always played with tiny ones—this when she was between seven and eight. It was after she was eight, and before eleven, that she was at the Priory. When she was eleven or twelve she could not say her alphabet and confused the same with numbers. She was an idiot and was not permitted to come by herself when she was a large girl.

MRS. MARIE AYLETT

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am a matron at the police station and have been such since 1910. In 1890 I was a teacher and the principal of the Kalihi Valley School for five years. I first knew Eliza in 1886 as a baby in arms, and from the first time I knew her she did not have that normal appearance like other normal children. She was always funny, very silly. She was a feeble-minded child—not normal. When Eliza was about three or four years of age I tried to teach her just a few objects, such as "chair," "table," and I would make a statement for them to repeat. The others would do it but she can't. She would laugh and go out and spin around. She never played with toys or dolls or marbles.

Cross Examination.

A cousin of mine was married to a member of the Holt family, a brother of Mrs. Kentwell. On one occasion I stayed with the Holts for about three weeks and then they had brought Eliza to my home when Eliza was a tiny baby. I then saw Eliza quite often, and from the beginning she was the funniest baby amongst all our babies. She (Eliza) was called "silly baby" while she was a baby in arms. I had always been a teacher to my brother's children and remember definitely attempting to teach Eliza but do not remember when this first started. I would

(Testimony of Mrs. Marie J. Aylett.)

say something but Eliza wouldn't answer. I asked her questions that she did not understand, just what I can't remember, but once in a while I would say something and she wouldn't answer, just run away like the rest of the children. My description of Eliza as a feeble-minded person is based upon my own observations of Eliza's actions.

Re-direct Examination.

I knew Eliza up to the time she was seventeen or eighteen years of age, and I never heard her carry on a real, sensible, rational conversation. She may have before, but not when I was present.

Re-cross Examination.

Eliza would obey a command if someone told her to do something.

DAVID M. KŪPIHEA

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I was a member of the legislature of the Territory of Hawaii and have had musical experience, having been a teacher of the steel guitar many years ago. I am 56 years of age, and knew Albert Christian and Eliza Holt before they were married. She looked lolo and while my friends called her lolo, I knew

(Testimony of David M. Kupihea.)

she was ihepa; "ihepa" translated into English means feeble-minded or something. She seemed kind of interested in music. I tried to teach her to play the guitar but she could never learn to play a tune and she could never understand because I knew very well she was ihepa. The Kentwells always tried to safeguard her from being taken away by someone else, but many times the Kentwells had come to my place looking for her. Albert Christian often stayed at my home. He was a drinker. I do not remember ever hearing Eliza carry on a rational, sensible conversation with anyone. Her laughter was the laughter of a child.

Cross-Examination

My acquaintance with Eliza began in 1898 when she was about fourteen years of age. My efforts to teach her music were on occasions when she and Christian came to my house. She was ihepa not only because her eyes were crossed, but she did not understand what you were talking about. I talked Hawaiian to her and sometimes a little English. Either language made no difference to her. Her father talked to her sometimes in English, sometimes in Hawaiian. I spoke to her in both languages, sometimes broken English, sometimes broken Hawaiian, just to get her to understand. She hummed, but could not sing words, nor could she dance the hula, nor keep time to music,—this when she was sixteen or seventeen years of age.

MRS. HARRY ALLEN

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I was the wife of Chris J. Holt, one of the sons of Owen J. Holt, Sr.; I have known Eliza and her father very well since about 1897, at which time Eliza was about ten years of age. I knew Eliza also when she had her first child while living at the Seas, to which place I frequently went. From the time I first knew the girl she was simple-minded, an idiot, one who had the mind of a three or four year-old child. She (Eliza) was unable to care for her baby, paid no attention to it, and the baby was taken from her by the Seas because she was not able to look after it. I never saw Eliza with any reading matter, and never saw her write or handle anything in writing; I never saw her sew. She had to be reminded to take a bath. She did not know how to take care of herself. The only money I ever saw given her was ten cents or a quarter. She never tried to nurse her baby although she was in good health. After her child was born, most of the time Eliza would be out of the house playing about the place, at which time she associated with little children in preference to adults. I remember Eliza as a mother playing with tiny children.

Cross-Examination.

I have talked with many people who all knew that Eliza was simple-minded. My testimony as to Eliza's inability to care for her child is based on what I had observed. I guess Eliza could dress herself.

ABBIE ZABLAN

was called as a witness for the Petitioner, was sworn, and testified as follows:

Direct Examination.

I knew Eliza at Makaha when I was living at that place with Mrs. Cushingham. I spent my vacations there when Eliza was either five or six years old, at which place I saw her mostly. The Cushingham house was in sight of the Holt house where Eliza lived; the inmates of the homes visited each other and I saw Eliza there on several vacations. Eliza's condition was simple; when one spoke to her she wouldn't talk and nothing could be got from her,—I know this from my own experience and observation. I did not know whether Eliza could read or not, but had heard that Eliza had been at the Priory. It was my impression when I knew Eliza that she had been at school. I do not remember having seen her read or write. When spoken to she would not talk, nor would she play when asked to, but would act silly; sometimes, however, she would play with the dog.

Cross-Examination.

I was born in 1875. When Eliza played she would play alone; she was very simple like,—ihepa;—grinned and ran around without a word; looked ihepa; would grin with a sort of slanting tilt to her head. I never heard her talk. She was not bashful. I do not remember the length of time I knew Eliza. By "ihepa" I mean simple-minded.

HELEN McPHERSON

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I have been a school teacher in the Honolulu schools for fifteen years. I knew Eliza at the Priory when I attended that school. Eliza was about five years older than I, and was then about sixteen or eighteen. I was there with her for a period of less than a year. Ever since I knew Eliza, the latter was very silly. She was spoken of as "lolo," which nowadays would be called "simple-minded"; was always that way, and was never any different. I was not in the same class with Eliza, being ahead of her,—this at a time when I was twelve or thirteen years of age. I observed Eliza about the playground, but not in class. When Eliza was spoken to by the girls at school she looked silly and foolish. Later, when I saw her at the Kentwells, her condition was the same. I saw her at the latter place once a month for two or three years.

I remember Eliza at the Priory at the time she was going to have a child, and remember that Eliza did not know her own condition, and speaking of it, she did not know what was the matter with her. What Eliza had to say was very simple and short. In speaking with her one would have to talk easy.

Cross-Examination.

During the play periods Eliza, when she was not standing off by herself, would play with the younger

(Testimony of Helen McPherson.)

girls. She was in the class with those younger girls. At the Kentwell's Eliza never helped with the dishes but sat around acting foolish and doing whatever she was told to do. The Kentwell children were never left alone with Eliza. John D. Holt looked foolish too, and acted the same way as Eliza.

ELIZA YATES MACKENZIE

was called, out of order, as a witness for Respondent, was sworn, and testified as follows: (this testimony was taken at her bedside in her home.)

Direct Examination.

I was born in Kohala on the Island of Hawaii. I knew Eliza Christian at Waikiki when she was living with Annie Kentwell. Annie Kentwell had at that time two children; one a baby and the other a child walking. I used to visit the Kentwells for a period of three weeks or sometimes four weeks.

I think Eliza Christian was perfectly sane. There was nothing wrong with the girl. She was nurse girl, the woman who cleaned the house, sewed the clothes, and I never saw anything out of the way with her. I used to sit on the veranda and talk with her nearly all morning sometimes, and she seemed to me perfectly rational. It was just general conversation. I do not know whether she could read but I know that she could sing Hawaiian songs. She had a little instrument and would strum on it on the

(Testimony of Eliza Yates Mackenzie.)

veranda and sing. I remember one song which is one of the older Hawaiian songs, namely, "Like no a Like." I don't recall seeing her with any magazines or newspapers. She would clean the house, cook, wash, iron and take care of the children. I saw her myself in the kitchen cooking and what she cooked was very good. She always ate in the kitchen with her father, old John Holt, and the rest of us used to sit in the dining room and eat. She would wait on the table. If the Kentwells were away the children would be left with Eliza. She used to go in swimming and would ask Mrs. Cassidy if she could go on the pier. I would go along and watch her. The Cassidy place was next to the Kentwells at Kalia Road at Waikiki.

Cross Examination.

My recollection of Eliza Christian is vivid. I can remember her singing songs but I could not rehearse any conversation. I have no recollection of her reading. I do remember the one particular song because she taught me three or four verses. I remember the Kentwells going away. I myself was living in Kohala and would come down to Honolulu. I saw them, as I remember, in 1904 and 1905. Annie was the one in Honolulu I saw particularly. She was a schoolmate of ours at the Priory. She was not in our grade but I remember Annie there. I don't want to tell you how old I am because you will say my brain is gone. I am seventy-two years of age. This

(Testimony of Eliza Yates Mackenzie.)

is going to be published in the paper and I don't want it published there. So far as Eliza Christian was concerned, I never thought there was anything out of the way with the girl; I would say she was only a drudge and kept a drudge by the Kentwells. They did not have any servants, only Eliza to assist. When Eliza wanted to go down town she would ask Annie Kentwell for money. She would make purchases for herself and the family, I suppose, though I never kept tab on her. She was a good sewer, making all her clothes and the clothes for the oldest little girl. She could crochet beautifully, such as lace for petticoats and different things such as underwear. She had a very sweet voice and could carry a tune well.

I did not know that Eliza had ever had a baby nor did I know that she was married. She was always called Eliza Holt. I know that Annie Kentwell wanted her to marry George Kentwell and she didn't do it. At one time Annie Kentwell took Eliza into her bedroom and whipped her with a rawhide because she refused to marry George. Eliza came to me and said, "Look here, Mrs. Mackenzie, I am going to run away," but Annie Kentwell watched her so closely she never had a chance.

My recollection is that I visited the Kentwells twice: one month in one year and in another year for two weeks. I did not tell counsel for Petitioner that Eliza Holt used to sit and read to me by the

(Testimony of Eliza Yates Mackenzie.)

hour, and if he says I did I will tell him he is a liar.

I am tired now and can't tell you any more. My doctor is Dr. Judd.

JAMES L. HOLT

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am the James L. Holt named as one of the respondents to this action. I am the son of James R. Holt and a first cousin of Eliza Christian. I am 57 years old. I first knew Eliza Christian at Makaha when I went there on a school vacation and she was about two years old. I saw her mostly here in town when she was seven or eight years old living with my aunt. John D. Holt and Eliza lived at my home for a few months during the period between 1897 and 1898. I knew Eliza when she went to the coast with Annie Kentwell in 1900, when she came back, and until she left here. I know of my own knowledge that she was an imbecile from infancy, from the womb. When you say to her, "How are you Eliza?" she merely giggled and would give no rational response to questions put to her. I never saw her read. I do not believe she could write intelligently. She played with younger children. I didn't notice any change up to the time she left.

(Testimony of James L. Holt.)

I first undertook the purchase of the Eliza Christian interest in the Holt lands in 1909, I think, about the time of my letter to W. R. Castle (Ex. D-2) of September 27, 1909. My negotiations were mostly with W. R. Castle. (Witness here identified Exhibit D-5 as a copy of a letter he sent to L. K. Kentwell, and Exhibit D-6 and Exhibit D-8 as copies of letters he received from Kentwell.) I think I learned in Honolulu, before the receipt of letter Exhibit D-8, that Mr. McCandless was negotiating for the purchase of the Eliza Christian interest. This was discussed by me with Mr. Castle and Mr. Colburn.

The letters introduced in evidence and the cables which were sent to Kentwell were sent after a conference with Mr. Castle or Colburn. In the first place I was anxious to sell my own interest, and when I heard about the McCandless deal, trying to buy Eliza's interests, I went to Castle and told him the circumstances. As to what Mr. Castle said to me in this connection, after I laid the proposition before them he told me to go ahead and negotiate with the parties in England, Kentwell and Annie Kentwell. My communications were addressed to Lawrence K. Kentwell and he was the only one I dealt with. The various messages sent out from the office of Castle & Withington to Mr. Withington on the mainland I know went back and forth, but I had no connection with them and I did not personally send any messages to Mr. Withington. They were

(Testimony of James L. Holt.)

messages from Castle & Withington. Referring to the unsigned copy of a letter dated April 28, 1910 (Ex. D-26) to McCandless, I believe such a letter was sent after conference with Colburn and Castle at Castle's office.

(Witness was thereupon shown by counsel for Petitioner an unsigned draft of agreement dated April 15, 1910, between himself, John F. Colburn and William R. Castle, Trustee, regarding the sale of a two-thirds undivided interest in the Holt lands for $120,000. The record shows, in connection therewith, that a subpoena duces tecum had been, prior to the trial of the cause, served upon Mr. W. R. Castle, calling upon him to produce all documents, cables, letters and the like in connection with the transaction, but that Mr. Castle was unable to appear because of physical disability. At a prior stage of the trial counsel for Petitioner made demand upon Respondent for the production of the original of such document. Counsel for Respondent at that time replied thereto that he had made search through the files for such document, but no such document could be found; that the only document Respondent had was a copy of a purported draft of such document recently handed to counsel for Respondent by counsel for Petitioner.)

WITNESS RESUMES: I got this document from the office of Castle & Withington.

(Testimony of James L. Holt.)

"The COURT: The court would like to ask a question. Do you mean this document which you are now being shown was executed?

A. After it was corrected. This was a draft.

The COURT: This particular paper was signed and executed or some other paper?

A. Some other paper. This is a draft.

The COURT: And this document you have been shown, as I gather, is supposed to be a draft of some ultimate document that was executed?

A. Yes, sir.

The COURT: This itself was not the final document?

A. No, sir, because of some corrections noted in this copy.

The COURT: I gather from what you say that there was a final writing growing out of this and other papers that was executed?

A. Yes.

The COURT: Did you get a copy?

A. I haven't got it now. I don't know whether I got it at the time or——

The COURT: Was there more than one copy signed?

A. I think three, one to Colburn and one to me and one to Mr. Castle.

The COURT: This paper was some preliminary phase of it?

A. Yes."

(Testimony of James L. Holt.)

WITNESS RESUMES: I remember signing such a document. Mr. Castle signed it and John F. Colburn signed the final document. The substance of the agreement we signed was that the Waialua Agricultural Company was to pay $120,000 for a two-thirds interest in the Holt lands, and out of that payments were to be made to Eliza Christian and Kentwell and deducted, including Mr. Withington's trip to England. The money was to be supplied by Waialua. Colburn and I were to get the balance after the payments made to Mrs. Christian for her interest and the Kentwells for their interest. The agreement provided that I should undertake to proceed without delay to do everything I could to secure the Christian interest.

(Petitioner's Exhibit D-36 was received in evidence without objection, the same being a notification to Waialua and W. R. Castle, dated April 21, 1910, and signed by witness James L. Holt, that the agreement dated April 15, 1910 was signed by witness on condition that John F. Colburn would also sign, and is set forth in full in the foregoing D series of exhibits.)

WITNESS RESUMES: The copy I signed and Mr. Castle signed was identical, the same wording as here, with the exception of an additional correction in Mr. Castle's own handwriting and the last clause of which was struck out.

(Petitioner's Exhibit D-37, being such unsigned draft of April 15, 1910, was introduced and re-

(Testimony of James L. Holt.)

ceived in evidence over objection, and appears in full in the foregoing D series of exhibits.)

WITNESS RESUMES: I knew of Eliza's imbecile condition at the time of these negotiations. I don't remember whether it was discussed with Mr. Castle and Mr. Colburn. I knew that Annie Kentwell had been appointed as Eliza's guardian, but I didn't know for what, for her person or her property. I realized myself roughly $60,000 out of this transaction, less the mortgage to Castle & Cooke.

I was tax assessor for the First Taxation Division in Hawaii from 1906 to 1908 and had been in the tax assessor's office from 1896. In the course of my duties I placed values on real estate on the island of Oahu. Returns for lands and tax assessments were made through my office. I believe the value of my interest sold in 1910 was $250,000 to $300,000. After I left the tax office in 1908 I was in business in the Office Supply Company with Charles Marques. I was indicted for embezzlement in 1910 by the Territorial jury. I had no money at the time, was having trouble with my trustee, and engaged attorneys to represent me in court. I got word from Mr. Seal of Kau to the effect that the deputy to whom I had entrusted this fund was a crook from Los Angeles and if I were to go to Los Angeles I could unearth his record. After this information was secured by me the whole thing was dropped, but Waialua having a long lease of the Holt lands

(Testimony of James L. Holt.)

and I having no money and being in need of funds, I sold out for that price.

(Witness was shown, by counsel for Petitioner, certain letters marked 1-A, 1-B, 1-C, and 1-D for identification by Respondent, the same being typewritten copies of purported letters of Eliza Christian to James L. Holt, dated respectively December 7, 1909, December 7, 1909, January 29, 1910, and March 11, 1910.)

WITNESS RESUMES: I believe I received the letters of December 7, 1909. I wouldn't swear that she wrote the letter (Ex. 1-B for identification) herself. My answer would be the same as to the other two. I cannot identify Exhibits 1-A, 1-B, 1-C and 1-D as actual copies of any letters received by me. I paid no particular attention to letters of this kind. I knew of my own personal knowledge that Eliza was incapable of composing such a letter. I always turned over to Castle & Withington different letters or cablegrams I got in this transaction. Whether these letters were in longhand, or typewriting with only the signature in writing, I couldn't say, eighteen years ago; I couldn't say. About three weeks ago Mr. Chillingworth offered me $500 to make some affidavits that they were correct copies, but I refused because I couldn't identify them as copies of the originals. I have never been able to find the originals of such letters.

At the time I signed the deed conveying the properties to Mr. Castle, Trustee, I had never seen

(Testimony of James L. Holt.)

the deed of May 2, 1910. I first learned of the contents of that deed in August or September 1910 after my return from Los Angeles, and so far as the actual deed itself—the original deed being Exhibit A-21—I have never seen it until the present moment. The agreement of April 15, 1910 (Ex. D-37) was signed the last part of April 1910, I think, and to the best of my recollection it was signed before May 2, 1910.

Cross Examination.

My first business transaction with W. R. Castle was in 1893 when I borrowed $2500 on my interest in the Holt lands at Waialua. It was later that this amount was increased to $12,500 in December 14, 1897 (Ex. 2-A). I had a brother who shared equally with me under my father's expectancy under the will of R. W. Holt. I purchased his interest on May 18, 1893, by written instrument (Ex. 2-B). I frequently sent my brother foodstuffs, clothing and money. I purchased the life interest of my father in the R. W. Holt estate under two written instruments dated March 16, 1901 (Exs. 2-C and 2-D). Under this latter agreement (Ex. 2-D) I was to receive 50% of the estate income, which went to my personal use. I was to give my father a house to live in and pay the taxes and water rates on the premises. I also purchased the life interest of my uncle John D. Holt on July 1, 1902 (Ex. A-17) and by agreement of the same

(Testimony of James L. Holt.)

date (Ex. 2-E) was obligated to pay him a minimum of $25 per week for life. My understanding was that I was obliged to pay the same amount to Eliza Christian after the death of John Holt, until their heirship was proved in court. When I had procured these interests I entered into an agreement with John F. Colburn to assume these obligations under the trust deed of July 1, 1902 (Ex. A-18). Colburn then tried to sell the Holt lands at Waialua, I think going to court and claiming a fee simple title.

The sale of these Holt lands was especially contemplated by the Trust Agreement of July 1, 1902 (Ex. A-18). After Colburn was not able to sell the lands we modified the trust agreement referred to. This was after the court decision, and the trust agreement was modified by agreement of March 4, 1905 (Ex. 2-F). We were contemplating at that time leasing my portion and the portion acquired by Mr. Colburn under the deed of trust to Waialua. This was done on March 17, 1905 (Ex. A-8), right after the modification agreement of March 4, 1905.

I don't remember any efforts to sell the property covered by the deed of trust until 1909. I knew at the time (March 31, 1909, Ex. D-3) that Mr. Colburn offered to sell the property to Waialua.

At that time I was trying to acquire the Eliza Christian interest for myself, and I wrote a letter to Mr. Castle to that effect, trying to help raise

(Testimony of James L. Holt.)

some money. I tried to acquire her interest for myself from that time on until the final consummation of the deed to the Waialua Agricultural Company. My interest in acquiring the one-third belonging to my cousin Eliza Christian was the fact that I wanted control of it without somebody from the outside getting hold of it. Around the latter part of 1909 Mr. Castle told me he did not want to buy my one-third, but that he wanted to buy a two-thirds interest, as I remember.

I knew from my correspondence with Mr. Kentwell that as far back as 1908 they were trying to dispose of the Eliza Christian interest, always writing back here to see what they could get. I think I made a sort of tentative offer at that time of $45,000. The offer fell through because it was predicated on getting the title straightened out in court.

In the early part of 1910, February I think, when I got definite news of McCandless negotiating for the purchase of the Christian interest, I believe I received an offer from Kentwell on the basis of $30,000 for the Eliza Christian interest and $5,000 additional as evidenced by letter of March 8, 1910 (Ex. D-6). Whatever was paid for the Eliza Christian interest came out of the total $120,000 purchase price. In regard to the $5,000, I think before the Kentwells went to England in 1906 Annie Kentwell secured a document from John D. Holt assigning his monthly allowance to Annie Kentwell, and

(Testimony of James L. Holt.)

on the strength of that instrument Annie Kentwell claimed she was entitled to some consideration in the deed, but I don't know. Mr. Withington fixed it over there. He fixed the $5,000 to Mrs. Kentwell later. The $5,000 which was paid for that interest was the interest which I was obligated to pay weekly to Mr. John Dominis Holt under my agreement.

I think I showed Mr. Castle the letter to the effect that they wanted $5,000 more and there was no scribble about it. I think Mr. Withington was authorized to go as high as $40,000. I think the $5,000 was not only for my release but there was still the obligation of John D. Holt for the portion of the Holt Estate property in the hands of the Hawaiian Trust.

Annie Kentwell did convey whatever interest she had in the real estate under the deed of May 2, 1910.

(Witness was thereupon shown a document dated August 31, 1906, Exhibit 2-G herein, being an assignment of rents, Eliza R. P. Christian to Annie Kentwell.)

WITNESS RESUMES: I have never seen that instrument before. Formerly my uncle was drawing from me, or through my trustee $150 per month, and naturally if the lands were sold to the Waialua Agricultural Company, that income stops, and naturally I asked him that that allowance be reduced from $150 a month which we agreed later to be $50 a month. I think I did write a letter to Kentwell saying that if they sold out on the agreed basis

(Testimony of James L. Holt.)

they would be out of it "holus bolus" and I would expect to be in effect released. The instrument of May 2, 1910 is a release of all the right, title and/or interest of Eliza Christian to me, including any claim she had against my trustee, John F. Colburn, or myself.

After the conveyance of May 2, 1910, Mr. Withington came back with the deed as far as San Francisco, and Albert Christian executed it there. Then, later on in May 1910, we conveyed our two-thirds interest over to W. R. Castle, Trustee.

I would not say, under oath, that I did not write Mrs. Christian letters. Referring to the letters purporting to be copies of letters signed by Mrs. Christian, I may have received such letters. I would not swear to it. The letters are prima facie evidence to the fact that Mr. Kentwell and Mrs. Christian were talking over the subject of the Waialua sale.

(Witness was shown a memorandum dated April 28, 1919, later received in evidence as Exhibit 2-H.)

WITNESS RESUMES: It may be possible that I did receive a couple of letters from her. I dispute the fact that I made direct remittances to Mrs. Christian. The memorandum you showed me is in my handwriting.

(Respondent's Exhibit 2-H, being the memorandum testified to, was received in evidence without objection, and reads as follows:

(Testimony of James L. Holt.)

"Apr. 28/19 Remitted $200—

February remittance to Mrs. Eliza Christian direct—cannot locate her letter. Hereafter any funds on hand from income will be remitted direct by us.")

WITNESS RESUMES: By this memorandum I meant the Hawaiian Trust Company should remit directly to my cousin. This memo was part of a letter to Kentwell notifying them that the matter had been turned over to the Hawaiian Trust Company and to deal direct with my uncle.

I remember receiving a letter from a nurse telling me about Eliza's condition after her last baby. This was in 1916 and the nurse had written me that my cousin was in very distressed circumstances and neglected by the Kentwells. She had been put out by the Kentwells and was in need of clothes and other things. I think that is the time I sent money to Mrs. Christian in charge of this home and this nurse.

As to Eliza's mental condition being discussed with people I was doing business with, I don't think the question came up in one way or another. I always knew that Mrs. Kentwell was acting as her guardian appointed by the court.

(Respondent's Exhibit 2-L, being the account taken from the books of Castle & Cooke, Agents for Waialua Agricultural Company, Limited, in relation to the purchase of the two-thirds interest

(Testimony of James L. Holt.)

in the Holt lands, was received in evidence without objection, and reads as follows:

Honolulu, Hawaii, Oct. 23, 1911.

MR. R. W. CASTLE, Trustee.

IN ACCOUNT WITH CASTLE & COOKE, LIMITED.

Date 1910		Items	Amount
May 6	To Cash paid J. F. Colburn		1,000.00
" "	Welch & Company, N. Y. a/c cash under L/C to D. L. Withington £85.0.0		419.59
11 "	Welch & Company, N. Y. a/c cash under L/C to D. L. Withington £7225.0.0		35,637.94
14 "	Welch & Co., N. Y. a/c cash under L/C to D. L. Withington £73.1.9		
31 "	Stamps on Deed James L. Holt to W. R. Castle, Tr.	600.00	
	Stamps on deed Kentwell et al to J. L. Holt	140.00	
	Cash to J. F. Colburn and Jas. L. Holt	60,000.00	61,140.00
June 2 "	Recording Fee Holt deed		6.00
5/16 "	Welch & Co., S. F. a/c cash under L/C to J. F. Colburn		100.00
5/17 "	Welch & Co., S. F. a/c s/dft. favor W. H. Chickering a/c L/C of J. F. Colburn		2,130.00
5/19 "	Welch & Co., a/c cash under L. C. Colburn		100.00
" "	Welch & Co., a/c cash to Roos Bros. a/c L/c of J. F. Colburn		44.60
5/21 "	Welch & Co., S. F. a/c s/dft. favor 1st Nat. Bank a/c L/C of J. F. Colburn	802.20	

(Testimony of James L. Holt.)

Date 1910		Items	Amount
" "	Welch & Co., S. F. a/c cash under L/C to J. F. Colburn	50.00	852.20
5/23 "	Welch & Co., S. F. a/c cash under L/C to J. F. Colburn	611.15	
" "	Welch & Co., S. F. a/c cash to Hotel Stewart a/c L/C J. F. Colburn	102.05	773.20
5/31 "	Principal and Interest on following Notes to May 31/10, said Notes being turned over in part payment for land purchased as of said date: Balance Note John F. Colburn, Tr., and Jas. L. Holt dated May 21/08	9,336.42	
	Amount Note John F. Colburn Tr., and Jas. L. Holt dated March 29/10	2,000.00	
	Interest on $9336.42 from April 1/10 to May 31/10 at 8%, 60 days	124.49	
	Interest on $2000.00 from March 28/10 to May 31/10 at 8%, 2 mos. 3 days	28.00	11,488.91
21 To	Cash a/c Jas. L. Holt to cover balance for advances cables, etc. re Holt Est. purchase Waialua	1,144.00	
" "	Cash to Jas. L. Holt a/c self for Holt Est. purchase at Waialua	5,000.00	6,144.00
30 "	Recording Fee Warranty Deed E. H. Kentwell and J. D. Holt et al to Jas. L. Holt	7.50	
" "	Salary paid Albert Christian by E. P. Co. during his absence from the plantation May 1, to June 15/10 inclusive a/c Holt purchase	90.00	97.50
Sept. 7/29	Welch Co. a/c cash to Jas. L. Holt		500.00
30 To	Castle & Withington for cablegrams a/c J. L. Holt		11.55
Dec. 31 "	Castle & Withington for clerical & guide services rendered Mr. Withington in London		14.50
			$120,820.03)

(Testimony of James L. Holt.)

WITNESS RESUMES: The instrument in evidence as Exhibit D-37 is not the modified agreement as signed. I probably had a copy but it is so long ago I must have destroyed it. We moved several times. I know I made a search for it and couldn't find it. The modified agreement was signed about April 29th or 30th in Castle's office. Colburn objected to the warranty clause.

(Witness thereupon was shown a letter dated April 21, 1910, and identified the signature of John F. Colburn, which was received in evidence without objection, as Respondent's Exhibit 2-M, and reads as follows:

Honolulu, April 21, 1910.

To the Waialua Agricultural Co., Ltd.,
W. R. Castle, Trustee,
And Whom it May Concern.

Dear Sirs:

Referring to an agreement dated the 15th day of April, A. D. 1910, assuming to bind myself and one, James Lawrence Holt, to the sale of certain lands and interests at Waialua to the Waialua Agricultural Company, Limited, or its order, I beg leave to say that I have looked over said agreement and being dissatisfied as to the form of same in a number of particulars, I have decided to refuse and hereby refuse to sign the same.

Yours very truly,
(s) JOHN F. COLBURN.

(Testimony of James L. Holt.)

Witness thereupon was shown a letter dated June 10, 1910, identified the signature of John D. Holt, and as to the signature "Eliza R. P. Christian" stated "It looks like hers," whereupon the letter was received in evidence without objection as Respondent's Exhibit 2-N, reading as follows:

159 Woodstock Road,
Oxford, June 10/10

To the Honorable Judge W. J. Robinson,
Honolulu, H. I.

Dear Sir:

We, the undersigned beneficiaries under the Will of R. W. Holt, deceased, do hereby respectfully request your Honor to appoint James Lawrence Holt, Esquire, of Honolulu, to be Trustee or Administrator of the said Estate, in place of John F. Colburn, Esq. Given under our hands and seals on this 10th day of June, A. D. 1910.

(s) JOHN D. HOLT (x)
" ELIZA R. P. CHRISTIAN (x)
" ANNIE H. KENTWELL (x)
" LAWRENCE K. KENTWELL (x))

WITNESS RESUMES: I testified yesterday that I knew Mrs. Christian was an imbecile from birth, or words to that effect. This is the first time I have been called to testify under oath as to her imbecility. My cousin, Mrs. Christian, did marry

(Testimony of James L. Holt.)

and there was an annulment proceeding brought in respect of that marriage. I think I testified at that trial. I don't know whether I testified that Eliza was a bright girl, or words to that effect. I will not testify now nor swear now that I didn't so testify at that trial.

Although it is true that I testified for the defense in the annulment proceedings brought on behalf of Eliza Christian against Albert Christian, I can't positively state what I did say at those proceedings.

Re-direct Examination.

I never, to the best of my recollection, have sat down and written a letter to Eliza Christian herself in which I discussed with her any matter of business or made any offer relative to her property.

"Q. And am I correct in saying on cross-examination your testimony was to the effect that in remitting direct to her meant remitting direct to this home where she was in London?

A. That was a memorandum I gave to the Hawaiian Trust Company to send $200 to help out Eliza's pilikia."

("Pilikia" is a Hawaiian word meaning "trouble.")

(On questions by the court, the following proceedings took place:

"The COURT: Before you go on with your direct I want to clear up a thing—just what

(Testimony of James L. Holt.)

you want to testify to as a fact, whether or not you did or do you remember receiving letters purporting to be letters from Eliza direct or whether you never did receive letters purporting to be letters from Eliza direct, in and about the years 1909 and 1910?

A. I said I probably did receive one or two letters from Eliza, but as to counsel's wanting to pin me down as to whether those were identical letters, I would not swear to it.

The COURT: I am not talking about any particular letters that are here, but I want to know what your statement is as to whether there were letters that came to you during that period purporting to come from Eliza, or whether or not there were any such letters?

A. I think there were one or two.

The COURT: There were some letters, whether copies exist today or not is not my question—there were letters purporting to come from her direct to you?

A. I believe so."

The court, in referring to Exhibit D-37, said:

"I understand from this witness, both on direct examination and cross-examination, and that he is now testifying, that the draft in evidence was the first negotiated document not signed, and a document based on that was signed by himself and Mr. Castle and a revision insisted upon by Mr. Colburn was finally executed by all three parties.")

MARIE L. SEA

was called as a witness for Petitioner, was sworn and testified as follows:

Direct Examination.

I did not know Eliza Christian very well until she came to my home out on Piikoi Street about six weeks after her baby was born. Thereafter she lived with me for six or seven months. She left me to get married.

(Petitioner's Exhibit E was received in evidence without objection. Such exhibit was an agreement of adoption dated June 12, 1902, between George C. Sea and Maria Louisa Sea, his wife, parties of the first part, and John D. Holt, Sr., and Eliza Holt, a minor, parties of the second part, by which the Seas adopted the child of Eliza Holt. The agreement sets forth the consent of Eliza Holt and the consent of John D. Holt, Sr., her father. The agreement is signed by all of the named parties, including Eliza Holt, and is executed before the Honorable W. J. Robinson, Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii, and such agreement was thereafter duly recorded.)

WITNESS RESUMES: Eliza was about 16 years old when she came to my place. She could not care for the child unless someone told her what to do. She did not know when to feed it when the child needed feeding; how to change it. I looked after that. She was very helpless. Sometimes she would have her clothes inside out and the buttons

(Testimony of Marie L. Sea.)

inside. She would wear them that way unless I noticed it. She was an imbecile, to my way of thinking,—lolo. She was very quiet; not communicative. I used to hear Eliza talking to her father and I remember that she asked her father for a pair of shoes for the baby. The baby must have been only three months old at this time. Her father told her the child was too small and for her to wait. Another time she asked her father for a locket and the father said the child was only a baby and not old enough to have anything like that. I talked to her sometimes and she would answer, you know, like, using that. (Witness indicated by squirming her face around.)

Before we went to court, when the baby was adopted, Eliza wanted to give me the child. The judge told Eliza that she was giving her baby to me and that it wasn't hers any more. He explained the thing to Eliza. She did not read over the paper and I have never heard her read anything.

Cross Examination.

Eliza would dress herself but would sometimes make a mistake. I have never seen her write except when she wrote on the deed of adoption. Eliza did not read it. She could not read. She never read. It was Mr. Holt who read the deed. When she asked her father to buy a pair of shoes for the baby she asked that in English. The only Hawaiian word I ever heard her say was "mopuna." She said,

(Testimony of Marie L. Sea.)

"You buy this for the mopuna," (referring to the baby.) Eliza was fond of her baby but it seemed to me that it was indifferent whether she had any love for it. She came to our house again after the baby died and did not show emotion, no tears being shed. It was then twenty-two months old. I heard her tell her father that she wanted a chain for the baby and that she wanted it to be a gold chain. Eliza was willing to help in the household work but you had to go over her work for she did it her own way. I never saw her sew. She wore glasses and there was something wrong with one of her eyes. When she was living with me she was very quiet and obedient; whatever I told her to do she would do. I have never seen Eliza in any temper. She seemed happy with her baby.

"Q. You do not feel that Eliza Holt was feeble-minded, do you?

A. She was one that needed protection."

Eliza was very devoted to her father and he to her. Eliza used to speak about the different island girls she knew in school, and spoke very well of Princess Kawananakoa, saying that the Princess was very nice to her. At one time Mr. Kentwell gave her some money. She did not mention the amount of money but said that Mr. Kentwell had given it to her for the baby. There were no children at our place. Sometimes the neighbors' children would come over. She would rather play with them

(Testimony of Marie L. Sea.)

than with older children. There were no older children for her to play with at the time.

Re-direct Examination.

Eliza used to see Princess Kawananakoa come over to my neighbor's house. Eliza would then say to me, "Oh, here is Princess Abbie! She was very nice to me in San Jose." Eliza's baby was very bright; more bright than her mother.

MRS. MARY PADAKIN

was called as a witness for Petitioner, was sworn, and testified through the Hawaiian interpreter, as follows:

Direct Examination.

I am seventy-four years of age, and knew Eliza in Honolulu when she was a large girl living with her father. I would sometimes meet her on the road, but lost sight of her when she went away with Mrs. Kentwell. I had heard of Albert Christian but did not personally know him. When I would meet Eliza in company with her father or Mrs. Kentwell or Mrs. Sea on the street, I would say in Hawaiian, "How are you?" whereupon Eliza would squirm her face and smile, which is all that I would observe; I tried to talk to Eliza, but there was no speech; she could not talk; she was what white people called "silly,"—in Hawaiian "ihepa"; I did not speak English but tried to speak to Eliza in Hawaiian.

(Testimony of Mrs. Mary Padakin.)

Cross Examination.

Eliza was older than fourteen at the time. I knew Eliza and she always made the gestures referred to when she was spoken to. By "ihepa" I mean not only the gesture described but in addition Eliza was unable to speak. While she might have been able to speak on other occasions, she did not on the occasions when I met her.

MRS. A. S. RIIS

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I was born and raised in Honolulu. I knew Eliza Holt very well from a child, knowing her in Honolulu. I knew old John D. Holt, Hanakalani Holt and other members of the family, and often called at the Holt home in Honolulu. After Eliza with her family had moved to another locality, I would meet her once in a while on the stret with her father or Mrs. Kentwell. From what I observed of Eliza Holt I would describe her as being "ihepa," simple-minded like, (witness squirming her face to illustrate her testimony). When I would speak to Eliza, asking her how she was, I would obtain no response.

Cross Examination.

I tried to talk to Eliza more than once, and Eliza

CLERK'S COPY

Vol. III

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 15

WAIALUA AGRICULTURAL COMPANY, LIMITED,
PETITIONER,

vs.

ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON, BY HERMAN V. VON HOLT, HER GUARDIAN, ET AL.

No. 17

ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON, BY HERMAN V. VON HOLT, HER GUARDIAN,
PETITIONER,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FOR CERTIORARI FILED { MARCH 30, 1938.
MARCH 31, 1938.

CERTIORARI GRANTED MAY 2, 1938.

No. 8329.

United States

Circuit Court of Appeals

For the Ninth Circuit.

ELIZA R. P. CHRISTIAN, an incompetent person by HERMAN V. VON HOLT, her guardian,

Appellant,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation, JAMES L. HOLT, and ANNIE HOLT KENTWELL,

Appellees.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation,

Cross-Appellant,

vs.

ELIZA R. P. CHRISTIAN, an Incompetent person, by HERMAN V. VON HOLT, her guardian, JAMES L. HOLT and ANNIE HOLT KENTWELL,

Cross-Apellees.

Transcript of Record

In Three Volumes

VOLUME III

Pages 1033 to 1581.

Upon Appeal and Cross-Appeal From the Supreme Court of the Territory of Hawaii.

Parker Printing Company, 545 Sansome Street, San Francisco

(Testimony of Mrs. A. S. Riis.)

would never answer when spoken to, but would only shake her head. I never saw anyone else try to speak to her, and when I first knew her she was a small child.

GEORGE A. MACKENZIE

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am the husband of Mrs. Eliza Mackenzie. I have lived in the Territory for a great many years. I knew Eliza Holt when she was Eliza Christian and living at Waikiki with the Kentwells. I would visit there perhaps two or three times a month on social calls and to have a drink with John D. Holt. I observed Eliza about the place but no one paid any attention to her. S was merely a member of the family and was the sort of person no one paid any attention to. She was not able to carry on a rational conversation. There were two ways of describing her: one "lolo" and one "ihepa," and I myself would call her "ihepa," meaning one having no control, no idea, one whose receptive powers were very limited. She was a grown girl at the time I knew her and could take care of herself, although I never saw her undress or anything like that.

(Testimony of George A. Mackenzie.)

Cross Examination.

The time referred to would be a period of nearly two years,—part of 1905, 1906, and perhaps a little of 1907. We often had meals at the Kentwell home. My wife was very friendly with the Kentwells. Eliza's father sometimes talked to her in English and sometimes in Hawaiian, and she would answer as the case might be. I paid no attention to any conversations between her, her father, or the Kentwells.

Re-direct Examination.

Old John D. Holt drank quite a bit. His allowance was a "Squareface" a day. I sometimes saw Eliza take some of the table stuff off of the table and Mrs. Kentwell doing the same thing.

MRS. HELEN CUSHINGHAM

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am the widow of James R. Holt, Jr., son of Owen J. Holt, having been married to him in 1886. After my marriage I went to Makaha to live and stayed there for some thirteen years. At this time John D. Holt was likewise living at Makaha with his daughters Eliza and his wife Kaahanui. When I first went there Eliza was but an infant. Our homes were then a short distance from each other.

(Testimony of Mrs. Helen Cushingham.)

Eliza was probably four or five years of age when she stopped living at Makaha and came to Honolulu. Relations between the families there were very friendly. I had little children of my own, Eliza being two or three years older than my eldest child. No schools were available there except the plantation school, which was about three miles away, so rather than send my children to the public school, I taught them at home about five days a week, Saturdays and Sundays excluded, until they were able to be sent to town to school. Among my pupils was Eliza and also a little girl brought up by Mrs. Cushingham, named Kaleiwaheo, now Mrs. Gomes. After Eliza lost her mother the Holts moved back to Makaha, and when I undertook to teach Eliza she was able to do nothing. Eliza was then about nine years of age. I tried to teach her the alphabet and numbers and found that she was a hopeless case. She was never able to learn her alphabet and was able to learn absolutely nothing about numbers. The few months that Eliza was there were the months I was trying to teach her. I can not state positively how long this was, as I didn't pay much attention or take much interest.

After the family moved back to town I lost sight of them and took more interest in my own children. I had no difficulty in teaching them. So far as Eliza was concerned, her father attended to the details of her physical cleanliness, while I used to sew dresses for her as I did for my own children, knowing that Eliza was motherless. She was not able

(Testimony of Mrs. Helen Cushingham.)

to do any sewing herself, being a very unnatural child. She would not play like the other children, but would roam around by herself. When I endeavored to talk to her, Eliza would give very short answers, such as "yes" or "no", and she was unable to carry on a sensible or rational conversation. After Eliza left Makaha I saw her from time to time in Honolulu, and remembered her at about the time that she had trouble in connection with having an illegitimate child. In all the time I knew her, up until the time that Eliza left Honolulu, there was no change whatever in her condition.

I remember the Hall case, and remember seeing Eliza at about the time of the trial at the police station, having driven down there with my mother-in-law. Mr. Kinney, the lawyer for Eliza, saw me and spoke to me. Eliza came to me and said, "Aunt Helen," to which I replied, "Yes, Eliza"; whereupon she said, "Father say if I be good girl he buy bicycle." She seemed to have no realization at all, or the significance, of what she was doing at the police station.

Eliza could not learn to add or subtract. During all the time I knew Eliza I never heard her carry on a sensible or rational conversation with anyone. From my observation of Eliza during all those years I would describe her condition as that of a simpleton. I am familiar with the Hawaiian word "ihepa," and that is what the Hawaiians would call her. The only way in which she could be induced to do little things was the following: she was very fond of

(Testimony of Mrs. Helen Cushingham.)

sweet corn and would eat it whenever the family had it; if she would refuse to go into a corner and study, I would tell her that she could not have any sweet corn for lunch, whereupon she would put up her arm.

Cross Examination.

I did not take much interest in Eliza after the family moved to Honolulu, but I knew her very well. I have no idea of her age when she came to town, but she might have been around four or five. It might have been a month that I attempted to teach Eliza at Makaha, perhaps more, but I gave her up as a hopeless case. I sold some property to the Waialua Company, and there was ill feeling about it because I was almost forced to do it. When Eliza came to me for the classes she sometimes came with her father, sometimes alone. Eliza did not attend every day, sometimes missing a day or two. I paid little attention to her because I felt that if she came it was all right, I would have her in school, and if she did not come it would be immaterial. I remember distinctly endeavoring to teach her. Eliza did not play with other children nor did she play with little children. I myself attempted to have a rational conversation with Eliza while sitting in her own house, but one could not hold any conversation with her, it being just "yes" or 'no" or other short answers.

JOHN D. HOLT, JR.

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I have been a truant officer in the court of Domestic Relations for a little over ten years. I am a grandson of Owen J. Holt and a cousin of Eliza. In connection with my office of truant officer I have been familiar with work having to do with the examination of persons of feeble mind and with the commitment of such persons to the feeble-minded home, such familiarity having been acquired during the past six or eight years. I think I know the distinction between the words "insane" and "feeble-minded"; I have attended examinations conducted by the authorities in determining the measure of mentality of persons supposed to be feeble-minded, and although I have never attended the meetings, I have read their reports on bringing them back to the office, and am familiar with the general character of the patients so examined from reading the reports. In connection with feeble-mindedness, I have attended some forty meetings conducted by a Dr. Merrill, brought down by social workers in Honolulu, in which lectures were explained the tests for feeble-minded persons and illustrations given by the lecturer for determining the mental age of patients.

I knew Eliza Holt and was born in the same year as she, since childhood knowing also her father, my great-uncle, well. My remembrance of Eliza began

(Testimony of John D. Holt, Jr.)

in 1892 or 1893. As a little girl I saw Eliza at various places in Honolulu and at my grandmother's, at her own place, and at the Kentwell's. I remember her up until the time that she left with the Kentwells for England. From my observation of the girl over the period of years that I knew her, I should say that she was a feeble-minded child, or an imbecile. This description would apply to her when she reached maturity, and on the day that I told her goodbye in 1906 she was no different. I am familiar with the Hawaiian terms "ihepa" and "lolo," and "ihepa" would be the proper word to describe Eliza's condition. In all the time I knew Eliza Holt, I never heard her carry on a sensible and rational conversation with anyone. She could not read a newspaper, nor could she write, though there were newspapers around the house where she was living. (In answer to a question put by the court as to the witness's understanding of the Hawaiian word "ihepa," he replied that it was "feeble-minded," and that this was the only meaning that he had ever heard ascribed to it.)

Cross Examination.

I do not remember what school Eliza was going to when I first knew her but she went to school for one year with my aunts, Elizabeth Holt and Annie Kentwell. I did know that she went to school for about eight months at the Priory and five or six years at the Sacred Hearts School, having learned this from one of the Sisters. I talked to her several

(Testimony of John D. Holt, Jr.)

times when she was with my grandmother. She was then living around, according to my impression, with various relatives. As a cousin, I went out with her. I visited the Kentwell home occasionally when Eliza was there, sometimes having lunch there. I do not remember ever seeing her do any work there; though she was sometimes put to work and told to do it, she would do it very badly in an awkward and sulky way. This was about 1904 and was after her marriage to Christian.

Eliza had one cross eye. I have never heard Hawaiians describe a person with such a physical defect as being "ihepa"; a crossed eye was called by them "makaka." I have seen Eliza pick up a newspaper and look at it, and upon my asking her what she had seen, she would not say; I asked her and she did not know. I would ask her what she was doing, reading, when I saw her try to read, and she would say in a funny way—giggling way—"I don't know." I have attempted to have rational conversations with her, but it was useless. I have never heard her sing or hum, nor known her to go in swimming. It was a hard job to get her to take a bath; my aunt would try, and had to force her. In my opinion Eliza would not be capable of asking her father for a gold chain for her baby. I have never seen her dance or play a musical instrument. I have never told her to do something and observed whether or not she did it.

DAVID KALAUOKALANI

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I was clerk of the City and County of Honolulu for 24 years. I krew Lawrence Kentwell, John D. Holt and his daughter Eliza very well, having first met Eliza when she was living in Honolulu. My acquaintance with her would be between 1904 and 1907, but I was not in very frequent contact with the family. The occasion for my knowing Eliza was when my friend Lawrence Kentwell was wooing Annie Holt. Then I would go down to the house on parties during this period, at which times I would see Eliza quite frequently. From my personal knowledge she was not the equal of others, being "lolo" by nature. I am familiar with the Hawaiian word "ihepa," and would say that that was a fair description of her mental attitude—either that or "lolo," another description of one's mentality. I never succeeded in carrying on a sensible or rational conversation with her. She would hardly answer one's attempt to carry on a conversation but would act in a "sissy" way, hiding her face, for instance, stooping her head down, and would never say one word to a stranger or to those whom she would know. I myself, who was there quite often, would notice her withdrawing from those who were there and not uttering a single word. At this time she was ten, twelve, or thirteen years of age. I would observe her whenever I called of an afternoon, and would see her playing with children smaller and younger than she

(Testimony of David Kalauokalani.)

in the yard. It was apparent to me that she was not one who could easily carry on any conversation, and in all the time that I knew her I never heard her carry on a rational conversation.

Cross Examination.

After a period of twenty or thirty years I do not remember any distinct conversation that I had with Eliza when she was playing with the smaller children. She would stand in the doorway looking at me and looking at my other friends and trying to listen to the conversation. My impression was that she was not of the same mental calibre as other children. Many a time I tried to carry on a conversation with her but she would not respond. She would giggle and laugh and run away. She had a defect in her eyesight, "cast" being probably the right description. I could not term her crazy. The words "ihepa" and "lolo" both convey the same basic interpretation. During the twenty years that Eliza has been away I have never had occasion to discuss with anyone her mental condition, nor have I ever heard it discussed in any way in my presence. Eliza was of a "very bashful nature."

CHRIS J. HOLT

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am a son of Owen J. Holt and a nephew of John Dominis Holt. I knew Eliza Holt when I was

(Testimony of Chris J. Holt.)

a young man at Makaha. In 1900 I sold my one-twenty-sevenths interest in the Holt lands at Waialua to the Waialua Agricultural Company, Limited for $20,000. Aside from my one twenty-seventh interest in these Holt lands, the conveyance also covered in addition about 186 acres of land in the gulch and a little on top of the mountain at Wahiawa. I wouldn't call it good land. There was no apportionment of the consideration as to my interest in the Holt lands and this separate parcel of 186 acres. I knew at that time that the Government was selling better land at Wahiawa at $5.00 an acre, which Government land was better land than this particular 186 acres.

I remember Eliza's birth—at that time I was living in Honolulu—and often went down to Makaha on my vacations. I first remember her as a child. During maybe two vacations I stayed in the same house as my Uncle John with Eliza. Later, on vacations, I stayed with my brother James R.'s family in the same neighborhood. I remember Eliza living at numerous places in Honolulu, including my brother William Holt's at Waikiki, the Kentwells, and the Seas. I visited these places from time to time and remember seeing Eliza there until she finally left Honolulu. During that time when I knew her I would call her imbecile; that is, she was feeble-minded. In town when I knew her one could not get very much conversation with her; I called her and a response would come from her in a childish way.

(Testimony of Chris J. Holt.)

In Honolulu I also observed she could not look out for herself very well. This was called to my attention in numerous ways, my mother frequently telling her to go and take a bath and change her clothes. I observed her condition before she took her bath or changed her clothes, and it was slovenly. I never saw her read, although plenty of papers and reading material was accessible to her. I do not remember whether or not I ever endeavored to find out whether or not she could read. She would not reply to the questions I might put to her; she would not answer simple little questions put to her by me. I do not remember ever seeing her write. When she was a big girl she would prefer to play with children six or seven years old, all younger than she. During the entire time that I knew her, until she was matured and went away, there was no change in her condition, to my knowledge. During that time I never had, or heard anyone else have, a rational and sensible conversation with her.

(In response to a question put by the court, the witness stated that he never tried to write letters to her or to her father after the latter left Honolulu, nor did he ever get what purported to be a letter from Eliza.)

Cross Examination.

I do not profess to remember specific conversations that I had with her in Honolulu after a period of twenty or thirty years, but I have a general impression of how I was impressed by Eliza at the

(Testimony of Chris J. Holt.)

time. I have not heard her discussed in any way since she left here in 1906. I have never heard any discussion as to whether she could read when she was in Honolulu, and the same as to writing. When I went to the Kentwells I never saw Eliza doing any work. I sometimes took meals there. She might have taken dishes from the table but that I do not remember, it being a long time ago. When asking her a question she would give an answer that would not be responsive, and her condition was very apparent, even a stranger being able to observe it if he talked with her.

MRS. ANNIE KEAHIPAKA

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am a sister of Oscar Cox, United States Marshal. I live at Waialua. I knew John Dominis Holt and his daughter Eliza, having got to know Eliza on an occasion when she came to my house in the country with Owen Holt's widow. Eliza was then about sixteen or seventeen years of age and stayed with me about two weeks or a month. In the same party were the two Miss Holts and Mamie Christian—this visit being at a time before Eliza had been married to Christian. I knew Eliza at a later time than this, having seen her sometimes when she came to Honolulu to stay with Mrs. Owen

(Testimony of Mrs. Annie Keahipaka.)

Holt. From my observation of Eliza when she was visiting me, she is what you call a feeble-minded,—we call it "ihepa"; I noticed this condition because if one tried to talk to her she would not answer. I have tried to talk to her and could get no intelligent reply at any time. At eating time she had to be held by the hand and told to come and eat. I have had no occasion to see whether or not Eliza could read or write, nor do I know whether or not Eliza could sing or count. During the time I knew Eliza I saw no change in her condition as described by me. In all the time I knew Eliza I never heard her carry on a sensible or rational conversation with anyone. She did not understand you. I never saw her go down to the water. On one occasion I was sitting on the beach with old Mrs. Holt, and Eliza was sitting off by herself, talking to herself, and I laughed at the way Eliza used her hands, turned to Mrs. Holt and called her attention to the girl, whereupon Mrs. Holt replied, "Eh, ihepa."

Cross Examination.

I do not remember how many times I have seen Eliza. The first time I saw her was when Eliza came to visit me in Waialua, when she was about sixteen or seventeen years old. I remember distinctly trying to talk to Eliza but she never answered, only laughing and turning her head around. I saw Mrs. Kentwell and Eliza speaking together, with their arms around one another; I also saw them going around together that way. I

(Testimony of Mrs. Annie Keahipaka.)

do not remember whether Mrs. Kentwell talked to Eliza in Hawaiian or English. It was perfectly apparent to anyone that she was "ihepa" by looking at her, and this condition continued up until the last time I saw her.

MARY KUPIHEA

was called as a witness by the Petitioner, was sworn, and testified through the Hawaiian interpreter as follows:

Direct Examination.

I knew John D. Holt and his wife Kaahanui, as well as John D. Holt's two former wives, both of whom had died and by whom he had no children. While I was not present at the birth of Eliza, I heard of the birth, was shown the baby, and knew Eliza as a child at Makaha. I lived first with James Holt and later with his brother, Mr. John D. Holt, they being my cousins. When I went to live with Mr. John D. Holt at Makaha, Eliza was six or seven years old,—a big girl. I lived there for one year. I remember Eliza when the latter came into town and was an older girl.

When I or others would speak to Eliza and ask her why she did not get herself fixed up, wash her face, or dress properly, she would giggle and screw up her face. She was ihepa. After Eliza left Makaha I remember her living in Honolulu, at which place I would sometimes come to visit Eliza's aunt, Mrs. Holt. I spoke to Eliza in her home at

(Testimony of Mary Kupihea.)

Makaha in what little English I knew. "Ihepa" means one who is crazy. Eliza could not realize what was being said to her and acted in a foolish fashion. She could not take care of herself, and I used to help her mother wash her feet and clean herself. Sometimes Eliza went out to the cow barn where she tied herself with the tails of the cows. She could not take care of herself and was fond of playing with cats and dogs. I have not seen Eliza since the latter left Hawaii for the States with her father and Kentwell. When I would ask Eliza whether she could not fix herself, comb her hair and the like, she would give indications of not realizing what she was doing. She could not sew, half her dress being torn from her running in the lantana bushes. She could not do the housework, this being done sometimes by myself. I had a child who also lived with the Holts at Makaha. Eliza did not know how to play the guitar or piano, nor did she know how to play the ukulele. When I knew Eliza in Honolulu the latter was practically about the same as she was at Makaha.

Cross Examination.

Eliza, at Makaha, was then big enough to play, and in fact played, with cats, dogs and calves, but did not seem to realize or know what she was doing. I saw her chasing the tail of a cow. I stood by and laughed, but Eliza's mother was afraid Eliza might be poked by the cows and killed, so she was taken to Honolulu. I would speak to her and accuse her of

(Testimony of Mary Kupihea.)

being just like an insane person, whereupon Eliza would laugh and act. I tried to teach her to work but she was so lazy she was helpless, so far as the mother was concerned. She was a real "ihepa," sometimes sitting down and playing with dirt or stone or rock, and when Eliza would be told that was dirty, she would act in a foolish fashion. She was worse than "lolo" because she was altogether different from a person with insanity. A "lolo" person is one who cannot help themselves up from bed—numb. Eliza had crossed eyes.

Re-direct Examination.

"Ihepa" might apply to a person who had crossed eyes as well as one who did not. A person who could not take care of herself was "ihepa", and whether or not one had slanting eyes did not make that word stronger or weaker.

Re-cross Examination.

There are many people with cross eyes who are not "ihepa", though I am not well versed in that. It is not necessarily true that Hawaiians refer to people with cross eyes as being "ihepa."

MAUEL S. DEPONTE

was called as a witnes for Petitioner, was sworn, and testified as follows:

Direct Examination.

I knew Eliza when she was living in Honolulu about 1904 or 1905. She had been married at this

(Testimony of Manuel S. Deponte.)

time a couple of years. She was living with one of the Christians, as was her father. I used to call there very nearly every day, knowing the Christians well. Old Mr. Holt was very fond of drinking gin, and I was accustomed to going to the saloon with John F. Colburn, getting an order from him, and taking home gin to the old man. Eliza lived at the place in question for about a year. I knew her before she got married, when she lived with the Seas. I also knew Kentwell well.

The impression made upon me by Eliza was that she was "lolo". I tried to talk to her a number of times but never got any intelligent response to anything that was said by me. Four or five times I came with her from the Christian place to my house to get Portuguese bread which my mother used to bake. On the way to my home for the purpose indicated, Eliza would walk in a foolish fashion and shake her head, and if I said anything to her she would laugh. I remember addressing remarks to her on a number of occasions and would ask her why she would stand by the gate, waving at persons passing by and laughing at everything she saw; why she would stand on the gate and turn around making all kinds of faces; and the only answer she would give me was to laugh and make silly faces. On the occasions when she came with me from her house to my house to get bread, I recall two or three times she would leave me, go right to the side of the street, and there obey the calls of nature, whereupon I would ask her, "What is the matter with

(Testimony of Manuel S. Deponte.)

you? Why do you do that? Can't you wait until you get home?"—whereupon she would simply laugh, walk away and shake her head.

Eliza had no capacity for handling money, nor did she understand the value of the same. When the Christians would give her money to buy bread they would say, "One loaf," and give her ten cents, or whatever the price might be, and that if it was twenty-five cents for anything she was to get they would tell her to get no more than that. I have never seen her in the act of making any purchase, but I personally saw the family hand her very small pieces of money with the instruction that that was for one particular thing, whereupon she would go over and get it. I never saw her read, I never took a paper and tried to see whether she could read. I had no occasion to see whether or not she could write. I saw her in back with other people around the house and during all the times that I met her I never saw her carry on a real conversation with anyone. The most intelligent response I ever heard her give was "No use," many times. Anything that was said to her would cause her to laugh. During the time that I knew her there was no change in her condition that I noticed. I did not know her when she was pregnant and never saw her in contact with her child. The times referred to when Eliza relieved herself on the street in my presence was in the afternoon, some time after lunch, in the daytime.

(Testimony of Manuel S. Deponte.)

Cross Examination.

I am fifty-one years of age. While I knew Eliza before she got married, I did not know her to talk to—merely knew that she was a Holt. The first time that I had a conversation with her was when she came to live on Punchbowl with the Christians, to which place I used to go nearly every day. I visited in the home with Mr. Christian after she was married, but Christian was not then living with her; she was then getting a divorce. The people living with Christian at that time were old Holt, Mrs. Holt, Mamie Christian and her daughter,—this about 1904 or 1905. I used to do lots of errands for the old man. I then had my own business and did not have to work for anyone. I never saw Eliza go around town alone, as the family would not allow her to do so. I have never seen her go into town. She stayed inside the fence. On the occasions when she would be given a dime to get a loaf of bread she would get the bread and bring it back. While no one was ever with me on the occasion of Eliza relieving herself on the street, there were people on the street.

I have not talked these incidents over with anyone before I took the witness stand. I saw Eliza only once with her husband and I then walked with them up Fort Stret. She would not talk. I do not think I tried to talk to her, but I had tried to talk to her before at Palama. I base my impressions of her condition upon the observations I made of her and from her actions, the actions described by me in

(Testimony of Manuel S. Deponte.)

court, and also I took an interest in her because her father wanted me to marry her. This was when I was getting gin for the old man and when I was about twenty-five years of age.

Re-cross Examination.

The occasion when I saw Eliza at Palama was in 1901 or 1902 when she was living with the Seas. The Seas were living near Palama Settlement in Honolulu when Eliza lived with them, and not on King Street near Piikoi.

MRS. JOHN LOPES

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am the daughter of Mrs. Mary Kupihea. I knew Eliza as a child at Makaha. I was reared by Mrs. Cushingham and remember Mrs. Cushingham teaching the children at Makaha. I was too young to remember much; I do remember her classes but don't remember whether Eliza could do her a, b, c's. From my observation of Eliza and from my memory of her, her condition was "ihepa,"—the English word for that condition being "feeble-minded." I remember Eliza when she was seventeen or eighteen years of age, just prior to the birth of her baby. I called to see Mrs. Holt and old lady Holt, and the girl in her condition I saw climbing over the—

(Testimony of Mrs. John Lopes.)

jumping from the chiffonier to the bed, and the day I was there I said, "Don't do that in the condition you are in," and she only laughed at me and jumped up on the chiffonier, and I said, "In the condition you are in you are not supposed to do that," and she only laughed at me. I never heard Eliza talk to anyone in a sensible or rational manner. The last time I saw her at Waikiki before Eliza went away her condition was the same.

Cross Examination.

I would speak to Eliza in English and Eliza very seldom answered the questions put to her, but just laughed. I only saw Eliza to talk to this one time in town. I never saw her after that. Mrs. Cushingham was a lady who did not want me to associate with the Holts.

R. W. HOLT

a son of Owen Holt, was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am a son of Owen J. Holt, and a brother of Annie Kentwell. I remember my uncle, John D. Holt, and the latter's daughter Eliza, whom I first saw when she was quite young, at Makaha. I then lived at Waialua and would come occasionally to Makaha to visit the family. I also remember Eliza after she had moved

(Testimony of R. W. Holt.)

to Honolulu, at which place they lived in my house at Waikiki for maybe a couple of years. I came there myself occasionally from the country. At this time Eliza was possibly fifteen or sixteen years of age. I do not remember when she was married, and did not attend the rape trial against Hall. I heard about Mrs. Kentwell bringing an action to annul Eliza's marriage to Mr. Christian, but was not present at that either. From my observation of Eliza during the time I knew her, and particularly the time that she was living in my home at Waikiki, I would describe her condition as feeble-minded, "ihepa," "lolo," she having no mind of her own. I tried to talk to her, but she would just look at me and laugh and run away. In all the time I knew her I never heard her carry on a sensible conversation with anyone. She could not cook or help around the house when she was in my home. So far as I knew, she never did any sewing. Someone had to take care of her all the time. In the matter of personal cleanliness she did not care who was around but would go and answer the call of nature any old place, not caring. I have seen this happen on more than one occasion when other people were around. I never heard that she could read and never knew that she could, although she was put in school by my mother. I never tried to find out what she had learned at school because I was down in the country most of the time. I knew nothing of her capacity for handling money, and I do not know whether she could write. During all the time I knew her there was never any change in

(Testimony of R. W. Holt.)

her condition. I never received a letter or writing from her of any kind.

Cross Examination.

The first time that I ever heard any discussion as to whether or not Eliza was mentally incompetent in 1910 was a week ago; I had not heard of it before that time. When I first knew Eliza she was about a year old. On this occasion I went over from Waialua to work on the ranch, and stayed at Makaha six or eight months. I went there again, possibly when she was two years old or a little older. I have no recollection as to how much time I spent in the country when she lived there, and could not tell the year when she left the country and moved to Honolulu, but do know that she came into town. I do not remember any particular conversation I had with her in the country, although I might have said "Hello, Eliza," to which she would remain silent, because that is the way she always acted every time I spoke to her; she would look at me, squint her eye, and run away.

She lived on Fort Street for a few years, after which she went to Waikiki to my own place where both she and her father lived for a couple of years. Her father was very fond of her, but as to whether she was fond of her father I could not say, as she acted peculiarly sometimes. When her father would call her she would run away, the times I was there.

After living at my place, John D. and Eliza went to live at the Richards place. Thereafter I saw her

(Testimony of R. W. Holt.)

at Waikiki, living at a different place, some two or three years before she went away. She did not know whether anything was right or wrong. She did not care. She was always called "lolo" by us, as well as other people, and one could tell by looking at her that she was "lolo"; she did not look like an idiot but she looked feeble-minded.

MRS. J. J. SMIDDY

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

As a girl I was at St. Andrews Priory a portion of the time that Eliza Holt was there. I knew Eliza there and had occasion to observe her among other girls. She was a girl that gave me the impression of being below the normal,—feeble-minded. When I spoke to her she didn't respond at all, just hung her head, or just acted foolish. I know she was not in any particular class, because she never would attend classes very well. She was not a very bright child and I don't think she was ever made to study there, or she could not. I remember that Eliza played a lot with the younger children, children about seven,—five, six, or seven, but do not remember how old Eliza was,—perhaps eight, nine, or ten. If she had any fruits, peanuts or candy, she was very liberal and would share with the other girls.

(Testimony of Mrs. J. J. Smiddy.)

Cross Examination.

I heard her recite at times as I passed through Eliza's rooms while classes were being held. She was standing up trying to say something but she never could, and they really didn't force her. The subject she was attempting to recite I suppose was reading and writing, ordinary class work. I have never seen Eliza sign her name. While I never heard the fact that Eliza was feeble-minded discussed out of the school, in school it was discussed, and I had discussed the matter with Annie Holt (Kentwell).

T. H. PETRIE

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

My name is T. H. Petrie and I am an officer and vice-president and a director of the Waialua Agricultural Company at the present time. I am not sure whether I was an officer and director before 1910 without looking it up, although I was director in 1910 and at the time that this transaction was put through. I was also one of the trustees of the Helemano Trust (Ex. A-1) and a purchaser and holder and shareholder of one of the shares in that trust. I was also an officer and director during its period of life, extending over a few years prior to 1921, of the Kaala Land Company, the Helemano Land Company, the Kemoo Land Com-

(Testimony of T. H. Petrie.)

pany, the Kawailoa Land Company, the Anahulu Land Company, and the Kaheeka Pineapple Company.

As an officer and director of the Waialua Agricultural Company I had personally very little knowledge of the fact that transactions were being negotiated which resulted in the purchase of the two-thirds undivided interest in the Waialua lands of May 2, 1910. I may have known something about the anticipated transaction, but nothing that was handled by the Waialua Agricultural Company, but as a director I did have direct knowledge. I knew that moneys were loaned for the purchase, and if I remember correctly, to Mr. W. R. Castle, Trustee.

To the best of my recollection Mr. Castle purchased these properties with money loaned to him by Waialua or Castle & Cooke, I don't know which, which properties were then hypothecated to secure the loan. This loan was carried and the interest was paid thereon during the time that Mr. Castle held the properties, as far as I recollect. Upon the sale of the properties to the Helemano Trust the loan was repaid.

(Counsel for petitioner then referred to a declaration of trust of W. R. Castle setting out the terms of the trust under which he held the properties, dated May 28, 1910.

"Mr. CASTLE: I thought that was in evidence, but I guess not.

The COURT: Declaration of Trust, W. R. Castle, was reserved. The number was reserved but the document was never brought to Court.

Mr. CASTLE: Well, I will get that later.")

(Testimony of T. H. Petrie.)

(Referring to document dated May 17, 1920, (Ex. A-32) the witness continued:)

That is my signature and I was one of the three persons therein named. Although Mr. Castle purchased this property in the way indicated, he held it to be disposed of subject to such directions as might be given him by the three persons named in the document referred to. Mr. Charles H. Atherton was an officer and director of Waialua at the time, and the same is true of Mr. E. D. Tenney. We three persons could have directed Mr. Castle to transfer the property to anyone whom we desired. I had no personal or financial interest in the property. To the best of my recollection, I assumed the trusteeship to control that property with the hope that at some time, if it could be legally done, to instruct Mr. Castle to convey it to the Waialua Agricultural Company, Limited, but that time never came.

So far as that trust is concerned, the time did not come when it could be conveyed to Waialua, but the time did come when we three decided it would be advantageous to have the property transferred to the Helemano Trust. I remember the circumstance of the property being transferred to the Helemano Trust for a consideration of $120,912.47. This amount represented, so far as I can recall, the book value.

"Q. In other words, you were not requesting the transfer to the Helemano Trust which as a sale should be an emergency undertaking between the buyer and the seller?

A. I would not say that,—that is what the property cost us,—cost Mr. Castle."

(Testimony of T. H. Petrie.)

I don't know whether I would have sold the property to anyone else other than Waialua for 120 odd thousand dollars. At that time the Waialua Agricultural Company was not in a position to buy it. I would not say that a two-thirds interest in these lands in Waialua was worth no more than $127,000. We were willing to sell it to the Helemano Trust for that sum.

(Counsel for Waialua then admitted that the purchase of May 2, 1910, was made originally for the benefit of Waialua Company and that the series of transactions subsequent thereto gave the Respondent no different status than it had by virtue of the deed of May 2, 1910 (Ex. A-21), the court ruling as follows:

> "I understand they are not seeking to aid their position now by any series of transfers to Waialua after 1910. They are willing to abide by the evidence of the status as to what construction should be put on the 1910 transaction as if direct to Waialua at that time.")

(At this point counsel for Petitioner requested of the court a ruling on Petitioner's demand that Respondent furnish the net profits made by Waialua Agricultural Company on the lands in question, and Petitioner offered to make proof of such facts, including the amount of sugar raised on the Holt lands for the period, the price obtained therefor, and the expenses incurred in connection therewith. On objection by Respondent the objection was sustained, the Court ruling that unless Petitioner could show whether these lands were peculiar and better sugar lands, on account of the lack of necessity of irrigation or the lack of necessity of fertiliza-

(Testimony of T. H. Petrie.)

tion, or any other factor that goes to the question of these lands being peculiarly valuable, or the converse, but until it could be shown that Waialua sugar, by raising it on the Holt lands, makes the Holt lands unique, then the court would not go into the question of profits as bearing on the question of value of the lands and cancellation of the deed.)

(Counsel for Petitioner then offered that part of the record of the guardianship of John D. Holt and James R. Holt, which included the petition, the answer and appointment of guardians of these persons as spendthrifts, stating that the offer was made in connection with the showing that would be made of a congenital case of imbecility and that the record showed the immediate ancestor was incompetent from the excessive use of alcohol and weak-minded for over a period of twenty years. Counsel for Respondent objected to such offer on the ground that the appointment was made in 1897 and the guardianship order dismissed and discontinued in 1900 or 1901, and that the same was not material and was remote. The court reserved its ruling on the offer of the guardianship proceedings.)

MRS. ROBERT KING

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am a granddaughter of Elizabeth Aldrich. I knew Eliza at the Kentwells two or three years before the

(Testimony of Mrs. Robert King.)

latter went to England, and have also recently seen Eliza in Oxford, England. From my observation of Eliza in Honolulu, she was a simple, silly girl, who did not seem to take in anything that was said and was sort of ignored by us. From my observation of her I would not say that she was capable of carrying on a real sensible, rational conversation with anybody. Eliza's condition, as I observed it in England, was the same as I had observed in Honolulu.

Cross Examination.

I can not recall any specific conversation I ever had with Eliza, or whether she did any work about the house, or any specific instance, because that is going pretty far back. When Annie Kentwell talked to her or she talked to Annie they spoke English. John D. Holt did not live with the Kentwells at that time in Honolulu.

CHARLES A. DE LA NUX

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I have lived in the Territory of Hawaii all of my life, and am forty-seven. I knew both John D. Holt and his daughter Eliza. I first met them when they were living on Fort Street in Honolulu, Eliza then being four or five years younger than I. Our families visited each other, her father and my mother being

(Testimony of Charles A. De La Nux.)

cousins, but I most frequently saw her at my own home. Eliza and her father would be at my home two or three times a week and desultorily off and on,—this for a period of some two or three years. I also knew her after she got married to Christian. When I first knew Eliza she was between fifteen and seventeen years of age. From my observation of her, I would describe her as "simple-minded,"—a "nut"; the basis for this opinion was formed through the fact that during the time the visits referred to were transpiring, my mother and Eliza's father tried to arrange a marriage between us. In my conversations with her she appeared to be too stupid to answer any civil questions, so that I could not "fall" for her. Most of the time she used to act silly, shrug her shoulders, silly grins and foolish answers. In all the time I knew her and in my talks with her, I never got a sensible or intelligent response to any question put to her, nor in my presence did I ever hear her carry on a sensible, rational conversation with anyone. After Eliza was married to Christian she was sometimes brought to my house by her husband and there was no change in her condition.

Cross Examination.

I thought it was a good joke that my folks wanted me to marry Eliza. Whether Eliza took it seriously, I don't know what she thought. We did not tell her about it but we were trying to make love to each other like any other young people would do, but after I thought it was a joke. I took a dislike to her because

(Testimony of Charles A. De La Nux.)

she was not the sort of a girl to get married to anyone. The subjects talked with her by me were those things generally talked over by lovers. I refused to go ahead with any marriage to her.

CHRISTIAN S. BERTELMANN

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I knew Eliza well as a girl of sixteen or seventeen in Honolulu for a period of about four years when they were living on Fort Street. The neighborhood children used to play marbles, in which game Eliza would indulge. From my observation and acquaintance with her. I would call her a "lolo" or "simple-minded." In talking with her, sometimes she would be all right and sometimes run into the house and laugh, something like that. In playing marbles with her I would sometimes take them away from her as a joke and when I would return less than the amount I had taken from her she would not know the difference between how many she had and how many were returned to her.

"Q. Will you just illustrate a little more in that connection. Suppose you took ten marbles away from her and would give her back only five marbles,—did something of that kind ever happen? This is a leading question.

(Testimony of Christian S. Bertelmann.)

A. Well, I don't know. Sometimes I don't think she would know; sometimes she would. She was a funny girl that way. Sometimes she would remember things and sometimes she would not."

Cross Examination.

She had a funny way of talking, what you call "simple-minded", more than anything else. In the matter of the marble incident I would sometimes tell Eliza that I owed her ten marbles and she would not know whether I paid her ten marbles or five.

ELI M. CRABBE

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am a son of Horace N. Crabbe. I have known Eliza from the time she was seven or eight years of age until she left the Territory. I visited the family home quite often and knew Eliza well. We Hawaiians would call her "ihepa" or "lolo," otherwise known in the English language as feeble-minded. I have gone with her and seen her in the act of making purchases at the store when occasionally her father would give her a dime or a quarter. She would not know what she was buying, but would point to what she wanted, and after she had made the purchases she would give

(Testimony of Eli M. Crabbe.)

them all away to the young ones that were with her. If she got part of it, all right. If she did not get part of it, it was all right. She would take whatever was given her by the store keeper. So far as I know she could not hold a conversation. She was not able to look out for herself or change her clothes, and I personally saw Mamie Christian bathe her when she was about fourteen years of age. She always played with younger children. I have never seen her trying to read, but have seen her grab a book and look at the pictures, which was all she could do, so far as I know. I never heard her carry on a sensible conversation with anyone.

Cross Examination.

Her condition was about the same as that of the statue worshipper. I did not state I was taking the stand to "stick" Waialua. "Ihepa" was a common expression among the Hawaiians. I would not say Eliza was "pupule."

MRS. JOHN H. WILSON

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am the wife of John H. Wilson, who is mayor of the City and County of Honolulu. I knew Eliza as a young girl in Honolulu, and particularly remember her when in an advanced state of pregnancy just prior to the birth of Eliza's first illegitimate child. When she

(Testimony of Mrs. John H. Wilson.)

was pregnant, one Sunday I was going with my mother to church, and just out here, at the old Opera House we had before, past that was the old Gibson home, and she was sitting out with a couple of boys playing marbles. Of course she couldn't stoop, and sat flat on the ground, and I said, "Eliza, what are you doing here?" and then the boys started to run with the marbles and she started to cry, just like a child, and I called to them and they brought them back when I called, and I said, "How many marbles have you here?" and she said, "I don't know." They didn't give back all the marbles, but they ran, and that is all she got. Her condition of pregnancy was noticeable at that time.

I knew Eliza when she was four or five years old, saw her frequently when she and her father would come to Honolulu, and after she and her father moved to Honolulu.

After Eliza's marriage to Albert Christian I saw them once in a while, passing them on the street. One day she was going to church on Fort Street and she dressed up very nice. She had a nice hat on and nice flowers, and I asked her, "Where are you going Eliza?" She replied, "Going to church." I remember seeing Eliza outside the court house during the proceeding to annul her marriage, also when she lived with the Kentwells at Waikiki just before their departure for the mainland. The impression I got of Eliza during all of the time that I knew her was that she was a feeble-minded girl—that she was what the Hawaiians called "ihepa." During all the time that I knew her I never

(Testimony of Mrs. John H. Wilson.)

at any time heard Eliza carry on a rational or sensible conversation with anyone.

Cross Examination.

I can not remember the periods of time that Eliza lived in certain localities in Honolulu, nor can I give the exact dates on which I would stop and talk with Eliza. I saw her many times on the street and would stop and talk to her to see if she had improved, having pity for her kind. In regard to marbles taken from her by her playmates, I said, "Eliza, are these all your marbles?" She replied, "My marbles." And while I was talking to this poor child those boys started to run, and I saw that and when she turned around the marbles were gone and she cried.

Re-direct Examination.

I asked Eliza, upon observing her condition of pregnancy, "What's that?" to which Eliza replied, "I don't know."

The

DEPOSITION OF CATHERINE HAMBRIDGE,

taken November 1, 1928 on behalf of Petitioner pursuant to an open commission in Oxford, England, was read into the record, as follows:

Direct Examination.

My occupation is that of housekeeper, which I have followed for at least twenty-five years. I was in Mrs.

(Deposition of Catherine Hambridge.)

Kentwell's service at Oxford on July 8, 1911, and lived in the Kentwell house for about eight months and since that time have visited the Kentwells continually, and during my acquaintance with the Kentwell family I have come in frequent contact with Eliza, and knew her well. Eliza was not able to take care of herself in the ordinary way,—had to be told things that should have been told a child; had to be told more often than not to have a bath and when to change her clothes and linen. She wrote and read very badly, frequently went into fits of temper if anybody offended her, and if she was much upset she would go upstairs and shut herself in a room and not come down to meals. This happened fairly frequently. Eliza was very fond of the Kentwell children, but very often got exceedingly angry and I have known her to give the little boy a knock. The cause of these fits of anger with the children was because she wanted them to do something which they objected to. I never knew Eliza to keep up a rational conversation with anyone. She could not reason out anything with you. She would go out and you did not know when she was coming back. One day she went, I believe it was fair time, and she came back drenched. She went out several times and when she came home she was very wet and went straight to her room. She would not see Mrs. Kentwell at all. She generally had to be told when to do her room, but liked to do it herself. She always had to be told to change her bedclothes.

I was present and was housekeeper in the Kentwell home at the time of the death of Eliza's father, and

(Deposition of Catherine Hambridge.)

Eliza showed no grief of any kind upon his death; no actual grief that I noticed. There were no tears shed when her father died. That I do know. We had a nurse and she did not help nurse him at all. She never went near.

As to going out alone: Well, she did go out alone sometimes. She went to the pictures, but she was always told what time to come back. As far as I can remember she would come back at very fairly the right time.

During all of the years I knew Eliza since 1911 her condition had been the same, and she was more like a child than anything else. She rarely carried on a conversation. She did not seem to have the power to. If she liked a person very much she might do anything. I never quarreled with her but the servants quarreled with her. I treated her as a child from the time I went there. I saw that she was not really all there and I tried to be tactful with her so that I never quarreled with her and she would fairly do the things I asked her. You might get her to do the things I asked her. You might get her to do things by coaxing her.

Cross Examination.

Once I saw Eliza attempting to play the piano and just striking notes with no time or music in it, on which occasion Eliza had childishly remarked, "When I was at school I took several first prizes." She went to a shop once, bought a book for a present but the account was put up to Mrs. Kentwell. The whole thing of course was childish. I treated her as such and spoke to her as such. If I racked my brain I might find a lot

(Deposition of Catherine Hambridge.)

of odd things which showed how simple she was. Eliza avoided meeting people who came to the house. She would go upstairs to her room and oftentimes just sit for hours in her room doing nothing; she would frequently spend her time cutting out paper figures and flowers. She could not read much.

The

DEPOSITION OF MISS LOUISA TAYLOR

taken November 1, 1928 on behalf of Petitioner pursuant to open Commission in England, was read into the record, as follows:

Direct Examination.

I am a trained nurse. I have had experience and training as a nurse in various hospitals, institutions, and training homes since 1895. I have had experience throughout my nursing career with many mental cases. I first became acquainted with Eliza in 1911, at which time I was called in to nurse one of the Kentwell children. I lived in the Kentwell home for nine weeks, and on another occasion, about 1913, stayed in the house for about a fortnight. I also was a day nurse for Mr. Holt, Eliza's father, for ten or eleven months, in 1920 or 1921. In regard to Eliza's mental condition, I class her practically as an imbecile. Eliza was very erratic in her temper, would fly into tantrum without apparent provocation. She could not enter into a con-

(Deposition of Miss Louisa Taylor.)

versation very well. She had very short sentences. Eliza had no sense in taking care of herself. Her sewing was not very good. I have seen her handle small quantities of money, not a great lot. She generally bought little presents with it for people at home. The things she would buy were perhaps a little, small tray cloth for Mrs. Kentwell. She would buy the goods and stitch it herself; and small things for the others.

Cross Examination.

I am not a mental nurse. I saw Mrs. Christian most in 1920 or 1921 when I was nursing Mr. John D. Holt, because she used to help me with her father; though sometimes she would not.

The

DEPOSITION OF MARY CLAPTON,

taken November 2, 1928 on behalf of Petitioner in England, pursuant to open commission, was read into the record as follows:

Direct Examination.

I was a servant in the Kentwell home and knew Eliza during the five years I worked there. She cannot take care of herself and she wears clothes from one week-end to another unless you have the clothes in your hands and put them on her. Even to her bath, you have to tell her to have a bath once a week otherwise she would not do it. She can read a little but

(Deposition of Mary Clapton.)

she cannot understand what she is reading. In the words, big words, she cannot spell or pronounce them right. I have seen her try, but she cannot make out the words. I have only seen her write her own name.

As to Eliza's spare time, she generally gets hold of a newspaper and cuts out rubbish—cats and dogs and pictures like that. She cuts them out all crooked. She generally puts them in a drawer in the kitchen. She has never used the telephone. She has several times been up in her room and would not come down and has remained there all day long. I have been up and asked her to come down to her meals, and she has slammed the door in my face. When it has been a bitter cold day she has been in her room with the window wide open. I have been up and asked her to shut it and she has slammed the door in my face, shivering with cold. She cannot cook. I remember several distinct instances of temper on Eliza's part. As to her clothes, I have seen her tear them up,—good clothes they were. She has torn them up in front of me.

Cross Examination.

I have talked this over with Mrs. Kentwell and gone through this testimony with Petitioner's attorney, one question after another, just as put here.

(Upon representation of counsel for Petitioner made to the court, that the sisters of the Convent of the Sacred Hearts were not permitted to leave the convent,

the court adjourned to the convent, at which place the testimony of the Sisters was taken.)

SISTER ANNE JOSEPH

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I have been a Sister at the Sacred Hearts Convent for forty-six years and was there at the time that Eliza was there, remembering Eliza as she was at the school very well. I was just a young novice at the time that Eliza was at the school. Her teacher and the Sisters they did the teaching. They were all attending to all classes. I wasn't doing anything, just talking. Eliza was unable to make any progress at all in her studies. I was with, and assisted, the particular teacher who for some time was attempting to teach Eliza, but she could not learn. They would teach her reading but she could not promote. She really learned very little reading; couldn't read. I can't remember, so many girls in school I can't remember just what she ever learned. She was not an idiot nor insane, but she acted like a little girl, a little child, a girl playing with the little ones in the school. She was very polite; had a kind heart, would say, "Good morning, Sister," "Good afternoon, Sister," and "Thank you." She would write her name but she would not be very—suppose you gave her a bill, she would not know what it was. She would

(Testimony of Sister Anne Joseph.)

just sign that without knowing what she was doing. They never gave her a bill but I know she would not be able to sign. She sat there. She could not recite by heart, she could not memorize words like that. Once in a while she would say something. She would ask for her father to come and see her, and she would come over when the father came to see her and say, "Father came to see me and brought me cakes," or fruit and things like that. I know she was altogether like a little child. The father used to come sometimes drunk to the gate here, he couldn't hardly keep himself up. Eliza came here when she was thirteen. After she was transferred over to the big girls I didn't have anything to do with her.

Cross Examination.

I never saw her taking communion. I do not know what training she had before coming here.

SISTER MARY AUGUSTA

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I have been at the Sacred Hearts Convent in Honolulu for forty-six years. I was there at the time that Eliza attended and lived at the convent, and remember her. When she was first brought to the school her father brought her. I remember asking him if he

(Testimony of Sister Mary Augusta.)

wanted to talk to the girl, because she was kind of silly, you know. Only to see her you could tell there was something the matter. Eliza was like a little child in school. She was with me in the trunk room and in the dining room. That is all, she never gave me any trouble. She was just like a child; could never learn nothing. That is all I can say about her. I am not sure how many years she was in school. It is so long ago now I don't remember. Maybe four or five years. When she left here she was just the same, never learned anything. I did not teach her myself but I saw her teachers teaching her many times. She would try her best but she can't learn anything. She must have written because she was always trying to make her write her name, but not very much. This childlike condition of hers was something you could tell right away, the way she was trying to do things. She wasn't able to reason. When you say something, right away she would run away. I have talked to her myself many times and she would run away and say nothing.

Cross Examination.

When she was too big to remain with the small children they put her on the other side, just to be with the big girls. I never teach. I had charge of the trunk room and dining room. Her father wanted her to learn everything. I myself tried to teach her to sew but she never learned. Eliza dressed herself, took her bath, and knew her own locker. Sometimes she would be with me in the kitchen. She was friendly, polite, a

(Testimony of Sister Mary Augusta.)

nice little girl. If you did anything for her she would thank you. She never got into trouble, and was obedient. You would say, "Eliza, do that," and she would do it, but after she forgets right away. This institution does not take people known to be feeble-minded. We took her through kindness because she was small and gave us no trouble. She was nothing like an imbecile but more like a child six years old. You couldn't reason with her. I think she left at the age of about fifteen, but it is so long ago I have forgotten. It is more than twenty years.

SISTER THERESA

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

Prior to becoming a nun, I had myself been a student at the Sacred Hearts Convent in Honolulu during the last two years that Eliza was there. Eliza was a year older than I, and when I entered the primary grade Eliza, who was at the convent when I entered, was below me in school. Eliza was not an intelligent girl but she was a good-hearted girl. She really couldn't learn, she was not able to learn. She was easily influenced and she had a very kind heart and you could easily influence her. She often spoke about her cousin Annie. I think she was of that spirit that had a mind that could not be really developed,—a kind of small

(Testimony of Sister Theresa.)

child. She must have been maybe about eleven or twelve.

"Q. And you would describe her as having the mind of a small child?

A. Yes, not able to be developed."

Cross Examination.

I was never in any of Eliza's classes so when I say she could not learn, this was from hearsay. I never saw her try to write.

SISTER LEOCADIA

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I have been a Sister at the Sacred Hearts Convent for thirty-three years and am assistant to Mother Superior. I have the account books of the convent, showing that Eliza had entered first for music lessons April 1893, that she entered as a boarder at the boarding school in September 1894, and that she remained at the school as a boarder until the end of June 1899. I have the account books of the convent. We didn't keep the other records. These account books show that Eliza had had an operation on her eyes while at the school, and I nursed her after the operation.

(Testimony of Sister Leocadia.)

Cross Examination.

Eliza talked with me a little, but not very sensibly; like a little child, but I could not say definitely whether she did or did not talk sensibly—it is too long ago.

Re-direct Examination.

Records of grades have not been kept.

The

TESTIMONY OF SISTER MARGARET,

for Petitioner, who was at the time confined to her bed, was by stipulation of counsel received as evidence without her presence or the administration of the oath, and without the presence of counsel of questions by counsel. Sister Leocadia visited Sister Margaret and reported that she had known Eliza but had not been her teacher; that she remembered that she was not like a normal girl as to her mind, and she was put with the bigger girls because we couldn't leave her with the small children all the time.

The

TESTIMONY OF SISTER REGOBERT,

for Petitioner, also ill and confined to her bed, was taken in like mnaner. She testified to the effect that she knew Eliza and that she had a childish mind. The witness further testified as to Eliza that she cannot judge for herself what was right and what was wrong.

(Testimony of Sister Regobert.)

but she was never unpleasant or difficult to manage. As to her physical appearance, she remember that her eyes were crooked, but didn't remember much about it, and further testified that she was like a small child when she was big.

Trial having been resumed in the court room,

MRS. HARRY MURRAY

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am sister of the probation officer, John D. Holt, Jr. I knew Eliza for some years when she was in her teens, and remember seeing her when she was married to Albert Christian. Although I was not in Eliza's company very much at the time, from my observation of Eliza she was not normal and like other girls, being very simple in her actions, and I never held a conversation with her as I would with a normal person. When spoken to, Eliza would act very silly and never gave normal answers to questions. I don't remember whether I got an intelligent reply to any questions. During the time that I knew her I never heard her carry on a sensible, rational conversation with anyone. I think Eliza's condition can be described as "simple-minded, or ihepa."

(Testimony of Mrs. Harry Murray.)

Cross Examination.

I guess that Eliza would answer questions addressed to her, but it would depend upon what kind of questions they were; not all questions, because she would not know how to answer all of them.

MRS. MINNIE C. ALDRICH

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

My husband was a grandson of old R. W. Holt. I remember John Dominis Holt and his daughter Eliza, having known the latter after my marriage in 1884, on occasions when Mr. Aldrich and I would go down on visits to Makaha. When I first knew Eliza the latter was a year or two old. My husband and I would stay at Makaha over week-ends,—this over a period of four or five years. Eliza and her father moved around Honolulu so often that I could not remember any particular place where they stayed, but I last saw Eliza in 1920 in England. For the period of years that we visited at Makaha from time to time on week-ends, I would say that Eliza was not like normal children, but that the word "ihepa" would be the most fitting word for her condition. As Eliza grew larger I could not talk to her as I would to a normal child and get normal responses, but the responses were silly grins, looking

(Testimony of Mrs. Minnie C. Aldrich.)

up with her funny eye, and not answer you anything. I saw no efforts made in connection with teaching Eliza and did not know whether she was capable or did learn to read or write. I noticed no improvement or change in Eliza's condition from the time I first remembered her until I saw her later in England,—she was always lolo, ihepa. When I saw Eliza in England the latter was a grown girl and I hoped to see her improved in her condition. She appeared rational enough to look at, but in talking with her it did not seem to penetrate at all. Eliza never joined in any conversation or talked with the family in England, but usually went to her room.

Cross Examination.

I would not say that Eliza was crazy, but that she was "ihepa" or "lolo." She could not answer a question intelligently. When one looked at Eliza she looked strange. She was not a regular drudge in the Kentwell family. I saw her walking through the rooms and do not remember seeing her in any way helping with the household work. I was only in the Kentwell household over night. I do not think that Eliza felt easy at any time, but she did not seem to be depressed particularly in the presence of Mrs. Kentwell; I never saw Eliza moving around the Kentwell home like a frightened deer. I did not chat with Eliza on the English trip. When I spoke to her she laughed and smiled, a silly laugh. I would speak to Eliza on several subjects but Eliza would not get my questions straight and would give a wrong answer to them.

MRS. HILDA CHILLINGWORTH

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am about Eliza's age. We lived on adjoining properties when girls. I remember the fact of the birth of Eliza's illegitimate child, and, in regard to Eliza's pregnancy and her actions at that time, of course, we didn't realize what the trouble was. We used to make fun of her a great deal, never realizing, of course, that she was going to have a baby, but she would play around with us just the same and went around as though there were nothing the matter with her. I don't think she realized what was going to happen.

My earliest recollection of Eliza was when she was about twelve or fourteen years of age. While I have never been particularly intimate with Eliza as a girl, I saw a great deal of her and had played with her over a period of two or three years. As to what kind of a girl she was, and her condition, it is very hard to state, except our impression of her at the time was that she was just simple,—simple-minded. I imagine the Hawaiian word would be "lolo." In playing games we would always take advantage of her. In playing hide we would make her seek and let her keep on looking, and we would play marbles with her and we used to take them away from her. I don't imagine Eliza would know how many marbles she would have at any time. It seems to me we would give her a few or whatever we had and she would be satisfied—I don't recollect.

(Testimony of Mrs. Hilda Chillingworth.)

Cross Examination.

In regard to her conversational powers, she could carry on a child's conversation, I think, as far as my recollection went, but I don't think she was ever intelligent enough to discuss things. As children I guess we didn't carry on conversations that meant much at that time. I don't think she could have remembered the name of a street on which she had been, but I think she could tell us where she had been.

MRS. CHUNG

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I used to keep a grocery store and knew Eliza about four years when she lived in the neighborhood, in about 1890. When Eliza was about fifteen or sixteen she used to come into the store once or twice a week to buy candy. "When she buy the candy, but she don't know how to talk much, and she just point to the candy and I give her about five cents, and she give a dollar and don't take the money away; don't know change come back or not, and she go out and I tell her how much she want and she don't know, and pointed, and I give her that, and have to chase her out in the street to give her the change. She acts kind like silly acting." Eliza would go off without her change and I had to go around the counter to give Eliza her money. She could not count out the money and make correct change

(Testimony of Mrs. Chung.)

and didn't know the difference between ten cents or five cents. She would take whatever I gave her as being right. When I talked to her she would laugh and act silly; she did not talk right. During the time that I knew her and while Eliza was coming into the store, sometimes she acted differently. I talked to Eliza in pidgin English.

Cross Examination.

As to whether I had found Eliza in any way feeble-minded, "Yes, I find her kind of silly; don't know how to talk." She would buy candy and once in a while buy a loaf of bread or crackers. There were other children who couldn't make change but I don't remember their names. Eliza was buying things from my store before she went to boarding school.

GEORGE W. MACY

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I work with the Internal Revenue Department. I knew John Dominis Holt and Eliza Christian when they were living in Honolulu. I frequented the place, knowing the Holt boys, visiting them at the Holt place now and then, on which occasions I would see Eliza sitting there by herself. She would go into laughing fits now and then. After she was married to Christian

(Testimony of George W. Macy.)

I visited the Seas, George Sea being a friend of mine, and the Seas living next door to the Christians. Eliza had had a child which had been adopted by the Seas. At the Seas I remember seeing Eliza, and remember the death of the baby. I was present at the funeral and remember seeing Eliza there. Eliza appeared to me to be feeble-minded. I have seen her in the Kentwell office with Mrs. Kentwell, and Eliza had to be led on the streets, not being safe by herself; I have personally seen her being led on the streets. In all the time that I knew her I never heard her carry on a rational conversation with anyone. When addressed or spoken to she simply stared at you. She could not carry on a regular conversation, not to my knowledge. During the time I knew her there was never any improvement or change in her condition so far as I could see.

Cross Examination.

I can not testify that I knew Eliza very well but have seen her now and then. I never became intimate with Eliza but had known her first probably since she was ten years old. The indications of feeble-mindedness were observed by me the first time I saw her. At that time she would sit by herself and stare at things; laughed, jumped up and ran around, and generally acted silly. I remember distinctly her condition, and believe that a feeble-minded person can be told from observation. I could not say how many other children there were in the neighborhood at the time, nor could I give the names and age of any other child. I had no personal contact with Eliza, but saw her in the house

(Testimony of George W. Macy.)

where I visited. I discussed her condition years ago. I have not discussed the matter since 1924, nor have I heard the suggestion made since that time that Eliza was "ihepa", feeble-minded, or silly. When I first saw Eliza I would probably see her once a week.

I think my statement of Eliza being led along the street by Mrs. Kentwell refers to a time before Eliza's marriage to Christian. The last time I saw Eliza was when she was living with her husband and they used to come over to the Sea's where the baby was.

Re-direct Examination.

I talked with counsel in the hall just before coming in to testify.

MRS. MAUD BETTENCOURT

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

My maiden name was Crabbe. I remember Eliza as a girl of about twelve years of age, she and I being of the same age. I knew Eliza for a matter of years when the Holts were living on School Street and we on Nuuanu, and Eliza frequently visited my home with her grandmother. I, as a child, observed Eliza's condition; I always understood her to be a feeble-minded child. I took her to be ihepa. "Ihepa" refers not to a condition of the eyes but to a condition of the mind,

(Testimony of Mrs. Maud Bettencourt.)

Cross Examination.

Had Eliza been in a certain store, she could not have told the name of that store. I first heard the word "ihepa" long before the year 1924.

The

DEPOSITION OF MISS ALCE KENTWELL

taken November 1, 1928 on behalf of Petitioner in England pursuant to open commission, was read into the record as follows:

Direct Examination.

I was born in Honolulu in 1902 and am twenty-six years of age. I have a B. A. degree from St. Hugh's College, Oxford. I have studied law and have taken the preliminary bar examinations in the Inner Temple. I have known Eliza from about the time that we first came to England, when I was about eight years old. During all the years that I knew her, Eliza has never been able to care for herself, and the matter of caring for her, for her clothes and her cleanliness, has had to be attended to by members of the family. In her spare time she would sit around or cut out pictures. Eliza has no conception of the value of money whatever. Everything is written down, the actual money is given her. If it is not given her she would probably come back with short change. That has happened on several occasions. She cannot handle figures coherently and cannot add or make change. She collects

(Deposition of Miss Alice Kentwell.)

and hoards all sorts of useless things, such as empty matchboxes, pieces of candle, pencils, picture post cards and children's toys. She has never been able to read, except small words, or write, except her name. She has never been able to take care of herself when sick. On several occasions Eliza sat in her room, suffering with the cold, with the windows wide open. She would fly into tempers for no reason. For instance, I remember my small brother wanting to go into a room. She shut him out, but he would knock again, and she flew into an ungovernable temper.

She cannot do household work properly, such as dusting or making beds, and cannot sew. She cannot cook properly. I can remember an occasional joint overcooked and the pudding burned. In all my life I have never heard her carry on a rational conversation with anyone, and from my observation and association with her, in my opinion she was incapable of carrying on such conversation.

She repeats herself several times, the same story, very intangible. On meeting strangers: she shakes hands and there is a sort of look of bewilderment written all over her face. She is just bewildered. If two people are in the room having a conversation, and she is also in the room, she does not volunteer any statement at all, but would just sit in a retiring way. I should say she has no idea of making plans or arrangements. When we go out we say, "Get ready to go out, get your things on."

(Deposition of Miss Alice Kentwell.)

Cross Examination.

My father is L. K. Kentwell, a member of the Bar, being called in 1916 here in England. He read law at Oxford University for some four or five years, taking his B. A. in law and is now practicing abroad. He has always devoted himself to the law. I remember Mr. and Mrs. Holmes came to tea with us in 1912. We had tea in the garden. They also could form their opinion of Eliza if they spoke to her.

The

DEPOSITION OF ANITA KENTWELL,

taken November 1, 1928 in England on behalf of Petitioner pursuant to open commission, was read into the record as follows:

Direct Examination.

I was born in 1909. Eliza is some sort of adopted cousin of mine. I am really very vague about that. I remember her since 1914. She never had any idea of the value of money and has never been able to make change. She has never been able to add or subtract or read. She cannot write except to sign her name, and you have to point out the letters to her; otherwise the result is unintelligible. I have helped her write letters but it has been pretty hopeless. In her spare time she sits alone and starts into space. She collects all sorts of worthless things such as bits of candle, dead flowers, pieces of string, and keeps them in her drawers

(Deposition of Anita Kentwell.)

with her clothes. She is unable to sew, and her cooking is mostly burned. As to housework, well, she would go into a room and polish, say, half a piano, and then leave it. She would go on to something else, give it a flick, and say the room was done. What would you say, "a lick and a promise?" She has never been able to take care of herself personally or her clothes. She will take any explanation; for instance, we were going to the theater. The theater started at eight o'clock, she could not go but she wanted to. We said we were going for a walk; when we got back she said, "Have you enjoyed your walk?"

She would often sit in her room, in mid-winter, in the cold with the windows open. She was unable to distinguish between a weed and a plant, in weeding the garden. She was subject to fits of violent temper for no reason. Such fits of temper were most extraordinary. For instance, I was going to hang some clothes on a line; she came out and said, "I cannot bear the squeaking of the rack." I said, "Don't be absurd." She dashed to the knife-box and got out a knife, so I went upstairs and left her to it. She has never been able to make any plans for herself, and the family has had to plan everything for her. I have never known Eliza to carry on a rational conversation with anyone. She sits there, like a stuffed dummy.

Cross Examination.

I would begin to notice things round about the time I was ten. When she wrote her signature it was extraordinary letters, like a spider's scrawl.

The

DEPOSITION OF MISS ELIZA JANE GOSLING

was taken November 2, 1928 on behalf of Petitioner in England, pursuant to open commission, and was read into the record as follows:

Direct Examination.

I have no occupation at present. I am keeping a university lodging house. I was a trained nurse and have been nursing about thirty years, since about 1901.

I knew the Kentwells and Eliza Holt Christian first in 1911 when I went to the Kentwell home to nurse Mrs. Kentwell's daughter. I was there five weeks. Mrs. Christian seemed strange and weak minded. I didn't know much about her actions as I only had meals with her, and did not see her except for that. She did not look clean and I did not hear her carry on a really rational or sensible conversation with anyone.

Cross Examination.

I was with the child all the time and really don't know much about Mrs. Christian.

The

DEPOSITION OF DR. THOMAS SAXTY GOOD

was taken November 2, 1928 in England on behalf of Petitioner, pursuant to open commission, and was read into the record as follows:

Direct Examination.

I hold the degrees of O.B.E., M.R.C.S., L.R.C.P., and M.A., Oxford, and am Medical Superintendent of the

(Deposition of Dr. Thomas Saxty Good.)

Oxford County Mental Hospital at Littlemore, lecturer on neurology, member of the staff at Oxford University, and author of a work on tests for mentality. I have been connected with the Littlemore Mental Hospital for thirty-three years, being superintendent for twenty years. I am an Officer of the British Empire, hold a Master of Arts degree from Oxford University, am a member of the Royal College of Surgeons and Licentiate of the Royal College of Physicians. During the War I was Consulting Neurologist to the Third Southern General Hospital; for four years I had a neurological hospital, first in the Army in which I still hold the rank of Lieutenant-Colonel, and for two years under the Ministry of Pensions. I am on the staff of the Radcliffe Infirmary in Oxford as a neurologist, and lecture there on "neurological methods" for the Faculty of Medicine of Oxford University. In addition to that I am expert and referee for the feeble-minded for the City of Oxford and also for Oxford County.

I examined Eliza Christian professionally as to her mentality on four occasions, of which I have record; first, some time during 1915; second, on May 31, 1925; third, on November 30 or December 1, 1926; and fourth, just a few days ago. In my opinion Eliza Christian is a congenital imbecile, or feeble-minded person, with the mentality of a child of about four of five years of age. She is one of what, under the English law, is a feeble-minded person. In my examination of her in 1915 I approximated her mental age as between six and seven. The system used by me and under which I

(Deposition of Dr. Thomas Saxty Good.)

examined her in 1915 is the "Binet & Simon" test. Since then I have used a modification of an American test "Yekes." I have not absolutely formed a different test to anybody else but I work on a modification of Professor Yerkes and Dr. Bridge's test.

(At this point, and by way of illustrating certain features of witness's testimony, two exhibits were introduced in evidence by the Petitioner, one being a pamphlet of which the witness was the author, being marked "Exhibit 1" in connection with his Disposition. The other exhibit introduced by Petitioner was a certain paper containing thereon drawings made by Eliza in the presence of Dr. Good. This was marked "Exhibit 2" and contains, according to Dr. Good, on one side a drawing of a diamond made by Mrs. Christian, with a proper diamond before her as a model. Upon the other side of the paper appears, at the bottom, Eliza's attempt to copy a square, and upon the top thereof another attempt to copy a diamond. Petitioner also introduced in evidence a book by Dr. Good, entitled, "A Scale of Tests for Estimating the Intelligence," which was received as an exhibit. These are original exhibits and are, by order of the Supreme Court of Hawaii, made part of this record and statement. Witness then spoke in detail of the result of his recent examinations, and gave an explanation of the system that he used in reaching this conclusion.)

WITNESS RESUMES: She cannot compare simple objects. Might I give an instance? For instance, you ask, "I want you to tell me the difference between an

(Deposition of Dr. Thomas Saxty Good.)

apple and banana." She told correctly an apple was round and a banana was long. You give one mark for that. I said, "Give another difference." She said bananas grew on very high trees and apples grew on very low trees. The next question I asked her was, "What is the difference between wood and glass?" She did not attempt to answer; she was completely confused. She could not give any difference between those, nor could she between paper and cloth. Therefore one said that her powers of comparison were very much below the normal. Then there is the definition which is used to see whether people know things in terms of use and in terms superior to use. You ask, "What is a chair?" She said, "To sit on," but when you pressed her she could give no further definition of a chair or further comparisons with other objects. On asking her, "What is a horse?" she simply gave a description of a horse in a carriage, but she could not tell you what good or use the horse was in that carriage.

I gave her quite a simple addition sum and she could not, as far as I could ascertain, do any addition at all. A question I did ask her was a simple subtraction in terms of money; she did not seem to know how many shillings there were in a pound, and she could not even tell me if I took three away how many were left. I tested her for her power of reading; that test does test because there are certain words jumbled up which have to be put together to make a sentence, and she could not read some of the words at all. She could read some of the small, little words, but a word of

(Deposition of Dr. Thomas Saxty Good.)

perhaps two syllables very often one had to spell it out and then she did not seem to know it. Then again, her vocabulary, which is a well known test, in which you say, "Now I am going to give you three minutes, I want you to say as many words as you can," a word like dog, cat, piano. She produced about twenty words, simply the names of nouns, which is very much below what is considered even normal. It has been known for a normal child to produce something up to two hundred in that time.

"Q. A normal child of what age?"

A. A normal child up to fifteen. It is generally considered the intellect is complete by about fifteen."

One of the tests I put to her was as follows: I said, "I want you to listen to me carefully and remember I am going to say something silly; do you quite understand?" She said, "Yes," and showed some interest. I said, "In that sentence there will be something silly." The sentence used is this, it is put in this way, "I have three brothers, Paul, Ernest and myself, what is there silly in my saying that?" She gave an answer to the effect that it was saying I had three brothers but nothing appeared that she saw what is the obvious absurdity that I included myself as a brother. The second one I put to her was this, "I saw a finely dressed gentleman walking down the streets with his hands in his pockets, swinging a cane." She said there was nothing silly in that at all. Another was, "There was a man on a motor bicycle and he ran into a motor car and

(Deposition of Dr. Thomas Saxty Good.)

was killed, and they took him to the Radcliffe Infirmary and they are afraid he won't get well." She said she could not see anything in that at all except it might be taking him to the Radcliffe Infirmary.

As to the condition being a permanent and continuing one, "In my opinion there is a case either from birth or from a very early age. When I say a very early age it is within the first two or three years of life, but my opinion is it is a congenital case as we call it. * * * There is practically no condition of an acquired mental illness in which you could get such absolute childishness as this in every faculty, and also that as far as my experience goes I know of no condition after an acute illness which could approach the condition that I have seen this same person in; I know of no illness."

(The following questions were asked and elicited the following answers from the doctor:)

"QUESTION: Having to do with the capacity of a person to manage their own affairs or adjust themselves to the ordinary circumstances of life, would a condition of this kind indicate a greater or less capacity for those things than the various forms of insanity?

ANSWER: It is a less capacity. I mean to say the faculties that we use in adjusting our life which is a question of looking after ourselves and managing property, are not so to speak developed, whereas there are many people who are as the law says insane who can deal

(Deposition of Dr. Thomas Saxty Good.)

with quite complicated intellectual problems, can deal with money, and know all about their money. They are not capable of controlling themselves in their actions or statements about other people, but there are many cases of paranoia, a delusion state in which they are quite capable and do carry on their business, but they form false impressions about the actions of other people.

QUESTION: Would one in this condition be capable of understanding the significance of the conveyance of property?

ANSWER: In my opinion, no.

QUESTION: To come back to the testimony. You have testified that in your opinion this Mrs. Christian has the mentality of no more than a child of from four to five years of age?

ANSWER: That is my opinion.

QUESTION: Is it your opinion that that was the condition in which she was at all of these other times that you examined her?

ANSWER: Yes, I think so. Of course I will try to be as frank and honest as I can; this last time I went through the whole of the tests; the time before it is possible that I did not use absolutely all. I used my own experience; I gave her the benefit of the doubt. This time I did absolutely according to the mathematical test. It is difficult to be quite certain within a year, but two years retardation is considered extremely dull and backward, whereas three

(Deposition of Dr. Thomas Saxty Good.)

years retardation compared with the normal is considered a sign of definite mental enfeeblement.

QUESTION: Then your opinion is her condition has been the same since very early childhood or since birth.

ANSWER: Yes, I have a copy of what I found in the last examination before and there is no difference that I can see."

Cross Examination.

In feeble-mindedness, I don't think there is a great deal of difficulty in expressing an opinion in 1928 as to a condition in 1910, where you have any degree of feeble-mindedness. I would not pledge myself to say that the condition in 1928 was precisely the same as in 1910. She was not reticent at her examinations. From the fact that Eliza had a child in 1916 I could not possibly say because a feeble-minded has a child it will make any difference to her mental state of feeble-mindedness. That is not one's experience, one has seen many feeble-minded who have had many children but their feeble-mindedness is neither more nor less because they have a child. Whether or not feeble-mindedness might not vary during the patient's life, such, for instance, as insanity which may come and go, my answer is, "If you ask me does insanity vary with times of life, I should say yes, but mental enfeeblement I should say no."

The

DEPOSITION OF LILY JAMIESON

was taken November 2, 1928 in England on behalf of Petitioner, pursuant to open commission, and was read into the record as follows:

Direct Examination.

I worked as a maid for Mrs. Kentwell for three or four years, I should think about 1909. I left for a period of about a year and later came back when I again worked for her three or four or perhaps five more years, helping her in the work of the house. I was then away two or three years, whereupon I came back again. Mrs. Christian was living with the Kentwells all the time I was there. As to Eliza's temper: Yes, she got into a temper, she came into my room between five and six in the morning and thumped me on the head and quite dazed me. I had to call Mrs. Kentwell to my assistance. This happened only recently. The cause of Mrs. Christian's striking me was that the kitchen door was locked, and she seems to think it was through me it was locked. She thought I was the cause of it being locked, and so she thought she would have her revenge on me. She wanted to be down in the kitchen early. Because the door was locked she turned on me. As to Mrs. Christian's cleanliness: Well, she would never change her things nor never wash, not when she was told. In her spare time she generally used to go into her own room. She would sit up there; she would read or cut things out of the newspapers. By "reading" I mean she

(Deposition of Lily Jamieson.)

would look at papers then but she cannot read sentences properly. I have heard her try. She has done that with me. She would cut out pictures and advertisements, chiefly advertisements, just anyhow she would cut them, just keep them, collect them together, keep them.

She was very fond of going to the door and talking with them (the tradesmen), and giving silly, trifling things to them like flowers, pencils, or anything like that she would give. If a little money was given to her she would often give it away to people in the street, or if not, she would spend it on silly things. Things that were of no value at all, childish. She could not handle money because she could not give correct change and she could not count money, that I know from my own experience.

In regard to writing: No, she cannot write at all. She cannot make her letters nor spell properly. You would have to tell her how to spell, she cannot spell. I have seen that. She has always had to ask someone to spell words for her. Once when I was with her (on the street) she turned round and swore at me simply because I wanted her to come home. She wanted to stay out and she turned round in the street and swore at me. She has gone off and stayed out quite late at night, and Mrs. Kentwell or someone has had to go and search for her. She has often come to our house and has acted very silly. Dances about very silly you know in the house. I have always had to bring her home, she could never go home by herself. All the time I knew her she has

(Deposition of Lily Jamieson.)

never improved, has never got any better. She has always got into these terrible tempers. She has gone for tea or sugar, and would not know when change was given her if it was right or wrong. She has had to ask me.

The

DEPOSITION OF MRS. FREDERICA JAMIESON

was taken November 2, 1928 in England on behalf of Petitioner, pursuant to open commission, and was read into the record as follows:

Direct Examination.

I am the mother of Miss Lily Jamieson who has just testified. I knew the Kentwells since they came to Oxford in 1910. When Mrs. Christian came to my house with my daughter I noticed she did not act like a sensible being. She used to dance, letting her hair down and pulling up her clothes.

Cross Examination.

Mrs. Christian talked to me about all sorts of cuttings in the papers. She used to say she had a lot of money and would give us a good fat check. She said there was money in the family and she was going to get her father's share. She once gave me some newspaper clippings but I don't know where they are now.

(Counsel thereupon showed her certain newspaper clippings and asked her to identify the same, which were later introduced into evidence as Respondent's

(Deposition of Mrs. Frederica Jamieson.)

Exhibit 1 in connection with the deposition of Mrs. Frederica Jamieson.)

WITNESS RESUMES: Yes, I believe she gave me these clippings. There was something about the Holt affair. They were foreign papers. Yes, these are the papers (referring to the papers exhibited by counsel). She gave me these clippings when she was talking about money, I think it was more to see who it belonged to. She did not say much about it because I was not in. These were left when I was away from home. I had been in the North of England. She had been home with my daughter. Lily and when I came back these were lying there and I seanned them over. Of course they did not interest me. I did not ask her to bring them. I did not know she had them. I did scan the clippings but I can't remember now just what they were; something about the Holt family. A lawyer came to see me and I handed him these papers saying, "There is some silly things she gave me." I had meant to give Mrs. Christian the papers but I had forgotten. She brought a few other papers for my daughter to read. All kinds of papers, we all laughed at that. What did we want to do with foreign papers.

(Respondent's Exhibit 1 in connection with the deposition of Mrs. Frederica Jamieson was introduced and received in evidence, over the objection of Petitioner, the exhibit being newspaper clippings, as follows:

(a) Clipping from Honolulu Advertiser of Tuesday, November 15, 1910, giving a list of the

(Deposition of Mrs. Frederica Jamieson.)

assets in the Holt Estate received by the Hawaiian Trust Company from John F. Colburn, the list being taken, according to the clipping, from the proceedings in a pending case of James L. Holt v. John F. Colburn;

(b) Clipping, with no date, concerning the death of James Robinson Holt;

(c) Clipping from the Hawaiian Star of July 15, 1904, relating to the annulment proceedings of Eliza Holt Christian by her cousin and Guardian (Annie Kentwell, during her minority) against Albert Christian upon the grounds of conspiracy on the part of Christian and others, and of Eliza's feeble-mindedness.

REV. STEPHEN L. DESHA

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I have been a pastor of a Hawaiian church on the Island of Hawaii for forty-five years and have been a Territorial senator from that island for some eighteen years. Hawaiian is my language and I have translated various works into Hawaiian. I have likewise been for twenty years editor of a Hawaiian newspaper on the Island of Hawaii. I have acted as interpreter for persons making speeches in English. I preach in Hawaiian, and I have studied over this period of years and written

(Testimony of Rev. Stephen L. Desha.)

as well as spoken the Hawaiian language. The word "ihepa" means feeble-minded. "Lolo" refers sometimes to the body and sometimes to the brain. If "lolo" is used for the mind it is the equivalent of "not wisely." "Ihepa" never has any reference to a defect of the eyes. "Ihepa" is an old Hawaiian word, very old. When I was a boy in school nearly sixty year ago I knew a boy in school who was kind of feeble-minded and we called him ihepa.

Cross Examination.

It is true the average Hawaiian of today has not studied and followed up his mother tongue, so that words which I use in a correct way might not be so used by others. The younger Hawaiian does get mixed up in the use of "lolo," "hepa," and "ihepa." "Lolo," for instance, when people are playing marbles, might be "not smart," with the younger generation.

The

DEPOSITION OF ROBERT HUTCHINS

taken November 3, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I am twenty-eight years of age. I lived next door to the Kentwells in Oxford and have known Eliza Christian ever since I can remember. In regard to her actions, she always appeared to be very childish. She was treated as a child. She had a violent

(Desposition of Robert Hutchins.)

temper, and on one occasion I was teasing her, and was very frightened at her temper then shown to me. During all the time I have known her I have never heard her carry on a rational, sensible conversation.

The

DEPOSITION OF MRS. LAURA MATHEWS

taken November 3, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I was a charwoman in the Kentwell home for some six years and knew Eliza Holt Christian quite well since 1911 or 1912. I came sometimes four half days a week and sometimes two half days, depending how much Mrs. Kentwell wanted me. I used to see Eliza Holt Christian about the house, who would help a little at things about the house, such as dusting and the like. Eliza Holt Christian was not quite capable of taking care of herself. She was always on about young men and all that silly sort of talk. She was not very clean. She has often brought to my house bits of cuttings out of newspapers and torn photographs of the various Kentwells, some of which I gave back to Mrs. Kentwell.

One night she came down to our house and she wanted to know if she could stay with us. I said, "What reason?" and she said, "I was out all night last night." I said, "You were?" and she said,

(Desposition of Mrs. Laura Mathews.)

"Yes." I said, "But I have no room to put you up," and she said, "Well, I am not going back to Mrs. Kentwells." I said, "Why not? Why aren't you going back?" She said she was not going back; she wanted to go out and wanted to earn her own living. She said she had been in the shrubbery all night with the chauffeur inside Mrs. Kentwell's gate.

Cross Examination.

This was about 1922. Mrs. Christian did not come to see us often but when she was out she used to pop down and have a cup of tea and quite enjoy it. The time that Mrs. Christian stayed with us over night she seemed very unhappy and wanted to get away from the Kentwell house and wanted to get out and earn her own living.

The

DEPOSITION OF FANNY LOUISE HUTCHINS

taken November 3, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I have been next-door neighbor of the Kentwells and Eliza seventeen or eighteen years. Eliza has been over to my home and I have spoken to Eliza a great many times. Eliza would bring my family small presents, such as flowers and little ornaments.

(Deposition of Fanny Louise Hutchins.)

Once she gave a little china ornament to my father. Upon the occasions when Eliza came to our home, we always treated her as a child, telling her that it was time for her to go, and I have given her some little thing such as a piece of cake or a banana when I felt she had stayed long enough. On one occasion Eliza brought some handkerchiefs to me from the Kentwell home, which I returned to the Kentwells. I never sat down and discussed subjects with her. Eliza has always been the same mentally.

Cross Examination.

Eliza would come alone and go home alone.

The

DEPOSITION OF MISS ELIZABETH WORRELL

taken November 2, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record, as follows:

Direct Examination.

I am a dressmaker and have known Miss Holt (Mrs. Christian) since 1912. I visited the Kentwell home during a period of some years to make dresses for the Kentwell girls, and during my time at the place noticed that Miss Holt was not normal. She had no opinion of her own. I never heard her carry on a rational conversation and I observed that her speech was very bad and in broken English. I remember Miss Holt having stated on one occasion

(Deposition of Miss Elizabeth Worrell.)

that she had been to the pictures and that all the gentlemen there were looking at her. During the time I knew her there had never been any change in Miss Holt's condition.

Cross Examination.

Miss Holt simply came to my shop at odd moments with the Kentwell children.

MRS. ROSE WIGHT

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I was a pupil at Notre Dame Convent during the time that Eliza was there. I knew her quite well and took frequent walks with her in the garden. As I remember, Eliza was about fourteen years of age and she was not even in the first grade but in a sort of infants' class below the first grade, though they may have done first grade work. (Regarding her ability to read:) On many occasions,—probably it will need a little explanation. I was rather fond of the children and it was our custom to take walks during recreation time. We had school hours so long we had to walk in the garden, and very often I would ask Eliza to walk with me, and on many occasions she would read me her lessons. When she had a successful day she seemed

(Testimony of Mrs. Rose Wight.)

very happy of accomplishment. She did very simple reading of four and five words, but she felt she was accomplishing something and was anxious to let me see.

(Describing the kind of girl Eliza was with reference to mentality:) Of course I don't really think I am capable of judging, but from a lay person's viewpoint I would say she had the mind of a child of six. (Speaking of the kind of conversations they had:) Conversations that would suit a child of six. She seemed to be a little child and I like to go out and talk with her about things that would interest her, things about the garden and about animals, things that would make an interesting story. (In describing Eliza's attitude toward her and how she reacted to kind treatment:) Yes, just like a pet dog would. I was very sorry for the child. I didn't see her every day, but perhaps every week. We sat at different tables.

Cross Examination.

She was very retiring and had no assurance at all. Annie Kentwell was not very kind to her. I didn't see Eliza every day, but perhaps every week. With Eliza my conversation was just a kindergarten conversation. Eliza was a girl who had never worn shoes before and had not been brought up in the social conventions. She was a very sensitive child.

The

DEPOSITION OF DR. A. T. WATERHOUSE,

taken November 5, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I have been a practicing physician for twenty-five years; for a number of years a member of the Mental Deficiency Act Committee for the City of Oxford; and since 1919 a member of the staff of Radcliffe Infirmary, Oxford University, in the Neurological Department. I have been engaged in examining, as to their mentality, mental defectives for many years. I hold the degree of Doctor of Medicine from Oxford, am a Licentiate of the Royal College of Physicians, and a member of the Royal College of Surgeons of London. I examined Mrs. Christian as to her mentality on two occasions, once in 1926 and once just a few days ago. I found her to be a feeble-minded person with the mentality of a child of approximately six years of age.

(Describing Mrs. Christian's condition:) Her recent memory is very poor, she is unable to repeat a short sentence after one and she is unable to repeat a short series of digits. She is unable to enumerate the objects seen in a picture satisfactorily and could give no interpretation of a simple picture. She is unable to compare simple objects. Her vocabulary is very small, she is unable to construct a sentence containing three given words, her power of comprehension is very limited, she has no power

(Deposition of Dr. A. T. Waterhouse.)

of appreciating absurdities, she is unable to rearrange words so as to make a sentence and she is unable to define simple concrete and abstract terms.

(As to the continuing nature of Eliza's condition:)

"QUESTION: From your examination of this patient, in your opinion would you say that the condition in which you found her is a condition of recent occurrence or has been a continuing condition for any time and period?

ANSWER: I should say it has been a continuing condition.

QUESTION: And in your opinion for how long would you say that condition had continued?

ANSWER: I should say it has most likely been life-long.

QUESTION: In making your examination and in reaching the conclusion that you have reached, giving the patient a mental age of approximately six years, I will ask you whether you endeavored to grade as high as you could or just what you did with reference to grading her strictly or leniently?

ANSWER: I graded her leniently. I graded her as high as I could.

QUESTION: I will ask you doctor if we were to assume, for the purpose of the question, I ask you to assume that the patient whom you have seen attended a school for six or seven

(Deposition of Dr. A. T. Waterhouse.)

years, being a Catholic convent, from there was taken to another young ladies' school, attended there for a year and then to a third school and attended there for a period of several months, and assume that at the conclusion of this time she had not progressed beyond the most elementary grade, had not learned to read or write, whether in your opinion that educational history would be significant as indicating a probable condition of the patient in the past?

ANSWER: Most certainly.

QUESTION: Would that tend to strengthen or otherwise affect your opinion as to the continuance of this condition?

ANSWER: It would very strongly strengthen my conviction that the condition was congenital."

As to insanity found in a patient, nothing can be said as to its past continuity; where there is found a condition of feeble-mindedness which is due to want of development, that obviously must have been present at all times in the patient's life.

Cross Examination.

I only saw this patient on two occasions. She was very much the same on the last occasion as the first in the way she answered almost all the questions, a curious similarity. My practice has been mostly among English people and I can not say from memory that I have ever had a patient from the South Sea Islands or the Hawaiian Islands,

(Deposition of Dr. A. T. Waterhouse.)

I do not think it is hard for a medical man to express his opinion as to what a patient's mental condition was eighteen or twenty years before his first examination of her. While I have said it is most likely her condition is lifelong, I can't swear it is lifelong. I would not say that a really feeble-minded condition varies from time to time with the condition of health, nor would I say that the condition of feeble-mindedness would be more noticeable at maturity than at a younger age. An observer like myself would notice the condition all the way through.

Re-direct Examination.

There would be no increase in a condition of feeble-mindedness in a person, in my opinion, between the age of twenty-four and that same person at the age of forty.

"Q. Given a feeble-minded person from an insane person, which would you say was more incapacitated at any given date?

A. You could say that if the condition of mind is due to want of development it obviously must have ben there always . . ."

The

DEPOSITION OF MISS MARY ELIZABETH KENTWELL,

taken November 3, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

(Deposition of Miss Mary Elizabeth Kentwell.)

Direct Examination.

I was born in 1906 and am twenty-two years old. I remember Eliza as far back as I can remember anything. Nothing but the King's English has been spoken in our home. I have never heard Eliza speak or try to speak anything but an English word. I have never heard anyone attempt to speak to her in any language but the English language. This statement applies to her father speaking to her as well as anyone else. As a child I can remember that the little children used to make sport of her; that she has never had any idea at all of the value of money; that at times when she would buy things she would pick out some childish object such as a toy, a balloon, a little vase, or a pencil, take her money out of a handkerchief or small purse and put whatever money she had on the counter and let the shopkeeper take whatever he wanted. The family has never been able to let her have more than a very little small change. Eliza has never been able to care for herself in a personal way; she is very dirty and has to be made to bathe. A frequent way of persuading her to take a bath was to give her a piece of candy as a reward for doing so. She has to be told when to change her clothes. I have often had to bribe her to change her stockings or other part of her apparel with a chocolate. I remember an occasion when Eliza slept all night in her clothes. I recall her going out on a hot sunny day with rubber boots on. Eliza is not able to use the telephone, and notwithstanding that there has been a telephone in the house for over four years

(Deposition of Miss Mary Elizabeth Kentwell.)

I have never known her to use or talk over the telephone. She has never been able to learn to ride a bicycle and has no idea of balance. She has no idea of how to take care of herself when sick. Eliza has never been able to read. She can write very little. She can write her name, I have seen her practicing writing her name, but quite impossible to write a connected sentence. I myself have helped her write a letter by telling her what to put and how to spell it. These letters that I helped her to write have been usually to my sisters at school. The ideas have been mine, although the writing has been hers. She collects and fills her drawers with all sorts of newspaper cuttings, pencils, toys, and such things. She is unable to add or handle figures, and cannot do household work or sewing or cooking. I have never heard her carry on a rational conversation with anyone. At the time of the death of her father, Eliza showed no signs whatsoever of grief. Her fits of temper were usually the result of being teased. We used to tease her ourselves because it amused us to see her get into this temper.

MRS. CHRIS BERTELMAN

was called as a witnes for Petitioner, was sworn, and testified as follows:

Direct Examination.

I was a school-mate of Eliza's at the Priory. I used to try to get her to what you call read, and I

(Testimony of Mrs. Chris Bertelman.)

was unable to get her to, what you call, read. Eliza knew simple words like "it," "cat," and "and," but the two or three times I tried to read with her I found she only knew such simple words. I knew her before she went to the Priory and she was always, what you call, feeble-minded. Her conversation was simple and when one would attempt to carry on a conversation with her she would giggle and hang her head down.

Cross Examination.

I used to know Eliza when she was living up on Fort Street but I don't remember what year that was. It is so many years ago, I can't remember. I was a child myself at that time. I never heard her in any class and I only know about trying to get her to read. After the Priory I saw her when I was on the beach near the Kentwells. I did not visit the Kentwells, but Eliza would say to us, "Come in and have lunch when you get through with your bath."

The

DEPOSITION OF MRS. ELEANOR WAREING,

taken November 3, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I have known Mrs. Kentwell and Eliza Holt Christian since 1910, sometimes going to the Kent-

(Deposition of Mrs. Eleanor Wareing.)

well home to do dress-making. I stayed there sometimes for six months, sometimes a fortnight, and sometimes for a week-end, sewing and looking after the family generally. This continued until 1916, since which I have seen Mrs. Kentwell a great many times, although not to do any work for her. Eliza would not come in at night. She was very sulky, and if annoyed would go upstairs and sulk for hours. We always had to make her wash and we had to see that she put on decent clothes. I never saw her try to read or write. She was away at times, and I knew of her having stayed in the summer house at the bottom of the garden and of her coming in in the early morning. I have let Eliza in more than once through the study window. Sometimes I would have to go out to find Eliza, and would find her at various places about the town or at her friends, the Arnotts, in St. Ebbes. In all the time I knew her, I never heard her carry on a rational conversation with anyone.

The

DEPOSITION OF WILLIAM JAMES FISHER, taken November 3, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I am a boot repairer. I have known Eliza Holt Christian for about five or six years. She has fre-

(Deposition of William James Fisher.)

quently come to my shop and there I have had occasion several times to observe how she handled money. I have given her correct change and she has either said it has been too much or not enough. I have seen her try to count it, but she first made it one thing and then she has made it something else several times. In counting shilling pieces or two-shilling pieces she has taken them for sixpences or half crowns. I complained to Mrs. Kentwell about it.

The

DEPOSITION OF MRS. M. JOHNSON,

taken November 3, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I met the Kentwells and Mrs. Eliza Holt when they first came to England. Sometimes they visited my house and sometimes I visited them. The last I have seen of Eliza Holt was about three years ago. I have never heard Eliza Holt carry on a rational and sensible conversation with anyone, nor have I seen any indication of temper on her part.

Cross Examination.

I was simply on ordinary calling terms with the Kentwells. On one occasion Eliza Holt came to my house quite early one morning in a very poor state. She had been out all night, she came in a very poor state early in the morning; she was very like a tramp.

The

DEPOSITION OF ARTHUR LAMBERT,

taken November 3, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I am a plasterer, and married a former maid in the Kentwell home. In about 1913 Eliza Holt had often come to my house, presumably to visit with my wife, the former Kentwell maid. Eliza Holt would stay around the house all way, doing nothing but sit and lie about. Her talk was silly kind of talk. I cannot tell you exactly what she said, but childish talk. She would go of an evening, seven to eight o'clock. One time she stayed at our house a fortnight but never slept in the house, going away at night and returning in the morning. I told my wife to see Mrs. Kentwell and tell her we could not put up with her any longer. She went to see Mrs. Kentwell and Mr. Kentwell came and fetched her away. During the time she was staying at our house she was very dirty in her ways; when she would come back in the morning she would be as though she had ben walking about all night by the appearance of her; her clothes were very dirty. At the end of the fortnight she had no change of clothes, to my knowledge. I live in Oxford and about a mile and a half from the Kentwell home.

The

DEPOSITION OF MISS MARGARET JOLIFFE, taken November 3, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

My father is a professor of mathematics at the University of London. I have known the Kentwells at Oxford since I was about six years of age, coming in contact with them for about nine years. Our families frequently interchanged visits, Eliza Holt Christian always being present. I always considered Eliza Holt Christian rather queer, people have always rather laughed about her. I found her difficult to talk with; her voice was rather peculiar, and I did not always understand what she had to say. Her speech was rather jerky and one could not always understand what she said. During all the time that I knew her I never heard her carry on a rational conversation with anyone. I recall on one occasion Mrs. Christian, going with the children to the cinema, at which place Mrs. Christian sidled up to the commissionaire and presented him with a bouquet of flowers which she had.

Cross Examination.

I recall the flower incident quite vividly. I am twenty-four, so that all the time that I knew Mrs. Christian she was a grown woman and was always with the children. I always thought that she was a nursemaid. I did not like her and tried to keep out of her way.

The

DEPOSITION OF ETHEL MARGARET RICHARDSON,

taken November 1, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I am a trained nurse and have known Mrs. Christian and the Kentwells ever since they came to England in 1909. When they came to Oxford I lived at No. 217 Woodstock Road, whereas the Kentwell home was at 159 Woodstock Road. I later, from time to time, lived in London, returning to Oxford for visits. I frequently visited in the Kentwell home and Mrs. Kentwell and Mrs. Christian frequently visited in my home. Mrs. Christian was unable to read except very small words; I have seen her try and fail. I recall one time when I asked her to read a letter when I had mislaid my spectacles, and she was able to make out only one word, "clock."

As to personal habits, one does not like to be too personal, but I should not say she was by any means a very cleanly person. Certainly she did not look much brushed up. As to her character of speech, she talks extremely indistinctly, and it is very difficult for me to make out what she is saying until the sentence comes to an end. She talks as if she had a sort of impediment in her mouth. She does not seem to have any interest in anything except in what you might call immediate creature com-

(Deposition of Ethel Margaret Richardson.)

forts. As to how Mrs. Christian would spend her spare time, from my observation she would just hang about, gaze out of the window probably and twist her apron between her thumbs. She is certainly very moody. She had a way of going into a sulk for no apparent reason and she stares in an uncanny way, and she looks very loury, very loury, as if she was nursing a grievance. All of the time I have known Mrs. Christian her condition has been the same.

GEORGE C. KOPA

called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am Deputy Registrar of the Territory of Hawaii, having in my care and custody the records of conveyances recorded from time to time in the Bureau of Conveyances. The deed of May 31, 1910, from James L. Holt to W. R. Castle, Trustee, (Ex. A-22), was recorded May 31, 1910, by Mr. W. A. Greenwell, of William R. Castle's office. The deed of May 2, 1910, from Eliza Christian et al to James L. Holt (Ex. A-21) was received for record in the office on June 23, 1910, at 11:24 A. M., being received from the office of William R. Castle and to that place returned.

LORRIN A. ANDREWS

was called out of order as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live in Los Angeles, California, and am a member of the Bar. I have been admitted to practice in the United States Supreme Court, a number of United States courts in different jurisdictions in which I have practiced, and the courts in New York, Hawaii, California and Nevada. I studied law at New York University. I was at one time in the District Attorney's office in Brooklyn, New York, and was also a member of the State Legislature in New York. When I first came to Honolulu I was appointed chairman of the first Board of Registration of the Territory of Hawaii under the first Territorial election for these islands. After that I was appointed Attorney General and later in other positions. I was in the legislature from 1907 to 1921, being elected from the Fourth District. I left the Territory in 1921. I have represented the Territory of Hawaii as Attorney General a number of times in litigations involving the construction of the Organic Act and questions on the United States Constitution. I have likewise represented private interests in presenting cases before the Supreme Court of the United States. I was engaged in private practice in Honolulu.

I guess I knew all the Holt family and almost everybody connected with the Holt family during the time I was in Honolulu. I was very well

(Testimony of Lorrin A. Andrews.)

acquainted with Mr. John D. Holt and knew his daughter Eliza as a girl. I first saw her, to the best of my remembrance, in either 1900 or 1901. I was living at a boarding house owned by Henry Smith, Clerk of this Court, which was next to Mr. Smith's home, and right around the corner from Mr. John D. Holt's house. Through the kindness of Mr. Smith I visited his family a great deal during the evenings. The Holt children would come in to visit and sometimes we would go over to the Holt house. Sometimes I went there personally on the invitation of John D. Holt. I saw Eliza Holt on different occasions. I had occasion to interview Eliza Holt under the following circumstances:

Eliza, as I remember it, had given birth to an illegitimate child, and she charged a white man, named Hall, with having raped her and with being the father of this child. Hall was about to be tried for rape in the Honolulu courts, and Lawrence Kentwell called on me on behalf of his brother—a younger brother who either was a student or just had been a student. Lawrence Kentwell stated that he was told that his brother was about to be mixed up in the matter, and as a result of the conference with the young man I interviewed Eliza.

I can only give you the substance of my talk with Eliza, but I told her that I represented George Kentwell and desired to know whether she was going to implicate him in any way in this Hall mess. When I told her I was representing George Kentwell she talked very freely and said to me that she

(Testimony of Lorrin A. Andrews.)

had testified before the grand jury, I believe under the advice of Annie Kentwell. At the instance or advice of Annie Kentwell she had said that Hall was the only man who had ever been intimate with her and that he was the father of her child. She had fixed the alleged rape at an unfinished house that Hall was building, and had got mixed up in her dates, the house having been finished more than a year before her child was born. She was very much worried over it, as to what would happen to her when she got in court and they confronted her with these witnesses. She wanted to know whether they would put her in jail for having lied, and brought up different things that she wanted advice on. Annie Kentwell said: "Well, Eliza, play lolo; that is all you have got to do." From my conference with Eliza Holt that day, and from my visits in the Holt family, there was no question but that she was perfectly rational.

"Q. That is the way she impressed you?

A. Oh, absolutely. There was no question about it."

I remember that she talked rather slowly, but she was normal for her class and age. I heard her testify in the Hall case, and she was entirely different in court. There she was either very frightened or acting. She was led to the witness stand by either her father, John D. Holt, or Mr. Kinney, her lawyer. They led her on as if she were a little child unable to find her way. I had seen her on

(Testimony of Lorrin A. Andrews.)

other occasions in her home and never before had I seen anyone lead her.

When I saw her in her home she was a girl I should say of about sixteen years old, well developed, wearing long dresses, and had her hair up. On the occasion that she was brought into court by her father or Mr. Kinney, her dresses did not reach her knees and she had two big pigtails hanging down her back.

(The transcript of testimony of Eliza Holt in the Hall trial was received in evidence as Respondent's Exhibit 4, and excerpts from the same appear hereinafter immediately following the testimony of the witness Lorrin A. Andrews.)

Cross Examination.

To the best of my remembrance, the conference with Eliza Holt was not at my law office but at John D. Holt's house. I told John Holt that I wanted to see Eliza. I don't think John Holt stayed, but that I was first alone with Eliza and then Mrs. Kentwell came in. The Hall trial came up in the spring, as I remember, of 1902, and I became Attorney General on February 1, 1903. I interviewed Eliza Holt, it may have been a month or two months before the Hall trial. I was paid for that service by Mr. Lawrence Kentwell. He stated that it was his brother's money and they got an allowance from their father in England.

"Q. How much are you being paid for coming down her to testify?

(Testimony of Lorrin A. Andrews.)

A. My expenses are to be paid and I am to adjust the question of the absolute expenses of my offices with Mr. Castle.

Q. Your expenses are to be paid, and you have no agreement as to the amount of the charge that you make?

A. No, I think between myself and Mr. Castle, why, we would probably both be fair with one another. I am naturally sacrificing considerable time. At the same time I don't like to be paid anything more than my time is worth.

Q. You don't know how much, and you have no agreement as to any specific sum?

A. No specified sum."

I do not know who actually made the charge in the Hall case but I have been endeavoring to give you the background. A charge had been made, and it is my recollection that John D. Holt made the first charge; Annie Kentwell made a charge and backed out, and then John Holt made the charge against Hall. My opinion as to Eliza Holt's mentality is based on the interview I had with Eliza at the John D. Holt home, on what I saw at the trial, and what I knew of the girl before that time. I was a fairly frequent visitor at the John Holt house. John Holt and I were friends, and all of his family were more or less friends of mine. The younger people I had more or less in common with.

(Testimony of Lorrin A. Andrews.)

The impression I got at the trial was that they were trying to create the impression that Eliza was stupid, perhaps so as to evade the statements she made which had proved to be false. I thought she did very well for a girl of her age.

(Respondent's Exhibit 4 is a transcript of the testimony of Eliza Holt in the case of Territory of Hawaii v. John W. Hall, Criminal No. 3205, May 27, 1902, the following being excerpts from such transcript:)

Direct Examination of

ELIZA HOLT,

called as a witness for the prosecution and duly sworn:

By Mr. KINNEY:

Q. What is your answer, did you hear what the gentleman said to you that you would tell the truth?

A. Yes, sir.

Q. What is your answer?

A. Yes.

Q. What is your name?

A. Eliza Holt.

Q. Speak louder, these gentlemen want to hear what you have to say. What was it you said?

(Testimony of Eliza Holt.)

A. Eliza Holt.

Q. Do you know this man sitting next to this gentleman (pointing to defendant Hall) do you know him?

A. Yes.

Q. What is his name?

A. Mr. Hall.

Q. Where did you first see that man?

A. At the Eagle House.

Q. What were you doing at the Eagle House?

A. I went to see my friend.

Q. Who is your friend?

A. Mrs. Hall.

Q. Where is the Eagle House, what street?

A. Nuuanu Street.

Q. On Nuuanu Street. What time of day did you go to Mrs. Hall's, was it in the morning, or at noon or in the afternoon?

A. In the morning.

Q. What did you go there for?

A. My schoolmate asked me to go over sometime.

Q. Your schoolmate asked you to go over sometime, that is Mrs. Hall?

A. Yes.

Q. Where did you meet Mrs. Hall when she told you to come and see her?

A. In the street.

Q. What street?

A. Nuuanu Street.

(Testimony of Eliza Holt.)

Q. Well did you tell anybody at the house that you were going to see Mrs. Hall?

A. No, Mr. Kinney.

Q. Where did you go that morning when you left your home, where did you go?

A. Dr. Wayson's.

Q. To Dr. Wayson's, what did you want to go to Dr. Wayson's for?

A. For my ears.

Q. For your ears. Had you been before that to this doctor?

A. Yes, sir.

Q. When did you get the idea to see your friend, before you left the house or after you got to the doctor's?

A. After the doctor's.

Q. Well did you tell the doctor you were going to see your friend?

A. No, Mr. Kinney.

Q. Well do you go around alone yourself much?

A. No, Mr. Kinney.

Q. Well why did you go to see your friend without telling your people when you left the doctor's and you thought you would go and see this friend of yours; why did you do so without telling your people?

A. I don't remember.

Q. You don't remember. Well you went over to your friend's. Did you find her at home?

(Testimony of Eliza Holt.)

A. Yes, Mr. Kinney.

Q. Was that before or after lunch?

A. Before lunch.

Q. Where did you have your lunch?

A. Up to Mrs. Hall's.

Q. When you went to the house there was Mr. Hall there?

A. No, Mr. Kinney, he came at 12 o'clock.

Q. And before that had you ever seen him?

A. No, Mr. Kinney.

Q. Never at all?

A. No.

Q. Now after lunch what did you do there?

A. I stayed home.

Q. Until how long?

A. Until in the evening.

Q. What time in the evening do you think?

A. I don't know what time.

Q. Was it daylight or dark?

A. Dark.

Q. Where did you have your supper?

Q. Over to Mrs. Halls.

Q. What were you doing there all day; what did you do there that afternoon?

A. I am doing nothing.

Q. Doing nothing. Well, were you asked by Mr. Hall whether your people knew you were there?

A. No, Mr. Kinney.

Q. Well at dark what happened? You say you stayed there until dark, had supper there?

A. Yes.

(Testimony of Eliza Holt,)

Q. Then what happened; after dark what did you do, did you stay at his house?

A. I don't know.

Q. Well you had your supper there, didn't you?

A. Yes, Mr. Kinney.

Q. Well now after that where did you go, did you go home that night?

A. No, Mr. Kinney.

Q. Did you start home?

A. Yes, Mr. Kinney.

Q. Who was with you?

A. Mr. Hall.

Q. How did you come to go home; did you say you wanted to go home or did Mr. Hall say you wanted to go home or did Mrs. Hall or what?

A. Mrs. Hall wanted me to go home.

Q. Didn't you ask to go home?

A. No, Mr. Kinney.

Q. Well, why not?

A. She told me to go home.

Q. Who told you to go home?

A. Mrs. Hall.

Q. Well didn't you want to—Didn't you tell them you wanted to go home yourself?

A. I don't remember.

Q. Well who took you home or started to take you home?

A. Mr. Hall.

(Testimony of Eliza Holt.)

Q. Which way did you go from the house?

A. Vineyard to Fort.

Q. Vineyard to Fort, and from Fort where did he go with you?

A. The same street.

Q. To where? Then how near home did you get?

A. By the gate.

Q. Which gate?

A. Of John D—of John Holt.

Q. Which John is that?

A. Young John.

Q. Your father?

A. Young John Holt.

Q. Well, the gate on Fort Street or the gate inside by his house or where?

A. By Fort Street.

Q. Right on the street?

A. Yes, Mr. Kinney.

Q. What happened then, why didn't you go inside?

A. I don't remember.

Q. Well where did you go after that?

A. High School.

Q. Who took you to the high school?

A. Mr. Hall.

Q. When you say the high school, where is that?

A. The small high school.

Q. The small high school, on what street is that?

(Testimony of Eliza Holt.)

A. Vineyard street.

Q. Is it on the mauka or makai side?

A. Mauka side.

Q. Was anybody else with you besides Mr. Hall?

A. Nobody else.

Q. Well when you got to the school—to that place did you stay on the street or what?

A. Inside the yard.

Q. Went inside the yard, and what was done there; tell all the gentlemen, don't be afraid. What did he do, what did he do to you?

A. I don't remember.

Q. Is it the big high school or little high school?

A. Little high school.

Q. Where did he take you, up on the ground or the verandah or where?

A. Up on the verandah.

Q. Up on the verandah?

A. Yes, sir.

Q. Well, when you got on the verandah what did he do; what was it that was done on the verandah? Don't be afraid, just tell the gentlemen?

A. Took my drawers off.

Q. Where were you at the time he took your drawers off?

A. On the verandah.

Q. Well, standing up or what?

A. Lying down.

(Testimony of Eliza Holt.)

Q. How did you come to be lying down? What is that?

A. I don't know.

Q. How was that, just tell the jury? Did he say anything to you? Just tell the gentlemen here, there is nobody that is your enemy, you must not be afraid of anybody; everybody is friendly. Just tell what was done.

A. He said he might kill me.

Q. He said he might kill you?

A. Yes, sir.

Q. Well, did he do anything to you then?

A. Yes, Mr. Kinney.

Q. Had any man before that ever done anything of that kind to you?

A. No, Mr. Kinney.

Q. Did you know anything about——

A. No, Mr. Kinney.

Q. —— that before?

A. No.

Q. Did you want to do it?

A. No, Mr. Kinney.

Q. Well then why did you do it or let him do it?

A. I don't know.

Q. Did you say anything to him?

A. No, Mr. Kinney.

Mr. DE BOLT: How is that—you did not say anything to him?

A. No.

(Testimony of Eliza Holt.)

Q. After that what did he do then; where did you go from the high school?

A. Go right down to the Eagle House.

Q. Went to the Eagle House?

A. Yes.

Q. Why didn't you go home?

A. He said he would telephone up to my auntie.

Q. Said what?

A. He would telephone up to my auntie.

Q. Did you go back with him to the Eagle House?

A. Yes.

Q. Did he telephone?

A. Went over to——Yes——went over to the telephone.

Q. He went over to the telephone where?

A. Eagle House.

Q. Well was he living at the Eagle House?

A. Big one.

Q. The big Eagle House?

A. Yes.

Q. Why are there more than one house—are they on the same side of the street?

A. Yes.

Q. On the same side, you know what I mean do you?

A. No, Mr. Kinney.

Q. How many houses are there—I will ask you this: Were the Halls living in the big house or small house?

A. Small house.

(Testimony of Eliza Holt.)

Q. And where was the big house?

A. Up mauka side.

Q. Just tell me again.

A. Mauka side.

Q. In a different house?

A. Yes, Mr. Kinney.

Q. Was the telephone in the same house that the Halls were living in or a different house?

A. A different house.

Q. And he went over and telephoned, did he?

A. Yes.

Q. You don't know whether he telephoned or not?

A. I don't know.

Q. When he came back what did he say?

A. He says nobody is home.

Q. Well where did you stay that night?

A. Over to Mrs. Hall's.

Q. At Mrs. Hall's. And the next morning where did you have your breakfast?

A. Up to Mrs. Hall's.

Q. Who was at the breakfast?

A. The daughter and the wife and myself.

Q. Who?

A. Her daughter.

Q. The doctor?

A. No, daughter.

Q. Was Mr. Hall at breakfast?

A. Yes, Mr. Kinney.

Q. About what time did you have breakfast?

A. Seven o'clock.

(Testimony of Eliza Holt.)

Q. What did you do after breakfast; where did you go?

A. Up to Kewalo.

Q. How did you come to go to Kewalo?

A. He asked his wife first.

Q. He asked his wife first; what did he say to his wife?

A. Told his wife that he would take me out to Kewalo to see his new house.

Q. He told his wife that he would take you out to Kewalo to see his new house?

A. Yes, Mr. Kinney.

Q. Had you asked to see his new house?

A. No, Mr. Kinney.

Q. Did he say anything to you in the morning before you went to Kewalo about your friends or relatives?

A. No, Mr. Kinney.

Q. Or about taking you home?

A. No.

Q. Did you say anything?

A. No, Mr. Kinney.

Q. Well when he said he would take you out to Kewalo what did you do, did you go or not, did you go out to Kewalo?

A. Yes, Mr. Kinney.

Q. Who besides Mr. Hall went with you?

A. The Chinaman was painting the verandah.

Q. Painting the verandah?

(Testimony of Eliza Holt.)

A. Out at Kewalo, yes, Mr. Kinney.

Q. How did you get out there?

A. Tram car.

Q. Where did you get the tram car?

A. Beretania Street.

Q. Then you walked down Nuuanu until you got to Beretania?

A. Yes.

Q. And then caught the car?

A. Yes.

Q. Well now you went out Beretania or King?

A. Beretania, Piikoi and King.

Q. Oh, you got out on Beretania Street and walked down Piikoi?

A. Yes.

Q. Well walked down how far?

A. Well not very far.

Q. Well do you know where King Street is out there?

A. Yes, Mr. Kinney.

Q. Well did you walk down to King Street or past King Street?

A. Walked down to King Street.

Q. To King Street, and when you got to King Street where did you go? Is this house at Kewalo that the Chinaman was painting, is that right on King Street?

A. No.

Q. Is it mauka or makai?

A. Below George Sea's.

(Testimony of Eliza Holt.)

Q. Well what road did you take to go to that place, was it a road towards on the Waikiki side of George Sea's or on the Ewa side?

A. George Sea's going right down.

Q. How is that?

A. A lane going down.

Q. Well, now, which side of George Sea's house is this lane, is it towards Waikiki or towards Ewa?

A. Towards Ewa.

Q. Which is towards Ewa?

A. George Sea's house.

Q. George Sea's house is towards Ewa and the road is towards Waikiki, eh?

A. Yes.

Q. Well when you two went down to the house what did you do when you got to the house?

A. Do the same thing.

Q. Where in the house?

A. In the bath room.

Q. How did you get into the house?

A. Got the keys and opened the door.

Q. Got the keys and opened which door?

A. The front door and the bath room.

Q. The front door leads into what room?

A. The bedroom.

Q. Into a bedroom?

A. And from the bedroom into the bath room.

Q. Did you have to go through the bedroom to get into the bath room?

A. Yes, Mr. Kinney.

Q. Where did he get the keys from?

(Testimony of Eliza Holt.)

A. His pocket.

Q. He had the keys did he?

A. Yes, sir.

Q. And opened the door? When you two got into the bath room what did he do?

A. He took off my drawers.

Q. Was the bath room—the door open or closed?

A. Closed.

Q. Who closed it?

A. Mr. Hall.

Q. Had you ever gone into that house before?

A. No, Mr. Kinney.

Q. Have you been there since?

A. No, Mr. Kinney.

Q. Did you go there with the Grand Jury?

A. Yes, sir.

Q. Did you tell them what rooms there were in that house before you went out?

A. Yes, Mr. Kinney.

Mr. DE BOLT: I object, may it please the Court.

Mr. KINNEY: Before she ever went out there she could name to the grand jury the number of rooms and the location of the rooms and the location of the bath tub in the bath room.

The COURT: I don't think it is competent, what she stated to the Grand Jury. The objection will be sustained and the answer of the witness will be stricken out.

(Testimony of Eliza Holt.)

Mr. KINNEY: Q. Well what kind of paint is it in that bath room?

A. Red.

Q. Red paint, where is the red paint?

A. On the floor.

Q. Is there any bath tub in that room?

A. Yes, sir.

Q. On which side of the bath room is the bath tub?

A. On this side.

Q. What do you mean by this side?

A. The bath room, in this side by the wall.

Q. Is it on the Ewa side of the room or Waikiki side?

A. Waikiki side.

Q. Do you remember whether that bath tub is painted, what color?

A. Painted white.

Q. In what part of the room were you when he took your drawers off of you?

A. In the bath room.

Q. What if anything did you say to him, did you say anything to him?

A. No, Mr. Kinney.

Q. Did you want to do what he—do wrong?

A. No, Mr. Kinney.

Q. Did you want to have intercourse with him?

A. No, Mr. Kinney.

Q. Well, why did you do it?

A. I don't know.

(Testimony of Eliza Holt.)

Q. You don't know. What did he say to you?

A. He said he might kill me.

Q. Did you get any of that paint on your drawers?

A. Yes, Mr. Kinney.

Q. Where?

A. On the back.

Q. Was there any stains on your skirt?

A. Yes.

Q. What was it?

A. Blood.

Q. After he had intercourse with you what did he do?

A. Washed his hands.

Q. Where?

A. Inside the wash basin.

Q. When he did wrong to you where were you, had intercourse with you, where were you?

A. In the bath room.

Q. Standing up or what, when he was doing wrong to you?

A. On the floor.

Q. Well did you cry out?

A. Yes, Mr. Kinney.

Q. Did that make any difference with him, did he stop?

A. Yes, Mr. Kinney.

Q. He stopped. What if anything did he say?

A. The same as that, if I told anybody he will kill me.

Q. Where did this blood come from, did it come from him or from you, or from where?

(Testimony of Eliza Holt.)

A. I don't know.

Q. Well did he hurt you?

A. Yes, Mr. Kinney.

Q. Well how did he hurt you; he did wrong with you did he?

A. Yes, Mr. Kinney.

Q. Well had you ever had sexual intercourse with a man before you had it with Mr. Hall?

A. No, Mr. Kinney.

Q. On these two times?

A. No, Mr. Kinney.

Q. On Vineyard Street and here?

A. No.

Q. Never before?

A. No.

Q. After he was through with you at the house out at Kewalo, what did you do, which way did you go out of the bath room?

A. The back way.

Q. You went the back way, which way did he go?

A. The front way.

Q. Why did you go out the back way?

A. I don't know.

Q. You don't know why you went out the back way?

A. No, Mr. Kinney.

Q. Where did you see him again, you say he went out the front way, and you went out the back way, did you see him again?

(Testimony of Eliza Holt.)

A. Yes, Mr. Kinney.

Q. Where was that?

A. Seen him in front.

Q. Did he say or do anything there?

A. No, Mr. Kinney, he was painting the house.

Q. Who was painting?

A. The Chinaman.

Q. And what was Mr. Hall doing?

A. Nothing.

Q. What is that?

A. Nothing.

Q. Well did you leave there?

A. Yes.

Q. And go where?

A. Mrs. Sea called me in her house.

Q. Does she live a long way or short way from Mr. Hall?

A. A short way.

Q. And how did you get in town, did you walk in or what?

A. On the tram.

Q. Well how about your fare, who paid your fare?

A. Mr. Hall.

Q. Where was that that he paid your fare?

A. Gave me five cents to go home.

Q. Where was he when he gave you the five cents to go home?

A. At his new house.

(Testimony of Eliza Holt.)

Q. This new house that was being painted?

A. Yes, Mr. Kinney.

Q. When was that, before you went into the bath room or after?

A. After.

Q. Did he go with you to go home?

A. He went on another street.

Q. Didn't go the same street with you?

A. No, Mr. Kinney.

Q. Well, where were you when Mr., when Mrs. Sea called you to come in, where were you?

A. Going to catch the car.

Q. Going to catch the car and Mrs. Sea called you in?

A. Yes, Mr. Kinney.

Q. Did you know Mrs. Sea before?

A. Yes.

Q. A long time?

A. Yes, Mr. Kinney.

Q. Now when you got into Mr. Sea's, how long did you stay there?

A. I don't know how long.

Q. Some time, and then where did you go?

A. To catch the car to go back.

Q. To catch the car to go back?

A. Yes.

Q. Did you go alone to the car?

A. Mr. Hall went first, I went after.

Q. Mr. Hall went first and you went after?

A. Yes, Mr. Kinney.

(Testimony of Eliza Holt.)

Q. Well, did he go on the same street?

A. No.

Q. Well now, when you left Mrs. Sea's, did Mrs. Sea go with you, or anyone else?

A. No.

Q. Is it a long way from Mrs. Sea's to King Street?

A. No, Mr. Kinney.

Q. Well, when you got aboard the car who was on the car?

A. Mr. Hall.

Q. And which way was the car going?

A. To town.

Q. Did Mr. Hall stay on the car all the way coming into town?

A. No, he jumped out at Thomas Square.

Q. At Thomas Square jumped off?

A. Yes.

Q. And where did he go?

A. I don't know.

Q. He jumped off?

A. Yes.

Q. And you went in the car to how far?

A. To Nuuanu.

Q. And when you got to Nuuanu Street where did you go?

A. To Hall's.

Q. What time was it when you got to Hall's.

A. Before eleven.

Q. Well what happened then, why didn't you go home?

(Testimony of Eliza Holt.)

A. Mrs. Hall made me stay there.

Q. Mrs. Hall what?

A. Mrs. Hall made me stay there.

Q. Made you stay there. Well what did you do there?

A. Nothing to do.

Q. Well did anyone come for you before you went home, did anyone come after you?

A. In the afternoon.

Q. Who was it?

A. Lizzie and Annie.

Q. Lizzie who?

A. Lizzie Holt.

Q. And Annie who?

A. Annie Holt.

Q. Do you mean your guardian Annie?

A. Yes.

Q. Did you see her come to the house?

A. No.

Q. Well how do you know she came?

A. Mrs. Hall told me.

Q. Well did you hear any voices?

A. No.

Q. Where were you when she came?

A. Mrs. Hall sent me in the stable.

Q. Sent you in the stable?

A. Yes.

Q. Did you have on your clothes then?

A. No, Mr. Kinney.

Q. Where were your outside clothes?

A. Hanging up on the line.

(Testimony of Eliza Holt.)

Q. Who put them on the line?

A. Mrs. Hall.

Q. What did she want to wash your clothes for?

A. I don't know.

Q. You say there was blood on your dress after you left that place, is that so?

A. Yes, Mr. Kinney.

Q. Where was it on your dress?

A. On the back of the dress.

Q. Do you know whether anyone saw that?

A. No.

Q. Well how did Mrs. Hall come to wash your outside clothes?

A. I don't know.

Q. You don't know. Well where did you have lunch?

A. Mrs. Hall's.

Q. How did you come to get home, who went with you?

A. I went.

Q. You went yourself?

A. Yes.

Q. How did you come to go home?

A. Mrs. Hall told me.

Q. Told you to go home?

A. Yes.

Q. About what time was that?

A. I don't know what time.

(Testimony of Eliza Holt.)

Q. Was it before or after lunch?

A. After lunch.

Q. How long was it after Annie—after you went into the stable?

A. I don't know.

Q. And you went yourself?

A. Mrs. Hall sent me inside the stable to hide.

Q. Mrs. Hall did what?

A. To hide.

Q. To hide. And your clothes were on the line drying at that time?

A. Yes, Mr. Kinney.

Q. Well how soon did you go home after your clothes were dry,—well, did you get your clothes back?

A. Yes, Mr. Kinney.

Q. Well after you got your clothes on what did you do?

A. Went home.

Q. You went home, anyone go with you?

A. No, Mr. Kinney.

Cross Exxamination of

ELIZA HOLT

By Mr. DE BOLT:

Q. How old are you, Eliza?

A. Sixteen.

Q. You are over sixteen, are you not?

A. Sixteen years.

(Testimony of Eliza Holt.)

Q. How is that?

A. Sixteen years old.

Q. When was your birthday?

A. December 30th.

* * * * * * *

Q. Now which way did you go?

A. Vineyard and Fort.

Q. Vineyard up to Fort, did you go along Fort Street?

A. Yes.

Q. Which way?

A. Right straight up Fort Street, that big gate.

Q. How is that?

A. Right up Fort Street.

Q. Up where, which way, tell us where?

A. Up to John Holt.

Q. Which John Holt?

A. Young John.

* * * * * * *

Q. I understand you to say first that you went up Vineyard Street to Fort Street, then you went along Fort Street to John Holt's house?

A. To the gate.

Q. The gate is in front of his house?

A. Further back, near another cottage in front.

Q. Well now what did you do there at the gate, which way did you go? How close is that

(Testimony of Eliza Holt.)

gate to the school house? Now you just watch my question, how close is that gate in front of John Holt's house where you say you and Mr. Hall stopped, to this school house on the corner of School and Fort Street?

A. I don't know how far the gate is.

Q. Well not very far, is it?

A. No.

Q. Now didn't you go into the house and Mr. Hall wait outside?

A. No.

Q. Well what did you do, which way did you go? Now when you got to that gate what did you do?

A. I don't remember.

Q. Don't remember. Well where did you next go? You don't remember where you next went?

A. No.

Mr. KINNEY: You need not worry about the baby, the baby is all right.

Mr. DE BOLT: Is your baby outside?

A. Yes.

Q. Mr. Hall is not the father of that baby is he?

A. I don't know.

Q. Don't you know that Mr. Kentwell is the father of that baby?

A. Yes.

Q. He is the father of the baby?

(Testimony of Eliza Holt.)

A. Yes.

Q. Have you talked with Mr. Kentwell about this case?

A. No.

Q. Have you seen him?

A. No.

Q. Have you talked to anybody about this case?

A. No.

Q. Now what do you call that school on the corner of Fort and School Street, what is the name of that school?

A. The Normal school.

Q. Now this gate that you speak of where you and Mr. Hall went to, is close to the Normal School is it not?

A. No, John Holt's gate further down.

Q. Do you know where Henry Smith lives?

A. Yes.

Q. Now in going to this gate from Vineyard Street did you pass along by his place?

A. Yes.

Q. And went on up Fort Street?

A. Yes.

Q. Do you know where Smith's lane is leading off Fort Street?

A. Yes.

Q. You passed up by that and went to Mr. Holt's gate?

(Testimony of Eliza Holt.)

A. Holt's lane.

Q. Where is that, tell us where it is?

A. It is near the big gate the right end, two houses in front.

* * * * * * *

Q. What did Mr. Hall do there at the lane? You don't remember?

A. No.

Q. Well you went away from there didn't you?

A. Yes.

Q. Well where did you go?

A. Right straight down Fort Street.

* * * * * * *

Mr. DE BOLT: Don't you know where you went after you got up to that lane?

A. No.

Q. You don't know?

A. No.

Q. Well that is a long ways from the high school is it not?

A. Not very long.

Q. But it is much further from the high school than it would be from the Normal School; the Normal School was much closer was it not?

A. Yes.

Q. Very much closer was it not?

A. Yes.

(Testimony of Eliza Holt.)

Q. And you were also much closer to your father's house at that time than you were to the high school, were you not?

A. No.

Q. And so it was further from the high school than it was to your father's house when you were there at the Lane, was it not closer to your father's house than it was to the high school?

A. I don't know.

Q. Don't you know that it was closer?

A. I can't.

Q. What is that?

A. I can't.

Q. You don't know. Now you know it is wrong to have sexual intercourse with a man until you get married to him?

A. I don't know anything about that.

Q. You don't know about that?

A. No.

Q. Do you think it is right?

A. No, sir.

Q. You don't think it is right. Well then you know that it is wrong, don't you; you know that it is wrong to have sexual intercourse with a man, don't you?

A. I don't know.

Q. You don't know.

A. No.

Q. When was the first time that you mentioned this matter of having sexual intercourse to any person?

(Testimony of Eliza Holt.)

Mr. KINNEY: Speak up louder.

A. I don't know.

Mr. DE BOLT: You don't know. Now you say that you don't want to have sexual intercourse, why, because it was wrong?

A. I don't know anything.

Q. What is that?

A. I don't know anything.

Q. You don't like to have me ask you these questions do you? I say you don't like to have me ask you these questions, is that true?

(No answer.)

Q. After you came back to the Eagle House you say that Mr. Hall went over to the telephone to telephone to your people?

A. Yes.

Q. You knew that this case was coming on for trial today?

A. Yes.

Q. Have you talked with anybody about the case?

A. No.

Q. Have you told a single soul?

A. No.

Q. Nobody?

A. No.

Q. You are sure you have not told anyone?

A. Not anybody.

Q. Well, how did they know or how did anybody know that you knew anything about it?

A. I don't know.

(Testimony of Eliza Holt.)

Q. It is a perfect mystery to you, is it not; you don't understand why you were called here do you? Do you know why you are called here?

A. No.

Q. You don't?

A. No.

Q. Do you know how this case concerns Mr. Hall? What has it to do with Mr. Hall, is it not because Mr. Hall is the father of your child, is it?

(No answer.)

Q. Kentwell is the father of your child, is he?

A. I don't know.

Q. What is that?

A. I don't know.

Q. Well, didn't you just a little while ago tell me that he was? Are you tired?

A. Yes.

Q. Now you answer my questions right along and we will soon get through. I don't want to ask you anything that will hurt you at all; just simply want to get at the truth. Now Mr. Hall did not use you rough or anything of the kind, did he, Mr. Hall did not hurt you?

A. No.

Q. No of course he didn't. He didn't intend to hurt you did he?

A. No.

Q. You knew that, didn't you?

A. Yes.

(Testimony of Eliza Holt.)

Q. Certainly you did. He was perfectly kind and gentle to you, was he not, he didn't try to hurt you, did he?

A. No.

Q. Why of course not. Now can't you after thinking tell me where you went after you got up to the lane, John Holt's lane as you call it, can't you tell me where you went from there; did you go right back to the Eagle House?

A. Yes.

* * * * * * *

Q. Now when you got up to Fort Street did you stop, both of you stop right there?

A. Yes.

Q. Why did you stop, there must have been some reason for it, was there not?

A. I don't know.

Q. What is that?

A. I don't know.

Q. But you did; you both stopped right there?

A. Yes.

Q. Did you stand there and talk? What did he say to you when you got there to the entrance to Holt's lane; do you remember what he said to you?

A. No.

Q. Now, Eliza, why don't you answer my questions? You answered Mr. Kinney right along.

Mr. KINNEY: I don't think that is hardly fair. I remember experiencing difficulty.

* * * * * * *

(Testimony of Eliza Holt.)

Q. All right, now you tell me the truth. Now what did you and Mr. Hall talk about when you reached the lane there, if anything, do you remember?

A. I don't remember.

Q. Well can you remember whether or not you talked at all or is it simply you don't remember what you said, is that it?

A. Yes.

Q. You remember that you did talk?

A. Yes.

Q. But you cannot remember what you said?

A. Yes.

Q. But you are sure you did talk?

A. Yes.

Q. How long did you and Mr. Hall stand there and talk?

A. Quite a while.

Q. What is that?

A. Quite a while.

Q. What do you mean by that, ten minutes or fifteen minutes?

A. Ten minutes.

* * * * * * *

Q. How did you get into the high school grounds, what place did you go in, did you climb over the fence or go through a gate?

A. Through a gate.

Q. Where was the gate?

A. On this side.

Q. On Vineyard Street?

A. Yes.

(Testimony of Eliza Holt.)

Q. Why did you go to the high school, why did you go up there?

(No answer.)

Q. Don't you know?

A. No.

Q. All right. Now we will go back to the lane, on Fort Street, again. Now when you started home you started to your home that night, did you not?

A. Yes.

Q. Now you knew when you were at the entrance of that lane you were not at home did you not, you knew that did you not?

A. Yes.

Q. Why did you not go on home? Why did you not go on home, why did you turn and come back down Fort Street, do you know why?

A. No.

Q. Why did you go to the high school?

A. Mr. Hall took me there.

* * * * * * *

Q. Where is that gate on Fort Street leading into the high school?

A. Mauka side.

Q. On the mauka side. There is a stone wall there, is there not?

A. No, no stone wall, only a fence.

* * * * * * *

Q. There was trees and bushes all around in the yard, was there not?

A. Banana trees.

(Testimony of Eliza Holt.)

Q. Other trees too, was there not?

A. Yes.

* * * * * * *

A JUROR: Can we know the native phrase for that.

Mr. DE BOLT: Do you understand the native language?

A. I understand a little.

Mr. KINNEY: You know what mea kalohi is, don't you?

A. Yes.

Q. You have heard people speak about mea kalohi?

A. Yes.

Q. Between a man and a woman?

A. Yes.

Mr. DE BOLT: Now that means sexual intercourse, don't it?

A. Yes.

Q. You know that, don't you?

A. Yes.

Q. Well then when you told me a while ago that you didn't know what sexual intercourse meant, you didn't say what you intended to say, did you?

A. No.

Q. Now is it right or is it wrong to have sexual intercourse?

A. Wrong.

Q. You knew it was wrong, didn't you?

A. Yes.

* * * * * * *

(Testimony of Eliza Holt.)

Q. After it was all over with, all pau, and you got up from the floor, did he say he would do something to you if you told it then?

A. He might kill me.

Q. He might kill you, that was after it was all pau?

A. Yes.

Q. Just give me his exact words, how did he say that?

A. He said I must not tell anybody.

* * * * * * *

A JUROR: May it please the Court, I would ask that Mr. Kinney repeat that native.

Mr. KINNEY: Hui kalohi.

Mr. DE BOLT: Did you hear what Mr. Kinney said?

A. Man and woman.

Q. You understand what that means?

A. Man and woman.

Q. Having sexual intercourse together?

A. Yes.

Q. How long have you known that word?

A. I don't know.

Q. A long time, have you, a long time?

A. Yes.

Q. Ever since you were a little girl of eight or nine or ten years old?

A. Nine.

Q. Ever since you were nine years old, who told you, where did you learn it?

A. I heard the native of it.

(Testimony of Eliza Holt.)

Q. You heard the native?

A. Yes.

Q. Did you talk the native?

A. Yes.

Q. Not very good?

A. No, I understand a little bit.

Q. Can you carry on a conversation with a native?

A. No.

* * * * * * *

Q. You like to get up early do you?

A. I always get up early mornings.

Q. You always get up early and you think it was about seven when you started out there?

A. About seven, after breakfast.

Q. Oh, you had breakfast at seven. I am talking about what time did you leave the house to go out to the new house?

A. Half-past seven.

* * * * * * *

Q. Did you tell any of them what had taken place?

A. I did not.

Q. You did not?

A. No.

Q. Made no complaint?

A. No.

Q. Why didn't you tell them, were you ashamed, ashamed to tell them?

A. I was scared.

Q. You were ashamed were you not?

(Testimony of Eliza Holt.)

A. Yes.

Q. Why didn't you tell them?

A. I was ashamed.

* * * * * * *

Q. Now you know George Kentwell, the brother to your guardian's husband?

A. Yes.

Q. You saw him out there, did you not?

A. He stayed there too.

Q. Oh, you stayed at the same place. Well, that is where you and he had sexual intercourse is it not?

A. Yes.

Q. At whose house, at whose house?

A. Mrs. Kentwell's.

* * * * * * *

Q. Well when did you go back to your father's house here on School Street, two or three months after that or three or four months? Well you were back at your father's house in February, were you not?

A. In February.

Q. You remember that?

A. Yes.

Q. Well you knew at that time—you knew before that time didn't you that you were with child and that you were going to have a baby?

A. Yes.

Q. You knew it?

A. Yes.

Q. But you had not told anybody?

A. No.

(Testimony of Eliza Holt.)

Q. Told no one?

A. No.

Q. Who first spoke to you about it, asked you if you were going to have a baby, was it your father, was it your auntie, or was it your cousin?

A. My auntie.

* * * * * * *

Q. Did she ask you who the father of the child was? Didn't she ask you who you had sexual intercourse with? Tell me what she said. What else did she ask you?

(No answer.)

Q. Well what did you say? You felt ashamed did you not, you didn't want to tell her—Did you feel ashamed?

A. Yes.

* * * * * * *

Q. That was in February, was it, when you had this talk with your auntie when she asked you who the father of the child was?

A. No, it was in April.

Q. What was in April, tell me? Speak right out and tell me what took place in April?

A. My auntie asked me who is the father of the baby was in April.

Q. Is that before the baby was born or after the baby was born?

A. After it was born.

Q. Then you told her that Kentwell was the father of the baby?

A. Yes.

(Testimony of Eliza Holt.)

Q. Didn't you first say that Mr. Hall was the father of the baby?

A. Yes.

Q. You first said that he was the father of the baby?

A. Yes.

Q. And you didn't say anything about Kentwell first, you didn't tell them anything about Kentwell?

A. No.

Q. Why didn't you tell them about Kentwell in the first place? You didn't want Kentwell to have any trouble, did you? You didn't want to make any pilikia for Kentwell, is that it?

A. I don't know.

Q. Didn't want to make him any trouble, is that right, just tell me?

(No answer.)

* * * * * * *

Q. Eliza, you say you studied arithmetic during that seven years that you were at school?

A. Yes.

Q. Well now what do seven and five added together, what do they mean? Supposing you had seven apples and I hand you five more how many apples would you have, don't you know?

(No answer. Witness nods her head "no".)

Q. Do you know what five times four is, how much that would make, five times four, don't you know?

(No answer.)

(Testimony of Eliza Holt.)

Mr. DE BOLT: Supposing you have two apples Eliza and I gave you two more, how many would you then have?

(No answer.)

Q. How many fingers have you on one hand?

A. Five (after looking at hand).

Q. How many on the other hand?

A. Five (after looking at hand).

Q. How many on both hands?

A. Ten.

Q. If you had seven fingers on one hand and only five on the other, how many fingers would you then have?

The COURT: Don't you know, Eliza?

A. No.

Q. You don't know how many you would have then?

A. No.

Mr. DE BOLT: Try and think then about it and see if your cannot decide if you had seven fingers on one hand and only five on the other, how many would you have on the other? Just think about it, count it up?

(No answer.)

Q. Did you use a slate when you were at school and blackboard too?

A. Yes, blackboard.

Q. What did you make on the blackboard, figures?

A. Yes.

(Testimony of Eliza Holt.)

Q. And letters?

A. Yes.

Q. You would write words on the blackboard?

A. Yes.

Q. What did you make figures on the blackboard for?

(No answer.)

The

DEPOSITION OF MRS. ANNIE HOLT KENTWELL,

taken November 5, 1928 on behalf of Petitioner in England, pursuant to open commission, was read into the record as follows:

Direct Examination.

I was born in 1881, and am the wife of Lawrence K. Kentwell. I have known Eliza Holt Christian all my life. She was born in 1885. She went to a board school at the Convent of the Sacred Heart for about six years. She was very childish at this time. Whenever she did anything naughty I would frighten her with a large placard, and she would run away screaming. During her vacations she would come home and live with me. In 1900 I went with Eliza Holt to the Notre Dame Convent in California. I suggested to Eliza's father that she go to school with me, so I was appointed her guardian for her as a minor. I should think she was sixteen or seventeen at the time. Mr. John D. Holt suggested

(Deposition of Mrs. Annie Holt Kentwell.)

that I be made the guardian. She was so childish in her ways. On the way up to California I had to have extra care to watch her. She was climbing on the rails. I was always afraid she would fall off. She had no idea of danger. At that particular time I had a very difficult time with her as to her cleanliness and had to keep my eye on her to watch her all the time as I am doing now at present. At Notre Dame she was put in the very first grade with children of six or seven, although she was then fourteen or fifteen. At Notre Dame School she did not progress beyond the same form that she first entered. She did not seem to improve there. She could not read nor write. She could not make simple computations in addition or subtraction. I know this from my own experience, having seen her try in the class, although I tried to help her. We were there together for about a year. She was no better at the end of the year than at first. In matters of personal cleanliness she did not improve.

I was married to Lawrence Kentwell in 1901 and went out to live at Waikiki. I remember the Hall trial and that I attended the same, and I remember when Mrs. Christian married Albert Christian after the Hall case. She lived with Christian for about six months and then came to my house at Waikiki where I was living, and also Mr. John D. Holt. She lived with her husband about six months, then she came to my house, having run away from home. He did not come with her. I had no occasion to

(Deposition of Mrs. Annie Holt Kentwell.)

observe her with her child. She could not care for it so it was given away and adopted by the Seas. I remember hearing Mrs. Christian testify on the witness stand at the Hall trial. At that trial I remember questions being put to her asking her to make simple computations, which she was not able to make. In September of the same year in which she came out from San Jose I brought proceedings, as a relative and friend, and tried to annul the marriage. Eliza was still a minor at that time. Thereafter she lived with me all the time until we left Hawaii.

We left Honolulu about September 4, 1906. Eliza came with us, on the suggestion of John D. Holt and my husband. Before we left Hawaii the matter of what was to be done about Eliza and her father was taken up in my home. I did not want her to come with us, but it was a case of two against one.

(Witness was then shown a copy of a document dated August 31, 1906, in which Eliza Holt Christian assigns to Annie Holt Kentwell all of her interest in a certain lease dated March 17, 1905 (Exhibit A-8), and certain rents and profits, after the death of her father, in consideration for which Annie Kentwell agrees to support and maintain Eliza Christian for the remainder of her life.)

WITNESS RESUMES: I do not remember having signed that document but I may have signed it. I was ill and my husband was winding up our affairs. He never called my attention to the fact

(Deposition of Mrs. Annie Holt Kentwell.)

that among the papers I was signing there was a paper whereby she conveyed this property to me and I agreed to support her for the rest of her life. I remember signing several papers and I trusted him implicitly.

(The document referred to was thereupon received in evidence without objection, in connection with the deposition of Annie Holt Kentwell, but, to avoid duplication, bears the exhibit number throughout the trial of 2-G, and is a document cancellation of which is prayed for.

Witness was thereupon shown a certified copy of another document dated August 31, 1906, Eliza R. P. Christian, Lessor, to Annie Holt Kentwell, Lessee, the document being a lease of the Lessor's interest in the lands of Makaha for a term of fifteen years from and after the death of John D. Holt; consideration $250 net per annum, beginning on the death of said John D. Holt. The document was executed by Eliza R. P. Christian and Annie Holt Kentwell, in the presence of John D. Holt; the acknowledgments were taken by N. Fernandez, a notary public of the First Judicial Circuit, Territory of Hawaii, and the document was duly recorded in the Hawaiian Registry of Conveyances. The document was received in evidence without objection as Petitioner's Exhibit 2, in connection with the deposition of Annie Kentwell.)

WITNESS RESUMES: I may have signed the foregoing document also, but I don't remember it.

(Deposition of Mrs. Annie Holt Kentwell.)

My husband did not tell me that among other papers I was signing there was one whereby Eliza purported to lease, after the death of her father, her Waianae property for a period of fifteen years. I did not have any personal banking account after my marriage, and all moneys coming to me were put into my husband's account. We sailed from Honolulu September 3 or 4, 1906, and went to Boston for about six months, from which place we went to New Jersey.

(Witness was thereupon shown a certified copy of a document executed under date of June 14, 1907, by which witness conveys to May K. Brown, of Honolulu, certain interests of witness at Makaha, namely, her interest in lands at Makaha; her rights in a lease from W. A. Aldrich, Executor of the Estate of Robert W. Holt, Deceased, to John D. Holt, dated November 22, 1862; her rights in a lease made by Eliza R. P. Christian to Annie Holt Kentwell dated August 31, 1906 (Exhibit 2); her rights to a lease made by John D. Holt to Annie Holt Kentwell dated September 13, 1900; and her rights to a lease made by John D. Holt, Jr. to Annie Holt Kentwell dated January 1, 1901, in consideration of $500. This document was executed by Annie Holt Kentwell, L. K. Kentwell and Eliza R. P. Christian, the joinder of L. K. Kentwell and Eliza R. P. Christian being by way of consent. The acknowledgments of the parties named were taken in New York City on June 14, 1907, before E. L. Barnard, a notary public. The document was thereupon received in evi-

(Deposition of Mrs. Annie Holt Kentwell.)

dence, without objection, as Petitioner's Exhibit 3, in connection with the deposition of Annie Kentwell, but is set forth more fully in connection with the deposition of E. L. Barnard, called as a witness for Respondent, and bears the designation throughout the trial, to avoid duplication, of Exhibit 14-B. The document was duly recorded in the Hawaiian Registry of Conveyances.)

WITNESS RESUMES: I remember selling my interests in Makaha and I did sign my name and gave the deeds to my husband, but I don't remember about Mrs. Christian. I think this was signed in New Jersey, although I have a faint recollection that I went to New York with Mrs. Christian and my husband. My husband handled the transaction entirely. I don't remember about the $500. At that time I had no personal banking account in New Jersey or elsewhere. Any moneys which I may have received were turned over to my husband's account.

(Witness was thereupon shown a document dated June 14, 1907, Eliza R. P. Christian to May K. Brown, being an option to purchase Eliza R. P. Christian's contingent interest in the Ahupuaa of Makaha. This document was executed and acknowledged by Eliza R. P. Christian before E. L. Barnard, a notary public in the City of New York. This document was offered by Petitioner as an exhibit in connection with the deposition of Annie Kentwell and was received as such exhibit without objection. It is, however, more fully set forth in connection with the deposition of E. L. Barnard and

(Deposition of Mrs. Annie Holt Kentwell.)

bears the designation during the trial, to avoid duplication, of Exhibit 14-A. The document was duly recorded in the Hawaiian Registry of Conveyances.)

WITNESS RESUMES: I have no recollection of this document nor whether Mrs. Christian signed. So far as I know, Eliza R. P. Christian had no banking account at any time while we were in New Jersey, nor did she ever execute any checks or deposit any money in any banks in New Jersey or elsewhere. In all my experience with her I have never known her to have a banking account anywhere. So far as I know, Eliza Christian herself did not have in her possession any sum of $2500 received by her personally. In New Jersey there was no change whatever in her ability to take care of herself.

Eliza's second illegitimate child was born January 1, 1909. This child died two or three months after its birth. I don't remember the name of the hospital she went to, but it was in the City of New York. I was unable to ascertain from Eliza anything concerning the paternity of the child. I tried to find out but could not. None of us were able to discover its paternity. This child lived for two or three months and was never brought back to our home, but Eliza remained with the child at the hospital in New York. In June 1909 we all came to England and stayed at first with a Mrs. White at 24 Leckford Road, Oxford; then, after that, and on July 5, 1909, to our present address. She has made her home there ever since.

(Deposition of Mrs. Annie Holt Kentwell.)

I remember Mr. David Withington calling at our home in Oxford during the month of May, 1916. I was out when he first came, but when I got home about 12:30 he was talking to Mr. John D. Holt. My husband came in later, and we all, including Mr. Withington, had lunch, together with Mrs. Christian. The latter did not say anything at all during luncheon. My husband and Mr. Holt were talking to Mr. Withington who said he had been sent over by Mr. James L. Holt to buy Mrs. Christian's interest in Waialua. The sum of $30,000 was mentioned, but Mr. Withington did not address his remarks to Mrs. Christian. She said nothing. Mr. Withington did not speak about the sale to her. After luncheon I went upstairs and the three men went into the study, Mrs. Christian going out with the children. I next saw Mr. Withington when I had come downstairs after my rest. I went into the study. It was just before tea. Before this I had not been aware of Mrs. Christian conveying any of her properties away. When I came down from upstairs I said to Mr. Withington, "She is non compos mentis." Mr. Withington said, "I know it is all right we are taking the risk." Then my husband spoke up and said to me, "It is all right, dear, leave it to me," to which I replied that if that was the case I should leave it to him. It was suggested that we should meet Mr. Withington in London the next day, and I was told to sign the deed as being one of the family. I had no idea why I signed, because my husband attended to everything. Mr. Holt, Mrs.

(Deposition of Mrs. Annie Holt Kentwell.)

Christian, my husband and myself went to the American Consulate in London.

(Witness was thereupon shown a copy of a document executed under date of May 2, 1910, signed by John D. Holt, Eliza R. P. Christian, Annie Holt Kentwell, Lawrence K. Kentwell, and Albert Christian, conveying to James Lawrence Holt, in consideration of $35,000, certain interests set forth in the deed, which is a document cancellation of which is prayed for in this case, and which document is set forth in full as an exhibit to the petition and in the list of documents hereinbefore set forth. The document was received in evidence without objection in connection with the deposition of Annie Kentwell, but throughout the trial, to avoid duplication, it bears the designation Exhibit A-21.)

WITNESS RESUMES: I was told to come over and sign because I was one of the family. I had no idea of why I was to sign because my husband saw to everything. I know that I conveyed my interests in Waialua to J. R. Galt in Honolulu in 1904 or 1905. The deed, Exhibit A-21, was never read to me before I signed it, and to the best of my knowledge it was not read to Mrs. Christian nor to John D. Holt before it was signed, but my husband looked it over and passed it over to us to sign. I signed as Annie, instead of Anne, because I was so designated in the document. I remember John D. Holt, Mrs. Christian, and my husband signing. I think Mr. Withington gave the check to my husband but I am not quite sure; he may have given it to Mr.

(Deposition of Mrs. Annie Holt Kentwell.)

Holt. I do not remember whether there was more than one check. At that time and until my husband left me and went away I never had a personal banking account in Oxford, London, or anywhere, but left the matter entirely to him. Any moneys which came to me from properties in Hawaii or elsewhere I endorsed the checks therefor and turned them over to my husband. I may have endorsed a check at this time but don't remember, nor do I remember whether I received any money after this transaction. Eliza Holt Christian at that time had no banking account in Oxford or anywhere. So far as my knowledge goes, she did not receive any sum of money at that time personally. Since that time, so far as my knowledge goes, she has had no sum of money since the execution of the document. I have made every effort to ascertain whether any sum of money commensurate with the money designated in the deed of May 2, 1910 was placed to the account of my husband here in Oxford. I even went to see Mr. Bennett, the Manager of the Bank, and he refused to give me the information.

I remember Mr. Henry Holmes calling in May, I think, of 1912. I did not see him until the next day, when he and Mrs. Holmes came to tea in the garden. Mrs. Christian was there but sat with the children. I think we next went to the Randolph Hotel in Oxford, where Mrs. Christian, Mr. and Mrs. Holmes and I had dinner together. Mrs. Christian did not say anything at the table, nor did Mr. Holmes talk to her.

(Deposition of Mrs. Annie Holt Kentwell.)

I saw Mr. Holmes the next day and took Mr. and Mrs. Holmes around to see the colleges. Mrs. Christian was not present. I think next we went to the American Consulate in London. I think Mrs. Christian signed a paper there. The negotiations were between my husband, Mr. Holmes and Mr. Holt. So far as I know, Eliza Christian did not herself receive any sum of $7500, or any other amount at that time, nor at that time did she have any banking account, nor had she any moneys kept in any other place or in any other way.

I remember the birth of Mrs. Christian's third illegitimate child in October of 1915. Relative to taking care of her, in the matter of having that child born, I had her examined by Dr. Good. She was then sent to London and the child was born in a Home in London. The child is now with the Nazareth Sisters in Oxford. I do not know who the father of the child was, and could not find out. I tried to find out the paternity of the child from Eliza but did not succeed.

My husband first left Oxford in 1917, going to China; then he returned to join up in the War, being with the army until the armistice was signed. He was invalided after that and came back and stayed until 1919 when he went out to China again, going to Shanghai. I have not seen him since. When he left, he left with me whatever money was necessary for family expenses. He left no money with me for Mrs. Christian. I don't know just where he is in China as I have not heard from him since May.

(Deposition of Mrs. Annie Holt Kentwell.)

Moneys, however, are sent to me every month, coming by check through the Bank in London. The information that I tried to get as to my husband's bank deposit in 1910 was from Mr. Bennett in Lloyd's Bank in Oxford.

I remember the fact that Eliza Christian executed a power of attorney to Henry Smith of Honolulu in 1924. Mr. Smith wrote that in order to get money from the Hawaiian Trust Company he must have a power of attorney from Mrs. Christian. The power was sent to me here, Mrs. Christian signed, and I procured her signature at the suggestion of Mr. Henry Smith, and we sent it back to Mr. Smith. This was just after the death of John D. Holt. I knew nothing about the power of an incompetent to execute a power of attorney, and I had her sign this power because Mr. Smith wrote and told me to do so. The small income she was getting from the Trust Company was sent to me.

I remember the call upon me by Dr. Douglas. He called once and Mrs. Christian was out. He called a second time but he insisted upon seeing Mrs. Christian, so I called her down. She had influenza at the time. Mrs. Christian, Dr. Douglas and I were present. Mrs. Christian said her husband was out in Honolulu and that he had been very cruel to her. I was the one who informed Dr. Douglas of Mrs. Christian's family history. Out side of the information given him by her about her husband being cruel to her, she gave him no other information, not to my knowledge. I gave Dr. Douglas all the information

(Deposition of Mrs. Annie Holt Kentwell.)

I could. I think Dr. Douglas was with us for about ten minutes.

When Mrs. Christian's father died she showed no signs whatever, and did not seem to realize her father was dead. If she had she would have shed tears. When Mr. Holt died he left no property to Eliza that I know of and made no provision for her. Before he died and during his lifetime he set aside no money for her, to the best of my knowledge, and since he died I have been unable to find any properties of his, in England or elsewhere. To the best of my knowledge, Mrs. Christian has no property either in moneys, in a bank, or kept for her in any way or in her possession.

The deed of May 2, 1910 called for $35,000, but to my knowledge I never received the $5,000. Of the $35,000 recited as having been paid, Mrs. Christian, to the best of my knowledge, never received that sum or any portion thereof. The only time I put money in the bank was when I turned it over to my husband. If I had gotten the $5,000 I would know about it and I never got it. Mrs. Christian could only sign her name. She is able to write with the help of others. I have seen her write a letter with her father, her father dictating the letter and Mrs. Christian trying to write it. This took a long time because Mr. Holt could not see and Mrs. Christian could not spell. Mr. Holt's eyes were weak, he was short-sighted: he had only one eye to begin with. He would spell the words for her and she would write them, little words. If he wanted to write a letter, especially to James L. Holt, he would ask

(Deposition of Mrs. Annie Holt Kentwell.)

Mrs. Christian to write, with his help. I remember seeing his on only one occasion.

Mrs. Christian could not care for herself. I had to attend to her clothes and especially make a point that she dressed properly to go to London. She has never been able to make the right change. When a thing has cost about nine pence she has put down two shillings and not known whether she would have change or not. She has given the whole change to the shopkeeper. She has gone up to her room on a cold day, with the windows open, not knowing any better, although she would have a gas stove in her room but would not light it. She has always been fond of eating, would eat as much as possible and then be sick. She would go up to her room and rest and be better. The next day she would come down and eat again with the same result. I heard the testimony of one of the witnesses about her being at his home for about a fornight, and I remember the incident. We tried to find her but could not. We informed the police, and eventually my old maid, Mrs. Lambert, came up to tell us about it, which is how we discovered where she was.

She collects various odds and ends. She cuts out pictures from the newspapers—anything she fancies; for example, anything connected with men, football players, and so on. She cannot sew, and I have to induce her to take baths. I have had to bribe her to take her baths with apples or oranges. She has given me presents, such as pencils and faded flowers,

(Deposition of Mrs. Annie Holt Kentwell.)

in a most serious way, as a real present. If she was going to London I would make it specially a point to see that she was dressed properly. She loses her pocketbook. She has been into town and lost her purse and come back without it. She will go into a rage over nothing. I have seen her go to bed with all her clothes on and sleep there that way all night. She would come down in the morning in a most dilapidated condition. I have never heard Mrs. Christian use a Hawaiian word, except once when Mr. Goodale called and said "anuana" to her, to which she simply laughed and smiled. No language but the English language has ever been spoken in my home. In all schools that Eliza went to the instruction was in English. I have never heard her father speak to her in Hawaiian. In cooking, she tries to do her best but can't cook. She can't read. I have seen her try. The words which she read were simply words that a child would understand. In all the time I have known Mrs. Christian since early childhood she has always been the same.

Cross Examination

Eliza lived the early years of her life with her father at Makaha. I don't remember her mother's name and I never saw the mother. I used to go down to Makaha for the holidays, at Christmas, Easter and during the summer holidays. I am not living with Mr. Kentwell now because he is away; there is no separation or any trouble, but he has

(Reposition of Mrs. Annie Holt Kentwell.)

not been able to return. At the time of my marriage to Mr. Kentwell I think he was in a company of some sort—"the Hawaiian something." In 1905 he went to Columbia University for a year and then came back; then we left for the mainland in September 1906.

Regarding the two documents which have been shown me, both dated August 31, 1906, I expect the Eliza R. P. Christian there mentioned is the Eliza R. P. Christian in this case and the Annie Holt Kentwell is myself. I do not know where the document was executed and don't remember whether it was in my own house or not. I was taken ill about that time and my husband was getting all our things together. I think I knew Mr. Nagran Fernandez, although I don't know his business, and I don't remember his taking my acknowledgments to these papers. I don't remember whether the deed was signed in the presence of John D. Holt or whether Eliza Christian signed. I have no recollection whatsoever about that. My husband asked me to sign it. I may have signed it; my signature is there, so I must have signed it, but I don't remember when I did it.

My testimony is the same as to both documents dated August 31, 1906. I don't remember signing a lease to the Waialua Company on March 17, 1905. I sold my interest in the Holt lands at Waialua to Mr. Galt, I think in 1905. I think the Maturity Company had something to do with it as well. That

(Deposition of Mrs. Annie Holt Kentwell.)

is my faint recollection. If you (referring to counsel) suggest to me that the sum of $6,000 was the price, it must be right. Any money paid must have been paid to my husband. I had implicit faith in my husband. He attended to all business transactions. As far as any money transaction was concerned, my husband attended to it, and if he did attend to it, it was quite allright. I don't know anything about the other papers signed in New York or New Jersey, nor anything about a lease to the Waialua Plantation.

I remember signing deeds which my husband asked me to, but I have no recollection of this money for which I may have signed receipts. My husband had the check and I may have signed it. If receipts are produced signed "Annie Kentwell" they would be mine.

When we first came to the mainland we lived in Cambridge, somewhere by Harvard University but I don't remember the name of the street. My husband did not go to college at Harvard but we went down to Elizabeth, New Jersey, while he attended Columbia.

In regard to the two documents executed in June 1907, I don't remember whether I executed them in New York or New Jersey. I remember selling my interest to May K. Brown, and I think this was in New Jersey, but I am not sure. I don't remember anything about those two documents. I know we went to New York on one occasion, but I can't re-

(Deposition of Mrs. Annie Holt Kentwell.)

member whether that was the time. I don't remember signing anything at all. Although I remember selling my interest to May K. Brown, I don't remember the $500. If the money was paid to my husband it would be all right. Moneys have always come into my husband's account. The only time I can remember I had an account of my own was when my husband went to China. I don't remember signing other documents in New Jersey but if my signature is there, I will admit it. I don't remember Eliza Christian having sold her interest in Makaha. The family may have spoken about it but it is so long ago I don't remember.

When Mr. Withington came to the house I had never heard about any possible sale of the interests in the Holt lands at Waialua before.

I have seen John D. Holt write to James L. Holt through Eliza but I did not read the letter. I knew he used to write to James L. Holt. Eliza sat there and Mr. Holt spelled the words. It took hours to do it. This was the only occasion I saw Mr. Holt dictate a letter to Mrs. Christian. I happened to go into the room, that is how I saw them write.

(Counsel exhibited to witness a copy of a letter dated March 8, 1910, Lawrence Kentwell to James L. Holt, later received in evidence as Exhibit D-6, and referred witness to the first sentence which reads: "Liza and I have just got your letter, and after a long consultation with Annie and Uncle John, they have concluded to sell for $30,000" and asked witness to refresh her recollection as to

(Deposition of Mrs. Annie Holt Kentwell.)

whether she had ever heard the Waialua matter discussed.)

WITNESS RESUMES: I am sorry I know nothing about it and I never had any talk with my husband like that. I don't remember any cables coming from Honolulu or being sent from Oxford by Mr. Kentwell. The only cable I remember was when my sister died, the cable coming through announcing her death. My husband never mentioned any cables. The possibility of Eliza getting a divorce from Mr. Christian was mentioned in Honolulu but not in Oxford. I was quite surprised to see Mr. Withington when he came. I do remember having heard that somebody else was trying to get the property. Mr. Trent came a week later. In speaking to Mr. Withington about Eliza, I am certain I used the words "non compos mentis," and that he answered, "That is all right; we are taking the risk." Then my husband said, "Leave it to me; I am attending to this." I always use the word "non compos mentis," having used it with my sister-in-law in Honolulu, Mrs. Gus Holt.

At the Consulate my husband had the deed, looked over the paper and gave it to Mr. Holt to sign. He signed, then Mrs. Christian signed it, then myself and my husband last of all. Mr. Withington, I think, gave a check to my husband. I am not quite sure whether it was to my husband or to Mr. Holt. I don't think Mr. Withington read over the deed to us but if any deed was read Mr. Withington may

(Deposition of Mrs. Annie Holt Kentwell.)

have read it. It is my recollection, however, that it was not read. Mr. Westacott, the American Consul, did not do anything. I can't remember his taking our acknowledgments, but if it appears on the deed that he did, then it must be so. I can't remember whether there was more than one check.

My husband was four years at the Columbia Law School and got his L.L.B. degree there. After coming to England he studied law at Oxford, and in 1912 had his B.A. from Oxford in law; then he went to King's College at Cambridge University for two years. I don't think he practiced law at all during this time, just studying. I think he went to London and joined the Inner Temple. Then in 1916 he was called to the Bar. After that he lived in London. He went in Chambers as well. He came down to Oxford for the week-ends.

My husband generally used a typewriter in writing to others. I do not know whether he kept carbons of his letters. I think he destroyed all his letters before he went to China in 1917. He was, I think, careful in his business affairs and decidedly truthful. I had no correspondence with James L. Holt nor letters in my possession from him to Mr. Kentwell. I had one letter from James L. Holt relating to the Waialua deal but I turned it over to counsel. I think that letter was written during the time of this transaction about 1910. It was written to Mr. Kentwell. I turned over to counsel several letters, but I don't know how many of Mr. James

(Deposition of Mrs. Annie Holt Kentwell.)

L. Holt's letters. I have turned over to counsel letters dealing with the Waialua matter which were to James L. Holt and to John D. Holt.

(Counsel thereupon called witness' attention to a letter written by Lawrence Kentwell to James L. Holt, dated March 30, 1910, dealing with the Waialua matters, and asked that the same be marked for identification. This letter was later received in evidence as Petitioner's Exhibit D-8.)

WITNESS RESUMES: I have no recollection of this letter whatsoever and had never heard any discussion in my house about $35,000, until the day we had lunch together.

I never heard any discussion about the $30,000 until it was discussed at table with Mr. Withington there. I have heard Mr. McCandless' name mentioned. This was when Mr. Trent came. Mr. Trent came, as far as I can remember, a week after Mr. Withington came.

After leaving the American Consulate when we met Mr. Withington, I can't remember just what we did, although we may have gone to the bank. It is so long ago I can't remember, really, these little incidents. I may have said that Mr. Withington, at the Consulate, asked Eliza to sign the deed as a favor to her cousin Jimmie as a witness to Uncle's signature—I don't remember. That was in 1910; remember this is 1928. That is very long ago, isn't it?

(Deposition of Mrs. Annie Holt Kentwell.)

(Counsel exhibited to witness a letter written by witness to Mr. Henry Smith under date of September 23, 1917, which stated in part, "Mr. Withington must have known at the time when he asked Eliza to sign it, saying that Cousin Jimmie had asked her to sign it as a favor, in order to please him, as a witness to Uncle's signature." Witness inspected the letter.)

WITNESS RESUMES: I did write this letter. If I wrote that about Mr. Withington, I must have written it when I felt very anxious about Mrs. Christian's affairs at the time. I don't quite remember whether Mr. Withington did say that. I am under oath now and I don't know what really happened at the time. What I wrote there I wrote when I was most anxious, but I cannot say anything now because I am under oath.

I do not remember writing to Judge W. J. Robinson in Honolulu, under date of June 10, 1910, asking that James L. Holt be put in as Trustee or administrator of the estate of R. W. Holt in place of John F. Colburn.

(Witness was thereupon shown a letter dated June 10, 1910, written to Honorable W. J. Robinson and signed jointly by John D. Holt, Eliza R. P. Christian, Annie H. Kentwell and Lawrence K. Kentwell. Said letter was offered for identification and later, during the trial, was received in evidence as Respondent's Exhibit 2-N.)

(Deposition of Mrs. Annie Holt Kentwell.)

WITNESS RESUMES: I have no recollection whatsoever of that letter.

I have a recollection of an agreement by which John D. Holt adopted my children. This agreement was discussed between Mr. Holt and Mr. Kentwell. I did exactly as my husband asked me to do. I think the agreement was executed in Oxford.

(Witness was thereupon shown a copy of the agreement of adoption, dated June 12, 1918, and asked if that refreshed her recollection on the subject.)

WITNESS RESUMES: I knew the children were adopted by Mr. Holt but I had no recollection where it took place. Looking at the document does not bring it back to my memory. I don't remember going to London and I don't remember Mr. Westacott. I know who he was, as I was before him in 1910, but have no recollection of seeing him again in connection with any document. When Mr. Holt died the document was presented in a court in Honolulu.

(Counsel thereupon offered for identification an adoption agreement dated June 12, 1918, between John D. Holt and Lawrence K. Kentwell and Annie H. Kentwell, in which John D. Holt purports to adopt the six Kentwell children (then minors), which was signed by John D. Holt, Lawrence K. Kentwell and Annie H. Kentwell in the presence of R. Westacott and M. Mellon, and the acknowledgments to which were taken on June 12, 1918 by

(Deposition of Mrs. Annie Holt Kentwell.)

Richard Westacott, Vice Consul for the United States, at the United States Consulate General in London, England. This document was later received in evidence, without objection, as Respondent's Exhibit 15-C.)

WITNESS RESUMES: I don't remember signing said document, but if my name is there I must have signed.

I remember the execution of a power of attorney from Eliza Christian to Henry Smith. I think this was executed down town in Oxford in Mr. Rose's office. I think Eliza Christian and myself both signed. I do not remember any second power of attorney. I know nothing of Eliza executing a power of attorney at the Town Hall here in Oxford. Mr. Rose was Commissioner of Oaths and had an office at the Town Hall.

I remember also a document executed by Mrs. Christian before Mr. Linnell, a solicitor in Oxford. I appeared before Mr. Linnell with Eliza, and also Dr. Steadman, the latter being Mrs. Christian's medical attendant at the time. Dr. Steadman has not been our family physician at all, my family physician being Dr. Morton until 1918. I then had Dr. Freeborn, who was my doctor until Mr. Holt died. Then Dr. Steadman became family physician. Prior to 1922 Dr. Steadman was physician only for a time while Dr. Morton was away. I don't remember what the document was.

(Deposition of Mrs. Annie Holt Kentwell.)

Mrs. Christian was in the habit of taking summer holidays away from Oxford for every summer with someone from the family except when she was in a Home in London for a period of four years during the time that the child was born—1915 to 1919. She was not in Oxford during those years. I have no recollection of the name of the Home.

I saw Dr. Douglas about three or four weeks ago. I went to see him because I had forgotten what he said at the time he visited us in connection with the power of attorney. He did not tell me when I asked him. I don't remember suggesting to him that in view of Dr. Good's probable testimony it would not be advisable for him to testify.

Redirect Examination.

When I sold my interest in the Holt lands at Waialua to Mr. Galt, which transaction I remember, I turned the money from the sale over to my husband. I had given him complete control of all my property. Mr. John D. Holt's financial condition was bad when he died. I had had to give him money quite often. At the time of Mr. Withington's visit, John D. Holt had been drinking, but was not intoxicated.

I never had any conversation with my husband at all before Mr. Withington came about selling Eliza's interest for $30,000 or for any sum. My husband certainly did not talk to Eliza about selling her property in Hawaii or concerning any details of the proposed sale of her properties. I have never heard,

(Deposition of Mrs. Annie Holt Kentwell.)

during all the time Eliza was with me, my husband talk to her about any matter of business.

In regard to the newspaper clippings in connection with Mrs. Jamieson's testimony which I heard, those papers were my papers and I know all about them. Eliza knew that I had these papers in Uncle's drawer. She was always taking things away from the house. I did not see her take them and do not know how she got them. I know they were taken away. The papers to which I refer are those marked "Exhibit 1, Testimony of Mrs. Frederica Jamieson."

(Referring to Dr. Douglas:) The Doctor has told awful lies; he has never had tea at my home; it is a downright lie; I have never asked him to tea.

(The following then transpired:)

"Mr. ULRICH: I want it to appear in the record that I have made every effort that I can within the power that is vested in this Commission to procure the records of Mr. L. K. Kentwell in the month of May and following in 1910 and that inasmuch as he has taken the position that it will not appear without a Court order and I cannot procure a Court order that evidence is not available. If you doubt that is the fact we will have Mr. Lungley interview him and endeavor to procure the order.

Mr. CASTLE: You have made the statement.

'Mr. ULRICH: It is Mr. Bennett, Manager of Lloyd's Bank."

(On the original deposition and following the above appears in typing:)

(Deposition of Mrs. Annie Holt Kentwell.)

"I hereby certify that on this twenty-third day of November 1928 I interviewed Mr. Herbert John Bennett M. C. the Manager of Lloyds Bank Limited in the City of Oxford and he affirmed his statement that no information with reference to the account of Lawrence K. Kentwell can be given by the Bank to any person whatsoever without an authority in writing from the said Lawrence K. Kentwell.

Commissioner."

(After the hearings in Oxford, England, the deposition of ANNIE KENTWELL was reopened for the purpose of examination on certain letters recently found. This was done on written cross- and re-direct interrogatories forwarded from Honolulu. Such cross- and re-direct interrogatories are herewith condensed as follows:)

WITNESS (Annie Kentwell) RESUMES: I identify my signatue to a letter written to "Henry Smith," dated September 23, 1927, and signed "Annie H. Kentwell." This letter was written to Mr. Henry Smith, Clerk of Court in Honolulu, who is a lawyer, and my letters to him were written to him as my attorney and as dealing for Mrs. Christian. (The letter referred to states in part that Mrs. Kentwell had been told by her lawyer that one Judge Stanley, of Honolulu, knew that Mrs. Christian was non compos mentis and, further referring to the execution of the deed of May 2, 1910, at the American Consulate, states: "Mr. Withington must have known it at the time when he asked

(Deposition of Mrs. Annie Holt Kentwell.)

Eliza to sign it, saying that Cousin Jimmie had asked her to sign it, as a favor in order to please him as a witness to Uncle's signature.")

WITNESS RESUMES: I wrote such letter, and this letter, together with following letters, are private, privileged letters written to Mr. Henry Smith on a matter which has no connection with the present claim. I have already testified that I did not hear Mr. Withington make any such statement.

(Witness was thereupon shown a letter dated November 5, 1922, signed "Annie H. Kentwell" and directed to "Henry Smith." The letter states in part: "Eliza is giving you a power of attorney to act for her.")

WITNESS RESUMES: I identify my signature, and did write and send to Henry Smith the letter referred to. The statement that Mrs. Eliza Christian is giving Mr. Henry Smith a power of attorney is not what the language suggests. What I meant to say was that the power of attorney was being signed by Mrs. Christian on my advice.

(Witness was thereupon shown a letter dated January 22, 1923, signed "Annie Kentwell" and directed to "Henry Smith." The letter reads in part: "Eliza tells me that she sent you a wire last Thursday, the 18th inst., informing you that she had given you her power of attorney and had also wired you for some money.")

WITNESS RESUMES: I identify my signature, and did write and send the letter referred to. The reason I wrote this letter is that I was desperately

(Deposition of Mrs. Annie Holt Kentwell.)

endeavoring to obtain money for Mrs. Christian. I tried my best to make it appear that she was competent, although I knew that this was not the fact, because I believed that no relief could be had otherwise. Wherever the letters now being shown me are directed to "Henry Smith," "Mr. Smith," "Henry," or "Friend," I mean Mr. Henry Smith, Clerk of the Circuit Court of Honolulu.

(Witness was thereupon shown a letter dated March 13, 1923, signed "Annie H. Kentwell" and directed to "Mr. Smith." The letter refers to the visit of Dr. Douglas and the fact that Mrs. Christian had given Dr. Douglas entire satisfaction, adding, "Dr. Douglas was surprised at her wonderful memory, for she remembers every date more so than I do." The letter further stated: "By the way, have you thought over the fact that Uncle adopted the children before he made his will & before the new Law in Honolulu over adoption came into use, so a solicitor told me he couldn't see how Judge Bankes could decide in that way & that I should write to my husband about it, I am only sorry I was not there to see it for I am sure there is a loophole somewhere. Both the Waianae people & Waialua people were anxious to have it settled this way because they had bought Eliza's interest on speculation & if they had decided that uncle's adoption of the children were legal, then it meant they had a share to the estate & Eliza's interest had diminished. Besides the children were adopted before the American Consul & Uncle was an American citizen, still we'll see what Lawrence says.")

(Deposition of Mrs. Annie Holt Kentwell.)

WITNESS RESUMES: I identify my signature, and did write and send the letter referred to. I was desperately endeavoring to create the impression that Mrs. Christian was competent, believing that unless I did so the moneys which we so much needed would be indefinitely withheld. I should not have said that Mrs. Christian had a wonderful memory for she had no memory at all. I was trying to get Dr. Douglas to make a report to the effect that Mrs. Christian was all right so that the power of attorney would hold.

(Witness was thereupon shown a letter dated April 12, 1923, signed "Annie H. Kentwell" and directed to "Henry Smith." This letter again refers to the visit of Dr. Douglas and to Mrs. Christian's memory, and further states: "Eliza suggested to send a wire to Judge Banks asking him to authorize H. T. to pay the money over to you but I have asked her to wait until I hear further from you." (H. T. refers to the Hawaiian Trust Company, Trustee of the R. W. Holt Estate.))

WITNESS RESUMES: I identify my signature and did write and send the letter referred to. Mrs. Christian did not suggest that a wire should be sent to Judge Banks. Now that I am obliged to give my statements under oath I must say what is correct and true. The reason why I wrote these letters, containing these statements that they did contain, knowing these statements not to be true, was because I was hoping that Mr. Smith would use the letters to show to the Hawaiian Trust Company so that they

(Deposition of Mrs. Annie Holt Kentwell.)

would honor the power of attorney and forward the money which was so much needed.

(Witness was thereupon shown a letter dated May 23, 1923, directed to "Henry" and signed "Annie Kentwell," with an addition or supplement to the letter being signed "Annie." The letter refers to witness's discussion with Mrs. Christian about securities, and further refers to the fact that witness's husband sends her £150 á month through the London branch of the Guaranty Trust Company of New York.)

WITNESS RESUMES: I identify my signature, and did write and send the letter referred to. I never talked such matter of business over with Mrs. Christian. My testimony already given on oath truthfully proves that any such statement would be absurd.

(Witness was thereupon shown a letter dated August 22, 1923, signed "Annie H. Kentwell" and directed to "Friend." The letter states in part: "I have just come across a Will which was drawn up by Frank Andrade for Eliza when she came away with us and signed in Andrade's presence and Armitage's.")

WITNESS RESUMES: It is improbable that I should have written to Mr. Henry Smith about the will unless I had seen something, either a draft or a will which was drawn up by Mr. Andrade and later mislaid. I can honestly say I have never seen Mrs. Christian make a will and I have no knowledge of any attempts of having a will signed by her. I have

(Deposition of Mrs. Annie Holt Kentwell.)

no will in my possession and am not capable of having it brought into my possession.

(All of the foregoing letters addressed to "Henry Smith," "Mr. Smith," "Henry," or "Friend," were letters written by the witness, Annie Kentwell, to Henry Smith in Honolulu, and all of said letters were received in evidence as exhibits attached to the deposition of Annie Kentwell herewith written into the record.)

MR. RUDOLPH BUKELEY

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I have been for eight years last past a local agent in Hawaii for the New York Life Insurance Company, during which time I have written insurance on a great many persons here, and have written over one million dollars in a year. Before engaging in the life insurance business I was in the banking business, was vice-president of the First National Bank for about a year and a half and prior to that had been cashier of the institution since about 1915. Before that time in 1896 I was in the Bank of British North America for seven or eight years.

There have been compiled in the insurance business for use therein tables and statistics showing the life expectancies of persons at various ages. For the United States the recognized table is "The American Table of Mortality." The life expectancy

(Testimony of Mr. Rudolph Bukeley.)

of a woman twenty-four years old by this table is 39½ to 40 years, while the life expectancy of a man seventy-one years of age is eight years.

The New York Life Insurance Company was operating in England in 1910. Life insurance companies will write any form of insurance in which the insured has an insurable interest.

"Q. Assuming the purchase by someone of a contingent interest in the remainder, that is, of an interest which depends upon the seller surviving a certain life tenant, it is a well-recognized form of insurance for protecting a purchaser against the death of the seller pending the vesting of that contingency?

A. It is often done."

The rate of insurance, the premium, on the life of a woman twenty-four years old in 1910, on the ordinary life policy, would be $20.99 per thousand. The annual average cost of such insurance for a period of eight years on the life of a woman twenty-four years old in 1910, if the policy were surrendered at the end of eight years, would be $8.94 per thousand per annum. This would be the annual average cost of carrying that insurance for the period named. I have computed the annual average cost of such insurance on the life of a woman twenty-four years of age taken out in 1910 and carried for a period of ten years and then surrendered. This annual cost would be $7.07 per thousand. I have also computed the annual average cost to carry insurance on a policy taken out in May, 1910

(Testimony of Mr. Rudolph Bukeley.)

and surrendered, assuming the death of the life tenant in April or May, 1922, a period of twelve years, and this annual average cost is $6.88. These figures are based on the amount you have paid out in premiums, less the amount returned in annual dividends, less the cash value upon surrender of the policy. It does not include interest on the money you have paid. I have also carried out my computation for a period of fifteen years, which is $4.63 per thousand per annum. Assuming that a purchaser plans the purchase of a contingent interest dependent upon the life of a person whose expectancy is eight years, or of a man seventy-one years of age, and that it is desired to make a reasonable correction against the purchase price or unreasonable deduction therefrom, to enable that purchaser to have complete protection in the matter of his investment pending the vesting of his remainder, I think a reasonable or conservative correction would be to take the man's expectancy of life and insure the seller.—If the person only had a life interest in the period equalling the expectancy of the land he held title in, as in this case, eight years. For this eight-year period, on the problem presented me, deducting dividends, which of course would be problematical, but you could figure on between twenty and thirty per cent of the premium, less the cash value which would be established, for a period of eight years the cost per thousand would be eight times $8.94.

(Testimony of Mr. Rudolph Bukeley.)

High class life insurance companies then, as now, would not insure the life of a person definitely feeble-minded. No distinction is made in the insurance business between writing insurance on the life of a woman and that of a man.

Cross Examination.

I am testifying purely from an insurance point of view, and I was asked to have certain statistics based on life insurance tables. Real estate has nothing to do with the transaction. If the purchase involved a certain sum of money the limit of the insurance allowed would be that purchase price. The question of business risk is not involved. If a life insurance company hears rumors that a person is supposed to be feeble-minded, an investigation is made as to the truth of such rumors before any policy is issued. The one to be insured would have to get by a physical examination before insurance would be written. There are no special mental tests that are ordinarily applied.

(Counsel for Petitioner then called the attention of the Court to a letter written by Mr. Withington to his firm in Honolulu, dated May 19, 1910 (Exhibit D-35), with particular reference to the statement therein contained, that Castle & Withington had already been written to by Mr. Withington relative to trouble over the insurance, and demanded of counsel for Respondent Waialua that said letter be produced. In response thereto, counsel for Respondent stated that he had made a special look

(Testimony of Mr. L. L. McCandless.)

through the files and found no such letter. That he would look again but it did not appear on the examination already made.)

MR. L. L. McCANDLESS

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I have been interested in the purchase of lands in Hawaii for many years. In 1910 I had some negotiations relative to the purchase of the interests of Miss Eliza Holt or Mrs. Christian through Mr. Trent. The land was offered through Mr. Trent for me. There came an offer to me, as I recollect it, but my mind is vague—it is a long while ago—but it was an offer that had come by cable from Mr. Kentwell in England that Mrs. Christian would sell for $30,000 and I sent Mr. Trent to England to close the deal. I have been acquainted with the Holt lands since prior to 1910. I knew there was some land in cane on the Holt lands but nothing about the amount of pineapples. I have bought a good deal of land in this Territory and sold very little, extending over a period of a great number of years. I have had occasions to deal in lands and to know the value of lands used for pineapple purposes. I have leased some of my own lands for pineapples, and I know something about the business of pineapples. As to the character of the

(Testimony of Mr. L. L. McCandless.)

upper lands of Helemano, a portion of that is very fine land for pineapple purposes. I knew the character of that country, as I had been all through that land along about 1886, driving cattle. I tried in 1905, or perhaps 1903, to get the railroads to run their line up through that country. In my opinion those lands could have been bought on the market at that time from $150 to $200 per acre, and that would not have been too much for all the good lands of Helemano. I am talking about the flat plateau land, for there is a lot of land up there which is gulch land. I am only speaking of the lands actually leased for pineapple purposes, *or* an average, say, of $175 per acre. This is for an unencumbered fee simple title, with no law suits involved, and not for an undivided interest.

Cross Examination.

Leases on the land would have some effect on market value. You can fix the market value to some extent by what you can get out of the rentals. I leased some pineapple land on the other side of the island in 1911 at $7.50 per acre. My land is not a comparison to the Helemano lands so far as quality goes, and I think the quality of Helemano would be far ahead of anything we have had at my lands. In leasing the land I used the method of leasing it for what you can get. As for the Holt lands, it would not have been unfair to demand $15 an acre. I don't know anything about what they were actually

(Testimony of Mr. L. L. McCandless.)

getting for their leases, but my price of $175 per acre is based on the fact that they should get around $15 an acre. In 1910 we had had little ups and downs in the pineapple business. We have had little ups and downs, but I know the character of what the country up there is. That is a very fine country, all beautiful agricultural country. I would class the Ii Estate lands as the same general character as the Holt lands and I understood the Ii Estate were getting $10 to $12 an acre. I think the Ii Estate lands would be worth as much as $175 an acre, $150 to $200 an acre.

I don't know exactly the state of the pineapple market in 1910. Even if I did not know the state of the pineapple market at that time I would still not change my testimony as to the value, because I think those lands are worth it. The pineapple canneries may not pay as much for pineapples one year as they would another, but still the general average of it would make very little difference in the value of the property. We have ups and downs in the pineapple industry just like the ups and downs we have had with sugar,—good seasons and then again poor ones. I consider that in 1910 the pineapple industry was a successful industry, though in its experimental state. At the present time pineapple lands are running along at a rental of about $10 an acre, although some small pieces may have been leased of late as high as $15 per acre. Those, however, are the exceptions. I had one piece of land in 1918, at Waikane, a small piece,

(Testimony of Mr. L. L. McCandless.)

that I got $20 an acre for; in 1910 $10 an acre would be a fair rental. I don't know the average rentals of the Holt lands in 1910. There was a depression in the pineapple business, not prior to 1910, as I recall, but since that time. I believe the pineapple industry from the beginning of it was a success. The depression referred to was about 1912 or 1914. My idea of that depression being that some of the canneries wanted to get rid of some of the little planters. I don't think there was any real cause for it, because it did destroy the little planters and did not destroy the big men in the pineapple industry. It destroyed the little planters. That was told to me by the big Hawaiian pineapple people and is only a conjecture on my part. I do not know the facts. I don't think there has been any time but that we always got rid of our pineapples. I don't know what year the iron sulphate spray came in. It was said that it did help the pineapples. I am not positive about that; don't know anything about it. It came in after 1910 and was generally used. I don't know when the Caterpillar tractor came into general use in the pineapple industry—probably some before 1910 and some afterwards. The paper mulch came into effect only within the last few years; some claim it has made a tremendous change in the industry and some not. The Hawaiian Pineapple Company, Libby, McNeill & Libby, and the California Fruit Packers use paper mulch. The outlay for paper mulch would not be justified on the small pieces.

(Testimony of Mr. L. L. McCandless.)

I offered $30,000 in 1910 for the Eliza Christian interest in the Holt lands and took the matter up with Mr. Trent as representing me. The character of the land as I knew it leads me to know that the Holt lands up in that section were very valuable lands for pineapple purposes. This I knew in 1910. The general character of that land would make all of that upper land available for pineapple purposes. Prior to 1910 I was in the pineapple business at Pearl City, with the Woodlawn Fruit Company, having the majority of the stock. At that time we irrigated pineapples. We sold the fresh fruit to the mainland in boxes. I sold my stock to the Honolulu Plantation who later abandoned the business, threw the pineapples away, and the farmers gathered the roots and planted them in Wahiawa. This was in 1900. Therefore it was I who probably started the Wahiawa pineapples.

On my lands on the other side of the island, which I leased for pineapple purposes, they are still growing pineapples to a very small extent. They are now mostly pasturing cattle and horses on the lands, and the lands are lying fallow. Most all of that country over there has been abandoned for pineapples. In 1910 I do not think it was determined at how high an elevation pineapples could grow. I think they were really experimenting in 1910. I think they have found out a good deal since. In the last few years they found out lands that were not considered available for pineapple lands which turned out to be very good pineapple lands.

(Testimony of Mr. L. L. McCandless.)

Lands ought to be worth more now than they were in 1910. If you are only getting $1.00 an acre up there, you would take into consideration that rental value of course, but my opinion of Helemano lands is that it is one of the best pieces of pineapple land in this country. If you based values on a certain number of times the annual rental, you might say ten times the rental, or maybe less, in 1910, I don't know what basis was being used by the Government for tax purposes in 1910. As to the pasture lands, which are not classed as pineapple lands, I believe that a rental of 20¢ per acre per year would be fair for pastural purposes. I testified to that effect in a case between the Waialua Agricultural Company and the Oahu Railroad, but the decision was 10¢ an acre per annum.

Redirect Examination.

Referring to map, Exhibit C, in 1910, on the lands used for pasture, I would not put a value higher than $2.00 or $3.00 an acre, or possibly $4.00. $5.00 an acre is exceptional for pastural lands.

Recross Examination.

Referring to the map, Exhibit C, 50%, 60% or 70% of the land on the north side of the Helemano Gulch is broken up, and that gulch land, with the rolling land too steep for pineapples, would be good for pastural purposes. The land on the south side of Helemano Gulch is better. I think that $2.00 an acre in 1910 would be a fair value for the pastural lands.

ARTHUR E. RESTARICK,

called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii. Through me there was introduced in evidence the record "In the Matter of the Guardianship of Eliza Holt, a Minor," from which it appeared that upon the resignation of J. S. Walker as guardian, Annie Holt was appointed guardian of Eliza Holt under date of August 3, 1900. The records of the guardianship matter are missing from the files, having been taken by one Judge Gear to San Francisco and never returned. The guardianship of Eliza Holt as a minor was instituted in 1893.

MRS. BERNICE IRWIN

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I visited with Mrs. Cushingham at Makaha and remained there throughout an entire summer, during which time I saw Eliza around her father's home most of the time. Eliza at this time was five or six years old. From my observation of the child I would describe her as being simple-minded, or, to use the Hawaiian expression, "lolo"; she did not go around much with the other children; she was just simple and feeble-minded. When one would say

(Testimony of Mrs. Bernice Irwin.)

"Hello, Eliza," to her, she would look up with a sort of vacant stare and say nothing. I never heard the child talk sensibly or rationally with anyone, although I had no difficulty in talking with other children of a similar age.

(Through Mr. Kenneth B. Barnes, Secretary of the Hawaiian Pineapple Company, Limited, and over the objection of the Respondent, Petitioner introduced in evidence a map dated November 1, 1922, of the property leased by the said Pineapple Company from Waialua, the map being marked Petitioner's Exhibit H, and showing the lands in cultivation for pineapples as of said date of November 1, 1922. The map has no reference whatsoever as to what lands were actually in process of cultivation in the Holt area at Waialua in 1910.)

MANUEL OLSON

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am forty-nine years of age, was a friend of Albert Christian's, and knew Albert Christian and Eliza during the time that they lived together as husband and wife. I saw her at the Christian home three or four times within a couple of months. I did not know her before her marriage, nor did I know her after she separated from Christian. From my observation of her, I would call her "lolo"; she

(Testimony of Manuel Olson.)

was very simple and could not make heads or tails out of anything. I tried twice to speak to her in English but could get no answer from her; I then tried Hawaiian, and also got no answer. When I went to the house with Christian I thought it funny that she did not greet me or say anything; she stood on the veranda as I came up the steps, and said absolutely nothing. I was surprised when I learned that this was Christian's wife, and said: "That's funny; she is a little top-sided." I noticed the way she was dressed and her actions. I saw a little baby on the veranda and noticed that she did not take care of it, nor seem to care. While we were playing cards she kept away all the time as if she didn't care. During the times I went there I never heard her carry on a sensible or rational conversation with anyone.

Cross-Examination.

I only saw Mrs. Christian three or four times. I think this was about a year before I was married in 1904. This was when we were playing cards and drinking. I did not know whose baby it was, the sex, or anything about it, but merely noticed the child clad in its dress lying on the floor, and thought Mrs. Christian would care for it even if she were not the mother, I thought that was peculiar, because one observes how children are treated whenever one visits a home. The child looked unclean and uncouth. Eliza could not answer an intelligent question, and I got the impression she was "feeble-minded" because of her looks and actions; she acted silly

(Testimony of Manuel Olson.)

and feeble-minded, but I could not describe her actions. She did not answer me when I passed the time of day with her, and looked feeble-minded to me.

MRS. DAISY SANDERS

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I knew Eliza Holt at St. Andrew's Priory when she was about fourteen or fifteen years old. We were there perhaps two or three months. I think that Eliza was in the baby class. I remember Eliza's condition as, well, most people would—the new name for it now is "feeble-minded," but we used to call her feeble and stupid, the girls in school used to. She didn't want to mingle with the girls, and if you asked her anything she didn't know what to answer you, whether to say "yes" or "no"; kind of timid. Sometimes she would answer and sometimes she wouldn't as if she didn't know.

MR. JAMES GIBB

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I have been engaged in the sugar business in the Hawaiian Islands since 1888, including the managership of two plantations, one being the Honolulu

(Testimony of Mr. James Gibb.)

Plantation, on this island, for sixteen years up to December, 1925. I have testified on sugar values once or twice, the last being for the Internal Revenue Department in Washington a year or so ago.

I have examined the Holt lands, both below and above the Wahiawa Extension Ditch. I have visited and examined them with a view to placing a value on the cane lands there. A fair market value for the Holt cane lands, as of May 1910, was $200 an acre. There is a difference in value between the lower and upper sugar cane lands and I have placed an average of $200 an acre for the cane lands. This value is without water inherent in the lands themselves but on the basis that there was water flowing and available for these lands. I consider $200 per acre a fair price for the land, with the contemplation that water would have to be paid for in addition to that amount.

(The witness was then questioned as to the value, in his opinion, of an annual flow of water for irrigation purposes assuming the development of the flow of approximately three billion gallons annually by a series of ditches, the intakes of which are entirely on the Holt lands, one being at the place marked "F" and the other at a place marked "G", on the map, Exhibit C. Respondent objected to the question on the ground there was no foundation laid for the witness to testify as to the value of water and in the second place that the evidence showed that the waters in question did no arise upon the Holt lands but came from the lands above, the Re-

(Testimony of Mr. James Gibb.)

spondent having a lease on such waters. The Court ruled as follows:

> "The COURT: The Court will not permit you to base a hypothetical question to this witness which involves this witness using the personal assets of the Waialua Agricultural Company developed by itself on other lands, brought on to these lands, but, in that connection, if this witness knows, or if you have anything in the record or want to put it in the record as to what the water was the Holt land had, or what any expert could see was available, if that could detract or add to the value of these lands, that might be relevant, but the question you propound to this witness includes in every item facts that are beyond the scope of the Holt origination or creation."

Petitioner made an offer to prove that a flow of three billion gallons of water produced through a set of ditches on the Holt lands, with correction for the extent to which that flow is represented by payment for waters conveyed to the system on upper lands, to the extent of a rental of $4,000 annually, would represent an asset to the Holt lands, in the opinion of the witness, of approximately $140,000. Objection being likewise interposed to this offer by Respondent, the Court denied the offer.)

WITNESS RESUMES: Referring to Exhibit F-7, wherein is enumerated certain improvements such as reservoirs, ditches and the like on the Holt lands and representing improvements on the

(Testimony of Mr. James Gibb.)

land in 1910, such improvements represent an asset which has not been considered by me in the value of $200 an acre which I have given to the cane lands, and I would say that those improvements would be an additional value, less depreciation up to 1910. To take these improvements as a whole and determine depreciation is somewhat difficult. There are several different improvements here, several of which ought to have different rates of depreciation. I haven't figured it out. I guess I can do that roughly. Taking the improvements as a whole I would consider that 5% per annum would be a fair average rate of depreciation. It would be fair, in addition to the value which I have given for the sugar lands in 1910, to therefore include the additional element of value in the land of one hundred thirty-four odd thousand dollars depreciated over the period of time from 1905 to 1910. This would represent an additional value to the land.

I have gone on the lands and inspected them above the Helemano extension ditch at an elevation of approximately seven hundred feet up to an approximate elevation of a thousand feet. In my opinion in 1910 the lands above the Helemano extension ditch and below the thousand-foot level, assuming them then to be in an unimproved condition, had a value of $25 for dry land cane, and very cheap at that.

From my experience in the sugar industry it was on a firm and established basis in 1910. In fact, it was firmly established before that. I have gone into the growth of the sugar industry in Hawaii from

(Testimony of Mr. James Gibb.)

1837 to 1919 and am of the opinion that the growth commenced when we got the Reciprocity Treaty and from then on it climbed right up. The industry had in my opinion in 1910 got long past the experimental stage, and I know of my own knowledge that back in 1898 when the Waialua plantation started that there were millions of dollars put in the industry just as soon as we got annexation,—another proof that the sugar industry was on a good firm basis. Sugar was grown on Waialua fifty years before 1910 and off and on since that time.

Cross-Examination.

In arriving at my value of $200 per acre, I considered the fertility of the soil, location, prospects of future profits, and the profits that had been made generally by Waialua on its sugar cane. I also considered it as an investment to an outsider, knowing its location, dove-tailed between other cane lands. I did not take into consideration other leases but I took into consideration the value to Waialua, namely, that a portion of its lands are to be held in fee.

The Holt lands are next to the Bishop Estate lands and the rental on the Bishop Estate land, on the percentage basis, figures out about $7.75 per acre per annum rent. I consider the sugar industry here is fairly hazardous, in spite of the fact that it had been going along profitably in the Hawaiian Islands long before 1910. Testifying in Washington for the Government, I stated that the sugar business has always been considered a very risky business and

(Testimony of Mr. James Gibb.)

there have always been hazards. The productivity of any sugar land depends on a great many elements, such as management, price of sugar, labor situation, possible shortage of labor, fertilization, and other elements. It would likewise depend upon how the particular plantation treated those lands and the water supply in connection with the land. When, therefore, I am speaking of conditions, I mean the conditions applied to these Holt lands by the Waialua Plantation.

In figuring on net profits, I figured the net profit per ton all over Waialua Plantation. In considering net profit I did not consider interest on the investment. The question of management is important and certainly determines whether the plantation is profitable or not. Our plantations also face the tariff question, and I testified in Washington that, with free sugar, 75% to 80% of our plantations would go out of business. I, however, think that we could perhaps do better than that. I was painting a somewhat black picture in Washington, but now my picture is a little rosy.

The sugar cane varieties undergo a considerable change. Up to 1910 the Lahaina variety was intensively grown, and gradually the types have been changing. Waialua had perhaps more different varieties than any other plantation on this island. H-109 has become the dominant cane at Waialua. That did not exist except in a very few patches in 1910.

My value of cane lands below the Wahiawa Extension Ditch of $200 per acre is without water, but

(Testimony of Mr. James Gibb.)

with the knowledge there was water that could be run on to it from Wahiawa dam or other high lands. I figured the lower half of the cane lands, shown in yellow, worth $250, and the upper $150. My idea in figuring it out that way was it is more expensive to put water on to the higher lands, and usually you get a little less returns. My value of $200 per acre is its value to Waialua. As of May 2, 1910, any of the lands down to approximately 500 feet elevation would have been good for pineapples.

My testimony on values is based on a fee simple unencumbered interest. I am not taking into consideration any lease on such interest, or whether there are undivided interests in the land.

Referring to Exhibit F-7, the improvements therein set forth are improvements which would be valuable particularly to Waialua, assuming it to be considered simply as a sugar proposition. To the average owner of the land the improvements would not be of much value except for sugar cane purposes. I simply roughly estimated depreciation on these improvements. I was not taking the terms of the lease on this land into consideration.

Redirect Examination.

If I had no record at all of Waialua earnings, and basing my opinion particularly upon the other means used for placing the value on that land, I would still reach my figure of $200 an acre. From my experience with other lands on other plantations, I would consider that land was worth $200 an acre to raise sugar cane on even though I didn't know

(Testimony of Mr. James Gibb.)

what the profits from the land were. I checked my opinion of value heretofore given by reference to Waialua's earnings and recapitalization and was quite satisfied from looking over those earnings that the value I had placed on the lands from looking at it, judging it from other lands, only confirm my views that I was right in estimating that value. I preferred to take a less and more conservative value than the figure $300 an acre which I arrived at by reference to Waialau's earnings and recapitalization. My valuation of $200 an acre was placed on these lands as sugar lands with available water, although it did not include additional cost of bringing water on to the lands, which I would anticipate paying in addition to the $200. I placed the much lower valuation of $25 on the upper side of the ditch because of its potential value as dry cane land. The element of water had no particular place in the difference in value between such land and the land in cane. In my estimate of the value of the cane lands I assume irrigation water will be available and on the 25-dollar land I assume it will not be available. The value of $200 an acre which I have given is a value it would have in the hands of an independent purchaser or in the hands of anyone dealing with the land at that time for the purpose of either selling it for sugar production or leasing it for that purpose, or otherwise handling it in the production of sugar under conditions existing there.

MR. H. C. TENNENT

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am a certified public accountant and a member of the firm of Tennent & Wright. The present worth of a thousand dollars on May 2, 1910, due to be received in eight years from that date, figured at a rate of discount at 6%, is $627.41. Six per cent is the figure I have used in similar cases. Six per cent is the usual rate on Territorial bonds, and in my opinion is the figure which should be used in a problem such as here presented. In other words, if you compound $627.41 it will amount to a thousand dollars at the end of eight years. If the figure of $627.41 is corrected to allow for cost of insurance to protect against the contingency of the death during the eight-year period of a woman twenty-four years old, the net figure would be 552.14 per thousand. The figures given by me are figures based on Mr. Bukeley's testimony.

(Petitioner's Exhibit K was received in evidence as illustrating witness' testimony, without objection, and reads as follows:)

(Testimony of H. C. Tennent.)

DATA SUPPLIED AND CALCULATION BASED THEREON SHOWING COST OF INSURANCE PER $1000 FOR 8 YEARS.

	Premium payable	Dividend deductible from premium	Net payments	Value as of 2nd May, 1910 at 6% per annum
Beginning of 1st Year	20.99		20.99	20.99
" " 2nd "	20.99		20.99	20.80
" " 3rd "	20.99	3.45	17.54	15.61
" " 4th "	20.99	3.56	17.43	14.64
" " 5th "	20.99	3.68	17.31	13.70
" " 6th "	20.99	5.82	15.17	11.33
" " 7th "	20.99	3.84	17.15	12.09
" " 8th "	20.99	3.95	17.04	11.33
Total net payments	167.92	24.30	143.62	120.49
Less:				
Returnable at end of the 8th year: dividend		4.07		
Cash surrender value		68.00	72.07	45.22
			71.55	75.27

MRS. HELEN R. ROSA

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I have lived in Hawaii all my life and knew Eliza Holt when the latter was a neighbor of mine on Fort Street in Honolulu. Eliza was then a young girl in her teens, and I used to see her quite

(Testimony of Mrs. Helen R. Rosa.)

often because we were all friendly, visiting taking place between our respective families. I knew her prior to the time that Eliza went to live with Mrs. Kentwell at Waikiki, something longer than three or four years. From my recollection of Eliza and my observation of her, I would say that Eliza was an imbecile. This was because of the way Eliza acted and the fact that Eliza could not carry on any kind of conversation. When I tried to talk to her, the chief response was a grin. I had no occasion to see whether Eliza could read or write, but merely knew her in the conversational line. During the time that I knew her, the condition referred to was always the same. I never heard Eliza carry on a sensible conversation with anyone.

Cross Examination.

Of course I was an older girl than Eliza when I saw her playing with the children; in fact, I am seven years older than Eliza. I saw her at my home once in a while, not oftener than once a week. I base my impression that Eliza was an imbecile on the way Eliza talked and laughed. At this particular time we all described her as an imbecile. I do not remember whether one would get that impression the first time one saw her. I do not remember her distinctly over this period of years. I have heard Eliza's mentality discussed since she left Hawaii.

MARY HESTER LEMON

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I am Registrar of the Bureau of Vital Statistics. My sister married Annie Kentwell's brother. I knew Eliza from a child, and particularly when she lived with the Kentwells at Waikiki. I knew Eliza when the latter was in her teens andobefore she had a child, as well as afterwards. We and the Kentwells were neighbors and used to exchange family visits. From my observation of Eliza I would say that she was a simpleton. She was always looked on by us as a lolo, though I had little to do with her because I was an older girl at the time. I couldn't say whether I had ever heard her carry on a sensible, rational conversation because I saw her as an older person would. My impression was merely a general impression.

Cross Examination.

She was more or less simple in certain things and quite bright in others. It depended on what was asked her. She struck you immediately as a peculiarly looking child, a child not bright. She looked like an imbecile to me.

(Counsel for Peitioner here called the Court's attention to the offer of the guardianship proceedings of John D. Holt and James R. Holt, Probate 3097. After argument of counsel the Court sustained

(Testimony of Mary Hester Lemon.)

the objection of counsel for Waialua to its introduction as evidence.

Counsel for Petitioner then offered to prove that Robert William Holt, grandfather of Eliza and father of John D. Holt, had been similarly adjudicated a spendthrift in the year 1862 after the birth of John D. Holt. The Court sustained the objection of counsel for Waialua to its introduction.)

The

DEPOSITION OF DR. EDWIN MORTON,

taken November 3, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I am a Master of Arts of Christ Church, Oxford, and Doctor of Medicine and Master of Surgery of the University of Edinburgh. I took a special course with reference to mental conditions at the Morning Side Asylum in Edinburgh. I have repeatedly acted as locum tenens at the Warenford Mental Hospital in Oxford. I was medical superintendent at a special school for mentally deficient children at Wolverhampton. For ten or twelve years last past I have been a member of the Statutory Committee for the City of Oxford for the treatment of mental deficients, and am Chairman of the Voluntary Association for Mental Welfare. I have

(Depossition of Dr. Edwin Morton.)

known Mrs. Eliza Holt Christian since 1909 and have treated the various members of the Kentwell home, including Eliza, professionally from time to time. I have had occasion to observe the mental condition of Eliza Holt Christian in a general way. From my observation of her and from such facts as have come to my attention in treating her professionally her mental condition would be obviously one of feeble intellect and I should put her about the level of a child of about five or six. I saw her recently at the Kentwell home, and her mental condition was substantially the same as it had been when I first knew her.

Cross Examination.

I first began to attend the Kentwell family, including Mrs. Eliza Holt Christian, about 1909. I think I saw Mrs. Christian professionally twice; once for quite a physical condition. Her father was alive at that time. He was quite a delightful old gentleman. One always looked upon Mrs. Christian as rather of feeble mind. I knew that she had some native blood and that would make her different from the ordinary person one would come in contact with. So far as I had the opportunity of observing, her conversation was normal. She used to go out and act really as sort of nursemaid for the children, and of course one looked upon her as the same level. I don't remember carrying on any conversation with her. I should hardly say she seemed quite

(Depossition of Dr. Edwin Morton.)

normal. She would not appear like a normal English girl at that stage. To be perfectly candid I don't think one paid much attention to it. It was obvious that she was not up to the standard of the ordinary English girl. That would be placing native blood rather high to put her to that standard.

"Q. Then I just ask you with that sort of feeble-mindedness there is a tendency, is there not, as years go on a person gets older, there is a tendency for that condition to be aggravated more; emphasized, shall I say?

A. Well, I suppose at the same rate that a normal person, they are not so active at fifty or sixty as we are at thirty and forty, and I suppose she would go in the same sort of ratio, but nothing more than that, nothing more definite."

The

DEPOSITION OF
MISS MARY MATHEWS,

taken November 3, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I am a domestic. I knew Mrs. Kentwell and Eliza Holt Christian first about eight years ago when I worked in the Kentwell home for three summer holidays. Eliza Christian brought to our house

(Deposition of Miss Mary Mathews.)

newspaper cuttings, pictures, comics, an old money box, a comb and a packet of hair pins. She gave me the comb and hair pins, and the other things to mother for the children. During my time in the Kentwell home I never saw her reading. She came once to the house with two shillings eight pence. She was excited about it but did not say what she was going to do with the money. I have never known her to have a rational conversation with anybody.

(Counsel for Petitioner then called upon counsel for Respondent Waialua to admit that no moneys or consideration of any kind was paid to Eliza Christian, or to anyone acting on her behalf, as a consideration for the assent by her to the lease of March 17, 1905 (Ex. A-8), and also to admit that no rental for the lease had been paid to her, to which counsel for Respondent replied by producing later in the trial and offering in evidence a list of payments made under the lease, same being received as Exhibit A-36 and hereinafter referred to.

Counsel for Petitioner thereupon moved to amend his petition, all of which appears in the first amended petition, counsel stating:

"Those are all the amendments, if your Honor please; no other changes in any respect prayed for."

The court granted the motion to amend, without prejudice, ruling that a clean copy of the petition would be furnished with the amended portions in

(Deposition of Miss Mary Mathews:)

large type, and allowing Respondent to file its answer later, which answer to Petitioner's first amended petition was duly filed as appears in the record herein.)

The

DEPOSITION OF
MRS. MOLLIE ALATAU WILDER,

taken November 8, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I have known Eliza Holt Christian since 1920. I took a house at Oxford for three midsummer terms when my son was attending the university, and since then I have seen her from time to time. As to Mrs. Christian's mental condition, there is no question in my mind that Eliza Holt Christian had the mind of a child. I spoke of that to Mrs. Kentwell at the time. I have tried to converse with her. I would consider that her answers were very simple. I could not carry on any conversation with Eliza. I tried to. I have seen her at the Kentwell home in Oxford off and on for about three years. I never heard her carry on a rational conversation with anybody. I have never heard her answer more than a word or two, at any rate, if any questions were put to her. She did not seem to be able to converse. I looked upon her simply as a child sitting there.

(Deposition of Mrs. Mollie Alatau Wilder.)

I simply felt that Eliza when I was there was a child in the place. She was just there and that is all. You did not pay any attention to her, she was just there. I never saw Eliza try to read or write.

Cross Examination.

I do not mean that I have seen Eliza try to read but be unable to read; merely that I was never in a position to see her attempt it one way or the other.

The

DEPOSITION OF MRS. AGNES BERRY,

taken November 8, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I used to live in Summertown, about a mile away from the Kentwells in Oxford. I knew the Kentwells a very short time after they came to Oxford. I also knew Eliza Holt Christian who was living with the Kentwells. I left Oxford in 1918 and have seen nothing of the Kentwells or Mrs. Christian since. I should say Mrs. Christian was absolutely irresponsible and feeble-minded. I am really not responsible to say whether she was more in the society of her own people or more in the society of children.

(Deposition of Mrs. Agnes Berry.)

Cross Examination.

I could not say exactly how often I saw Mrs. Christian because the children, including my daughter, used to play together. Mrs. Christian would sometimes bring the children and then sometimes fetch them away. This would happen possibly once a week or twice a week or sometimes a fortnight. There were weeks and weeks when she would not come, and then for two weeks following she might come. It was just like a child's nurse coming.

Re-direct Examination.

When she came over with the Kentwell children, sometimes she would come and go away and then come back again for the children.

Re-cross Examination.

She never came to my house with anybody but the children.

The

DEPOSITION OF MRS. ELIZA JOLIFFE,

taken November 8, 1928 in England on behalf of Petitioner, pursuant to open commission, was read into the record as follows:

Direct Examination.

I am the wife of Professor A. E. Joliffe, formerly of Oxford University, but now a member of the faculty of mathematics at King's College at the

(Deposition of Mrs. Eliza Joliffe.)

University of London. I have lived in Oxford all my life until I moved to London with my husband about eight years ago. I have known the Kentwells and Mrs. Christian ever since within about six months from the time they arrived in Oxford in 1909. My own number was at 227 Woodstock Road and the Kentwell's was 159 Woodstock Road. My daughter was a very close friend of one of the Kentwell girls and therefore I was intimate with them. Before I knew Mrs. Christian I thought she was the children's nurse. She was always out with the Kentwell children. In all the time I knew Mrs. Christian I never heard her carry on a rational or sensible conversation with anyone. I should think a rational conversation was quite impossible. She would just say "Yes" and "No," or "It is a nice day," or "How are you," beyond that, unless you asked her questions, she would not volunteer any statement at all. As a grown woman Mrs. Christian would come to only little children's parties and never to parties for grown-up people. She was always peculiar. In all the time that I have known her, her condition has been the same.

Cross Examination.

We left Oxford in 1920. I knew Mrs. Christian was away from Oxford for a period of years, but when, I don't know.

(Following the introduction in evidence of the depositions, counsel for Petitioner read into the

(Deposition of Mrs. Eliza Joliffe.)

record the following record made November 8, 1928 before the Commissioner appointed to take the testimony of witnesses in England:

"Mr. ULRICH: As a matter of fairness, I think I have told you already it would probably be impossible for us to bring Mrs. Christian to Honolulu, and I do not want to have it appear that we thought she would probably be there. I think if there is any desire to have her examined by any specialists of yours, that would have to be done here, otherwise we are ready to close the deposition.

Mr. CASTLE: Very well, I understand the commission is now closed."

Counsel for Petitioner offered to prove that between 1910 and 1923 an additional area of the Holt lands amounting to 3919 acres had been leased for pineapple purposes. The court sustained the objection of Waialua to this offer.

Counsel for Petitioner then called upon Respondent Waialua to admit that in the event of cancellation being decreed the present value of the property would exceed in amount $30,000, with interest, together with such improvements which have permanently inured to the property.

"Mr. CASTLE: That is even to the property and to the improvements?

Mr. ULRICH: We want to go into it. That is why we ask for that admission at this time.

Mr. CASTLE: That is correct."

(Deposition of Mrs. Eliza Joliffe.)

Counsel for Petitioner thereupon rested, except it was stipulated that certain depositions then unreturned (but hereinbefore incorporated) would be considered in as part of Petitioner's case in chief. Petitioner likewise reserved the right to call Mr. Henry Smith in reference to his testimony with Annie Kentwell.

The opening statement on behalf of Respondent was made by Mr. Leisure.)

MR. ARTHUR WITHINGTON

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I am a practicing attorney in Hawaii and a brother of David L. Withington, referred to in this action. David L. Withington died July 21, 1919. He was born February 2, 1854, in Newburyport, Massachusetts. He graduated from Harvard in 1874, being a member of the Phi Beta Kappa. He graduated from Boston University Law School in 1876 cum laude. He was admitted to all the courts of Massachusetts and was a member of the Massachusetts Bar; also of the Federal courts in that district, and practicing law in Massachusetts until 1887. (At this point the following occurred:)

"Mr. ULRICH: May I interrupt. I will admit that David Withington was a man of

(Testimony of Mr. Arthur Withington.)

the highest eminence; educated in the best colleges, and that he practiced law with eminent success.

Mr. LEISURE: And will you admit that his reputation in the community was first class?

Mr. ULRICH: Yes.

Mr. CASTLE: I think we have a right to have the record show that, in view of the fact that this is the man who is attacked in this suit.

Mr. ULRICH: I do not attack Mr. Withington's character in this suit. I merely stated the facts from information received as to what occurred in England there. Whether it imputes any measure of attack on the character of the man or not is a thing I am willing to leave to the pleadings. The intent is to show that, for some reason or other, he did not take the precautions that he should have taken in the first instance."

WITNESS RESUMES: In 1887 Mr David L. Withington went to California on account of his wife's health and was admitted to the bar of California, practicing law there until 1903. During that time he was a member of the state senate of California and received two votes of thanks for work in the state legislature, one on the Reform of the Judicary Act and one on the drafting of the new County Act. He was president of the Civic Federa-

(Testimony of Mr. Arthur Withington.)

tion of San Diego where he lived; was a representative of the American Bar Association, and was on the Commission to frame the Uniform Laws of California. In 1903 he came to Hawaii and formed a partnership with W. R. Castle, being admitted to the courts of this Territory, practicing law here from 1903 until the date of his death in 1919. He was a representative from here I believe on the same commission on uniform legislation. He was also a former president of the Hawaiian Bar Association, and though I don't know when he was admitted to practice before the Supreme Court of the United States, I know that he actually conducted before that court from fifteen to twenty causes.

(Counsel for Petitioner thereupon stated:)

"I have no desire to cross examine, but I want to add my personal commendation of the remarks of witness and say that we do not come before this court with any intent or desire in any way to besmirch the name of David L. Withington. We agree that he was a man of estimable character. The only charge in this case is the mistake that was made in this instance, as is apt to be made by the best of us."

MR. W. W. GOODALE

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

When I became manager on February 17, 1898, the Waialua Agricultural Company was just being formed. The old Halstead Plantation had been operating there for a great many years,—a small place with a small mill, with about 600 acres of cane. When I became manager at that time, the status of the Helemano lands (Holt lands) was in dispute, Mr. Dillingham claiming an option on a lease from certain of the Holt heirs, whereas other of the Holt heirs contested his option. Dillingham was one of the promoters of Waialua, and he was supposed to complete the lease of the Holt lands on the terms of the option, but the lease did not go through. The proposed option was for a lease at a rental of $3500 a year for the first five years and thereafter for 45 years at 2½% of the profits, but a suit for specific performance of this brought by the Plantation against Hanakaulani Holt and others failed. There was a lease prepared in accordance with the option, recorded April 6, 1899, Book 190, page 98, (which was received in evidence, without objection, as Respondent's Exhibit 5-A).

When I took charge of the plantation I found that there was a campaign on for the acquiring of lands in the Waialua District, and one John Emme-

(Testimony of Mr. W. W. Goodale.)

luth, working himself and through agents, had obtained a lease of the Holt lands from some of the heirs of the estate who also had signed the agreement and lease with Waialua. This was a lease for a term of 49 years from May 1, 1899, and covered the Holt lands (except one or two small pieces) at $10,000 a year (which document was received in evidence, without objection, and marked Exhibit 5-B for Respondent). When I found this lease in existence I went to Bruce Cartwright, then Trustee of the R. W. Holt Estate, and asked him if he would sign our (Waialua's) lease. He said he would sign any lease if the terms were satisfactory to him, if the Holt heirs would stop scrapping among themselves.

There was another lease to Emmeluth which was likewise incomplete, covering the remainder of the Holt lands, at $1,000 a year (which document was received in evidence, without objection, as Respondent's Exhibit 5-C).

Mr. Henry Smith of Honolulu was soon appointed Trustee of the Estate of R. W. Holt, and executed, on June 7, 1900, a confirmation of the two Emmeluth leases (Exhibits 5-B and 5-C) (the confirmation being received in evidence, without objection, as Respondent's Exhibit 5-D). Emmeluth assigned his two leases to a plantation organized by him, called the Wahiawa Sugar Company (which assignments were introduced in evidence, without objection, as Respondent's Exhibits 5-E and 5-F respectively. All of the documents covered by Exhibits

(Testimony of Mr. W. W. Goodale.)

5-A to 5-F, inclusive, were duly recorded in the Hawaiian Registry of Conveyances.)

On May 29, 1902, Henry Smith, Trustee of the R. W. Holt Estate, brought suit against the Wahiawa Sugar Company for the cancellation of their leases for nonpayment of rent, and judgment in the Trustee's favor was rendered by the Judge of the Waialua District Court, so that in 1902 the Emmeluth leases were out of the way.

When I took charge as manager I was told that R. W. Holt had refused to sign the option and I immediately set about to try to buy his interest in the land if I could. I finally succeeded in securing his interest in March of 1899 and paid him for it the sum of $11,000. I must admit that I had at that time an exaggerated idea of the rights of a cotenant. I thought that in buying out William's one-twenty-seventh interest in that property, that the Waialua Agricultural Company would acquire some rights in the property that it would be able to use immediately. This purchase was made at the time the two Emmeluth leases were in existence. At that time we were in a land war, being in a very lively contest or competition for lands in the Waialua district. At the time of the purchase of the Chris Holt interest in 1900, I was still working on the principle of getting the whole or as many of the rights of the co-tenants as possible. It was then the plan to build a dam on the site where the Wahiawa dam now is, and, if built, the water would be thrown back upon Grants 973 and 1092. After 1902, when the matter

(Testimony of Mr. W. W. Goodale.)

of the Emmeluth leases was cleared up, Mr. John F. Colburn, who had succeeded Mr. Henry Smith as Trustee of the R. W. Holt Estate, approached me with the idea of negotiating a lease of the Holt Estate lands to the Waialua Agricultural Company.

(Witness was thereupon shown a letter dated June 13, 1904, signed by John F. Colburn, to Castle & Withington, enclosing a copy of the will of R. W. Holt, which set forth the writer's understanding of the title to the Holt properties and, in concluding, stated:

> "If the Waialua Agricultural Co., Ltd., will accept a lease of Halemano and the adjoining Grants belonging to the Estate of R. W. Holt, this excluding the land of Wahiawa, I think a lease can be obtained if the rent is satisfactory.
>
> "Can I hear from you at your most convenient opportunity?"

This letter was received in evidence without objection, and marked Respondent's Exhibit 5-G.)

WITNESS RESUMES: Everything of this kind relating to the lands at Waialua, whether Holt lands or other lands, were passed on to me for action, with suggestions as to price and as to what should be done. I had general charge of the land matters out there at Waialua, and this same condition continued from the early days until I left, although of course I could not, as manager of the plantation, alienate the company's property which would require action of the board of directors. I had a

(Testimony of Mr. W. W. Goodale.)

number of conversatons with Mr. Colburn. He came out to the plantation once and went all over the lands with me, with Mr. Clarence Ashford, an attorney at law and Mr. Colburn's legal adviser. Mr. Ashford is now dead. He had with him, also, a man named Collins, who I think was some kind of connection of the Holt family. They came out and we went all over the Holt lands on horseback. Then at different times we discussed the terms of a possible lease, and my suggestion was that, in making a new lease, the terms of the original lease to Waialua (Ex. 5-A) should be followed in substance, that is to say, $3500 a year as a minimum for ten years, and then based on the profits of the land. I myself suggested to Mr. Colburn the $3500, but Mr. Colburn would not agree, and the lease finally went through on the basis as shown in the copy of the lease dated March 17, 1905 (Ex. A-8) which called for a straight rental of $9,000 per annum. That was Mr. Colburn's proposition.

In March 1905 the Wahiawa dam was in course of construction. The dam was finished and we closed the gates for the first time, I think, on the last day of March 1906. When I went over the Holt lands with Mr. Colburn and Mr. Ashford we considered the Wahiawa dam and discussed the possibility of bringing water from the dam over to the Holt lands. Mr. Colburn is now dead. The completed lease was delivered to me on the first day of April 1905 at the old ranch house on the Holt lands, it being delivered by Carlos Long (who was the

(Testimony of Mr. W. W. Goodale.)

administrator de bonis non of the Estate of R. W. Holt), John F. Colburn, and Clarence Ashford. I had a gang of men with me, and when the lease was turned over to me I put them to work.

I knew of the offer directed to Carlos Long, administrator of the Estate of R. W. Holt, dated August 23, 1905, making an offer of $108,000 for the conveyance of a fee simple title to an 18/27 interest in the lands of the Estate of R. W. Holt at Waialua (Petitioner's Ex. B-2). The value was based on the fact that we had recently bought two of the 1/27 fee simple interests in the R. W. Holt Estate, and also a 2/9 interest in Grant 1092, at a price of $6,000 for each of the two conveyances (including the interest in 1092) (Exs. A-11 and A-12).

When I entered the Holt lands on April 1, 1905, from the bottom up to about the 400-foot level, the land was covered with a very dense growth of lantana and klu, and some guava. The lands had evidently been neglected since Dr. Brodie's death in 1895 or 1896, Dr. Brodie having previously leased it for ranch purposes, and having done some ranching on part of the lands. There was some klu and more guava up to the 700-foot level, and from there on the growth was lighter. There was lantana and klu scattered all over the place but not as dense as down below. There was a very heavy growth of grass from the 700-foot level all the way up to where the pineapples now are. There was grass and guava,

(Testimony of Mr. W. W. Goodale.)

but not much lantana. The old Holt ranch house was at the place which I will mark as "Z". The land at the upper part of the Holt lands was light and scattered forest, and from the Holt lands up to the top of the Koolau range, approximately 20,000 feet from the upper part of the Holt lands, is all forest country, being the water shed of the mountain range. I will mark on the map "X-Y." The land on the north side of that line X-Y belongs to the Bishop Estate and, on the south side, to the Territory of Hawaii or the United States Government, and is called the Wahiawa School Land Tract, extending about to the marks "V-W." In general, therefore, the water shed belongs to the Bishop Estate and Territorial School land, and adjoins the United States military reservation. The Helemano waters,—that is to say, the waters coming on to the Holt lands—come from this forest reservation above the Holt lands, where I have marked the letter "U", the head waters of the Helemano stream being in the forest land of Paalaa,—Bishop Estate land. I have been in that country myself many times. The country is all forest, coming right down to the bed of the stream.

The soil on the Holt lands is a regular dark brown, or red, soil, very heavy and very dense. Before I put a ditch in to touch the Helemano stream, I made repeated examinations from 1898, and began work I think in 1907. Where we crossed the Helemano gulch with the siphon it was about 275 feet deep, and then it varies. The siphon is approxi-

(Testimony of Mr. W. W. Goodale.)

mately at the upper end of the cane lands. From the upper edge of the cane lands the Helemano gulch runs all the way down to the extremely lower end of the Holt lands and it is very deep, with very steep banks or gulches. It is the only stream located entirely on the lands of Paalaa, except as the Poamoho stream is in part, where I have marked it from "S" to "T". The Poamoho stream rises in the Territorial School lands. I have had repeated occasion to observe the Helemano stream. It is a stream that fluctuates enormously with the rainfall on the lands above. It is a small stream which ordinarily, in ordinary dry weather, is lost in the course of the stream. Opposite the old Holt ranch house I have seen the stream dry many times, except for a few water holes, but it was a very frequent occurrence that the entire flow of the stream was lost by seepage or evaporation before it reached the ranch house. After heavy rains it would have a flow clear to the lower ends. The further the stream goes the smaller it becomes, and at the place where the siphon crosses it would be very rare to see any appreciable stream of water running. There would be more water at the head and quite a stream of water there, but those streams flow among the boulders and it is very hard to estimate their quantity. The stream itself is largely dependent upon storm waters, just as all of those streams are. They vary enormously in the amount of water flow, both as to freshets and droughts. The normal flow of the Helemano stream would be of no value for sugar

(Testimony of Mr. W. W. Goodale.)

cane purposes. The Poamoho stream is still smaller, and runs out very quickly. I put a ditch in the Poamoho stream in 1902 or 1903, hoping to use it in irrigating the Emerson lands, but we could not get anything out of it except during freshets.

I was first a cane planter at Pahala Plantation, Kau, Hawai, in one of the drier districts of Hawaii, where dry-land cane is cultivated. I had five years of experience there, then went to Paia, Maui, for a year; then thirteen months at Wailuku, Maui; then to Onomea, Hawaii. At Waialua I tried out some 32 acres on the Holt lands, above the Wahiawa extension ditch, for dry-land cane purposes, at a place marked "R" on the map, planting and cultivating the cane just as I would have taken care of it in Kau, planting about forty different varieties of cane, but it had a very stunted growth and the experiment was abandoned as unsuccessful.

The latest figures that I have as to the Holt areas set forth in the petition, as to whose accuracy I have no doubt, as of May 2, 1910, are a total of 14,082.24 acres; Grant 4475 is 12,018.44 acres; Grant 973 is 1902 acres; Grant 431 is 100 acres; Grant 235 is 36 acres; and Grant 238 is 25.8 acres. In addition to that a lot of five acres was sold for school purposes.

In the properties involved there is a lot of five acres, at about the point where I marked "R" on the map, which was sold to the Board of Education since 1924.

(Testimony of Mr. W. W. Goodale.)

Referring to Exhibit F-7, Helemano #3 Reservoir (costing $2299.70) is set out on the map, Exhibit C, at the lower edge of the Holt properties. Such a reservoir would be of no value to the owner of the Holt lands, the Waialua Agricultural Company, except that the water from it might be used on a very small portion of the land lying below it. The water that feeds this reservoir is what we call tail water from the irrigation ditches, being the water stored in the ditches, then stored in that reservoir, then taken across to other lands.

Helemano #6 Reservoir (costing $9396.05), marked on the map, was built in 1908 and is for the night water from the Wahiawa ditch extension. To an owner other than Waialua it might be used for the water that comes from the Helemano ditch for the land, but it wasn't built for that; it was built for the night water of the Wahiawa Ditch. The storage ditch for the Helemano water is up at the 1,000-foot level, and there was no reservoir there on May 2, 1910.

The item marked Helemano Lower Ditch (costing $7022.70) is not marked on the map. The ditch came out just between this camp here where I marked "Q" on the map. It was finished in 1905, and with it the 45 acres of Helemano was planted in 1905 and harvested in 07, and thereafter abandoned.

The Helemano Upper Ditch (costing $22,708.35), referred to on Exhibit F-7 and on the map, was installed for the purpose of taking waters from the

(Testimony of Mr. W. W. Goodale.)

water shed above the Holt lands, and the use of that ditch would depend entirely on the ownership of the waters in such water shed.

Wahiawa Extension Ditch (one-third costing $4791.54), referred to on Exhibit F-7, is explained as follows: the Wahiawa reservoir comes out on the lands of Kemoo (near "D"), and the Wahiawa ditch comes down to where you see marked on the map the Wahiawa ditch extension, somewhere on the place marked "K". This Wahiawa ditch extension is all of the extension ditch that carries the water from the Wahiawa ditch itself across the lands of Kemoo, Kaheeka, across the Holt lands, and then across the lands of Kawailoa north of the Holt lands. Apparently they have apportioned one-third of the cost of the extension to the Holt lands. The purpose of the ditch was to take the waters across to the Bishop Estate lands of Kawailoa, and the value of the ditch would depend entirely upon the ownership of the Wahiawa waters.

Helemano 54" Siphon (costing $16,098.49) is the 54" siphon across the Helemano ravine to take the waters over across Helemano gulch and then on to the Kawailoa lands. It was built in 1906.

Opaeula 54" Siphon (one-half costing $4,869.97): That siphon takes the water across the gulch on the north side of the Holt lands, taking the water from the Helemano land on to Kawailoa. Half of its entire length is on the land of Helemano and half on the Bishop Estate land, so that the cost is divided

(Testimony of Mr. W. W. Goodale.)

half to each. The sole purpose, however, is to get the water across to the Kawailoa lands.

Waterways (costing $5,875.10), likewise referred to, are ditches and flumes for distributing the water over the entire area of the Holt land, that is to say, waterways actually made on the cane land. The same would be true on the item for flumes ($299.35), which are simply small, wooden portable flumes used for the distribution of irrigation water.

As to the item Roads, Bridges and Fences (costing $3,532.35), I remember fences along the line of the government road. The roads specified were simply places left out of the cane fields to make them accessible to teams and people.

Telephone Lines (costing $719.60) was part of the plantation system carrying the lines to the section and overseer's houses. The system was for the exclusive use of the plantation but was taken over by the Mutual Telephone Company after 1910.

The item Railroads (costing $30,922.52) is the entire cost of the grading, the rails and ties of all the railroads that had been built on the Holt lands up to May 2, 1910. The difference between the grading and the ties and rails is kept as a matter of record, but I cannot say what proportion of this sum was grading and what would be for rails and ties.

The item Buildings, including Domestic Water System (costing $19,051.08), would include redwood tanks, stables for animals, and houses for laborers, and an overseer's house which was on the Holt prop-

(Testimony of Mr. W. W. Goodale.)

erty. The laborers' quarters are not affixed to the ground.

The waterways are really ditches to go in the fields which might be plowed under at the first plowing. These waterways and flumes are the provision for distributing water over the fields from the main ditches and this item would not mean permanent improvements in any way.

I knew of the offer of $108,000 apparently made by Mr. Galt. There was a court action brought after that offer, the technical name of which I do not know, but I do remember that they asked permission to sell the land for $108,000 and the Court decided that the Petitioner hadn't the authority to sell.

Referring to the Wahiawa ditch, the water must eventually come out of the Wahiawa reservoir.

(Referring to the map, Exhibit C, witness pointed out in general the location of the lands of the Waialua Plantation, identifying the same by pointing to the map and making appropriate marks.)

WITNESS RESUMES: The Kaheeka Tract is on the Waianae or southerly side, and extends to the Poamoho gulch, to the 6-mile circle. From the Poamoho stream to the large gulch, not appearing on the map, is the land of Kemoo. At the far southerly side (not appearing on the map) the Kaukonahua stream bends up against the mountain side—the Waianae range. This stream rises principally in the school lands. From the edge of the so-called Holt lands, used for cane in 1910, up to the Kaukonahua stream, is about two miles.

(Testimony of Mr. W. W. Goodale.)

Referring to the place marked "Mill," below the lower part of the Holt lands, you can follow a line almost directly west from the edge of the map, which is what we call the Mokuleia Tract. There is first a strip called Mokuleia, then a strip called Kawaihapai, and then a strip called Kahea, way out toward Kahena Point. The lands of the plantation, therefore, running westerly from the lower tip of the Holt lands, extend for a distance of about ten miles westerly, the cane lands in that section extending five or six miles from the mill.

If Waialua did not own the Holt land the Wahiawa waters in 1910 could have been wholly used on every acre of the plantation in a general south and southwesterly direction from the Holt lands.

The waters of the so-called School Lands (marked "C" on the Map Exhibit C) out of which the Poamoho stream rises, were under lease to the Wahiawa Water Company under a land license dated April 6, 1901, by J. F. Brown, Commissioner of Public Lands, to the Waialua Agricultural Company, Limited, et al, and later transferred to the Wahiawa Water Company. The School Lands touch the Holt lands at Grant 973. This license (Ex. 5-H) allowed the licensee to enter the lands in question to construct and maintain dams, reservoirs, ditches, flumes, etc., and to impound and carry water which may be obtained thereon during the term of the charter of the Waialua Agricultural Company expiring in 1948.

(Testimony of Mr. W. W. Goodale.)

The School Lands in general extend above Grant 973, marked on the map, Exhibit C, up to the summit of the Koolau range.

(Respondent's Exhibits 5-J and 5-K were received in evidence, without objection; 5-J being a lease dated February 14, 1899, Trustees B. P. Bishop Estate to Waialua Agricultural Company, of a portion of the Ahupuaa of Kawailoa adjoining the Holt lands to the north; term, 50 years from October 1, 1898; rental, $3500 per annum for 10 years, and thereafter to be 2½% of the gross receipts of products produced on the land demised, or, at the option of the lessors, 2½% of the market value in cash of all such products; lease duly recorded. Exhibit 5-K was a lease dated May 27, 1901, Trustees B. P. Bishop Estate to Waialua Agricultural Company, Limited, covering all the water flowing on a portion of the Ahupuaa of Kawailoa, with the right to enter upon the land, impound the water, and to use the same on the lands of Kawailoa leased to the lessee, under lease Exhibit 5-J; term of lease Exhibit 5-K, 21 years from July 1, 1900; rental, $1.00 the first year and $10,000 per annum for the balance of the term; duly recorded.)

WITNESS RESUMES: Our lease with the Trustees of the Bishop Estate was for the land below a certain forest reservation fence and we had no rights of entry upon the lands above that fence, being, as I think, a tract of 4,000 or 5,000 acres of forest land lying between the forest reser-

(Testimony of Mr. W. W. Goodale.)

vation fence and the summit of the Koolau mountains. Emmeluth had a lease on this other section, namely, the 4,000 or 5,000-acre tract under lease from the Bishop Estate, dated October 7, 1899, at an annual rental of $5,550 per annum (Exhibit 5-M). This lease was later surrendered for nonpayment of rent, but in 1908 I began negotiations with the Bishop Estate to clear up this lease situation. The lands above the Holt lands, belonging to the Bishop Estate and carrying water rights, were being surveyed by others, and plans were being made for the development of those waters, which plans were entirely independent of, and, as we thought, hostile to us. Therefore we began negotiating with the Bishop Estate for the entire tract of land, including both the Bishop Estate forest lands above the Holt lands and the Bishop Estate lands in Kawailoa already under lease to us. In December 1909 the Bishop Estate Trustees agreed to a modification of the original agricultural lease (Ex. 5-J) by which Waialua kept the agricultural land and was given the entire tract of forest land from the boundary of the School Land over to the lands of Waimea, far to the north of the map, Exhibit C, for a minimum annual rental of $13,500, including all the forest lands controlled by the Bishop Estate in that section. After one or two slight amendments, the new lease was executed on May 5, 1910, being in fact a combination of the two prior leases, namely, Exhibits 5-J and 5-K.

(Testimony of Mr. W. W. Goodale.)

(This lease was received in evidence, without objection, as Respondent's Exhibit L, and is described as follows:

Lease dated May 5, 1910, Bishop Estate to Waialua Agricultural Company, covering the portion of the Ahupuaa of Kawailoa to the north of, and adjoining, the Holt lands, together with the right to all waters on the lands of Kawailoa, and the lands of Paalaa adjoining and above the Holt lands, said Holt lands being the lower part of the Ahupuaa of Paalaa; also the right to enter said lands for the purpose of taking and impounding said waters, digging ditches, reservoirs, tunnels, etc. Rental, 2½% of the products raised on said lands, or the market value thereof, with a minimum rental of $13,500 per annum; term, 39 years from October 1, 1909.)

WITNESS RESUMES: Under the foregoing lease, Exhibit L, the Bishop Estate had the right to take, in lieu of the cash rental, 2½% of the gross proceeds, less marketing expenses. In those days marketing charges amounted to about $10 or $11 a ton, so if sugar were selling at 4¢ a pound it would be $80 a ton, from which the marketing expenses would be deducted; therefore the 2½% would be figured on, for example, $70 a ton. The average production of the Bishop Estate land was about six tons to the acre, the lands being very similar to the Holt lands and being all part of the same Royal Patent and same Land Commission Award.

On May 2, 1910, there were 1595.95 acres of cane under cultivation lying below the Wahiawa Ditch.

(Testimony of Mr. W. W. Goodale.)

Under lease for pineapple purposes there were 2558.74 acres. Above the Wahiawa Extension Ditch there were 4002.26 acres of land, but below the land in pineapples. These 4002.26 acres were unoccupied land in a heavy growth of grass, lantana and guava, except 25 acres that I put into sisal and was not a success.

"Q. And was there any waste land?

A. The remainder of the land amounting to 5,925.26 was land in the gulches and forest."

During my time at Waialua I kept a record of the land transactions in the Waialua district. I was a subscriber to a sheet that came out every few days with a list of conveyances taken from the Record Office covering the entire Territory, and I had every transaction affecting sales, leases and mortgages in Waialua copied. I was familiar with sales prices and rentals paid. In my opinion the value of the land marked in yellow on the map, Exhibit C, namely, the land available for cane as of May 2, 1910, would be about ten times the annual rental paid for that and lands of similar location and condition in the District of Waialua, or a value of some $40 to $60 an acre. The land above the Wahiawa Extension Ditch could not be considered cane land, but that class of land could only have value for pasturage purposes at, say, $2.00 an acre. From the 700-foot elevation to the 1,000-foot elevation which Mr. Gibb roughly referred to as possible for dry land cultivation of cane, it was dry land but I think I proved

(Testimony of Mr. W. W. Goodale.)

from actual experiment that it was not cane land. It would have no value whatsoever except for pasturage purposes. The waste land, namely, approximately 5925 acres, would not have a value of more than $1.00 an acre.

Referring to the list of pineapple leases as of May 2, 1910 (Ex. 5-L), that is a complete list of the pineapple leases at that time on the Holt lands. The total should be 2558.74 acres. Those leases show a total annual rental at that time of $22,000, the Hawaiian Pineapple lease of 1337 acres being at the rate of $8.00 an acre.

In regard to the lands under lease for pineapple purposes, I do not feel competent to fix a value. There were no pineapple leases made in 1910, and no applications for leases in 1910. It was a time of depression in the pineapple business and things were very slack. We had great difficulty in collecting some of our rentals, and a great many of them were delinquent. The small growers were delinquent in the payment of their rents, as, also, was the Hawaiian Pineapple Company itself.

Referring to Exhibit D-7 (being letter of John F. Colburn, dated March 30, 1910), I had conferences at the time with different officers of the Waialua Agricultural Company about the prospective purchase of these Holt lands, and at none of these conferences did I hear any mention by any officer of the Company or anyone representing the Company of any reference to a partition suit. I also recall the letter from Lawrence Kentwell dated April

(Testimony of Mr. W. W. Goodale.)

19, 1909, Exhibit D-1; also the letter of Lawrence Kentwell dated March 30, 1910, Exhibit D-8.

In the early part of 1910 we were having a very hard time with insect pests in the sugar cane. In 1909, for instance, I reported seven million borer beetles as having been gathered and destroyed through the efforts of the school children, for which we paid 15¢ an ounce. We also had the leaf hopper disease and the black scale, besides the top rot, which affected the cane very badly. This latter was a very serious cane disease. There had also been a strike of Japanese laborers in May 1909 which lasted for about two months.

Cross Examination.

I do not think the top rot has ever been gotten under control, but in 1913 or 1914 the borers were got under control and the leaf hopper is still being fought. The prospects for sugar in 1910 at Waialua were not very bright.

The year 1910 would probably be a year which, coupled with the price of sugar, would show and reflect the result of pests of one sort or another and strikes. We began harvesting the 1910 crop in December 1909. We were still harvesting that crop in May, 1910, and its results were not then known. Looking at my report as manager at that time it appears that the actual crop of 1909 was one of the largest crops harvested on Waialua during my management until 1918. To begin with, there were nearly 300 acres more cane cut in 1909 than in 1908.

(Testimony of Mr. W. W. Goodale.)

There are so many elements to be considered, that is where the remainder of the crop was harvested other than on the Holt lands. The quality of the lands in some other part of the plantation might have exceeded those on the Holt lands, and the variety of the cane. This doesn't tell the whole story. The crop might have lessened and the average yields lessened after that time by the quality of the kind of land that I harvested during those succeeding years. The crops during the succeeding years might have been affected by drouth, which would very much account for the uniform record of production from 1910 to 1924. I would not know whether there was a very large fall of rain in 1909 and a large crop expected in 1909 without referring to my report. Whether this would cause a rather optimistic view rather than a pessimistic view would depend on how the rainfall was distributed. Beginning with 1908 we have a range price between $91 and $65 a share and in 1909 a range of from $125 a share high to $80 a share low.

In giving my testimony as to value, I mean, by value, the value to the owner of the land, and to Waialua who wanted to use that particular land for the production of cane. Those lands in my opinion were worth no more than forty or fifty or sixty dollars an acre as a unit in the production of sugar. This value I fix on ten times the rental, not received by Waialua but received by persons leasing lands to sugar companies, and you have no profit in the enterprise. Referring to the market value

(Testimony of Mr. W. W. Goodale.)

of Waialua's securities, it is quite possible that the fact that in 1910 there was a jump in the price of Waialua's stock of from $80 and $85 as low to $125 to $138 as high, indicates that the gloomy outlook in 1910 was a circumstance not within the knowledge of the general public. I have not tried to describe conditions then as "terrible" nor as gloomy. I think it was gloomy enough to have an effect, possibly a material effect. In giving my opinion as to value I take ten times the rental we paid for the land as that value, this being the rental we agreed to pay at a time when the properties were unimproved and not clear. I can see no difference between the value of the land between 1905 and 1910 notwithstanding thousands of dollars had been put upon it and it had been improved and planted in cane, and it is my opinion that there is no difference in the value of land which has not been cleared, and land which has been improved and is under cultivation. I cannot consider anything that could be done to the land that would give the land itself a greater value than as uncleared land. Irrespective of any improvements that may be put on the land or any clearing that may be done thereon, my opinion is that the inherent value of that land remains the same as it was at the time it was wholly unimproved and a mere barren waste of lantana as I have described.

It would be fair to say that Waialua plantation from the very outset planned, if it could, to acquire these Holt lands and that the various negotiations and transactions that I undertook from the incep-

(Testimony of Mr. W. W. Goodale.)

tion there were taken with a view to the ultimate securing of those lands for Waialua.

In 1899, when we purchased the interest of R. William Holt for $11,000, it was for all his interest in the entire property shown on the map, Exhibit C, except that part designated as Grant 973, in short his 1/27 interest in all but 973. He retained that interest because he was in the cattle business and had a lease on it. The reason I paid such a very high price for properties at that time was because I believed a co-tenant had more rights than I have since found out he had.

At the time Waialua purchased the Robert Holt interest, we wanted, in order to develop the plantation, to get across the plantation with a railroad system, a permanent plantation railroad track. From the Oahu Railway & Land Company we had a right to use, for a time only, their right of way, but I wanted to build railroad tracks from the site I had selected for the mill, to carry it around the agricultural lands and across the land of Kawailoa. I couldn't get across that land without a right of way, and it was not until 1899 or 1900, when we bought the two undivided 1/27 interests (Robert W. Holt and Chris J. Holt) and acquired a co-tenant's rights, that I felt we could build across the lower tip of the Holt land. There was no other way in which I could get across to other lands of the plantation save across the lower tip of the Holt lands. The various transactions I was engaged in were not entirely my own independent acts. In anything

(Testimony of Mr. W. W. Goodale.)

involving expenditure of a large sum of money I always reported to the directors of the company for their approval. I had the dealings with R. William Holt myself, and I think he was indifferent to the sale. He was a man fairly well fixed. I paid Chris Holt $20,000 for his 1/27 interest in the Holt lands and for his 1/9 interest in Grant 1092. This 1/9 was 1/9 of about 140 acres. I would judge the value of this 1/9 interest would be less than $1,000. I still entertained my previous ideas relative to the powers and rights of co-tenants. That had its effect upon the purchase, for it gave us more than one-fourteenth of that entire property and I thought that the ownership of a fourteenth of a property like that would have some rights.

The Helemano stream runs through a gulch varying in depth 268 feet at the siphon, running out in depth at its lower end. When I first saw the Holt property there had been some ranching carried on on parts, the Oahu Railway running some cattle at that time. So far as I know, whatever cattle ranching there was, was on the south side of Helemano gulch.

I have already testified that by the time the Helemano stream got down to the cane land there was very little, if any, water in the stream and at times it would be dry. At the old Holt ranch house ("Z") I have seen the stream perfectly dry, and seen it thus many times. Every time there would be a heavy rain in the mountains there would be freshets, whereas at other times there would be

(Testimony of Mr. W. W. Goodale.)

no water at all. At the time of the purchase of the Holt properties I knew that the water, other than the normal flow of the stream, was the property of the Bishop Estate, and we had no control over the forest lands. The possibility of developing water on the Holt lands had very little value. The Bishop Estate, for instance, could have sold the right to use the waters above the Holt lands to any outsider who could have used the water provided the normal flow of the stream was not interfered with. I believe that where a stream of water runs through a tract of land, the occupants of that land have the right in Hawaii, subject to the rights of any taro lands there may be along the line of the stream, to water for domestic purposes and for stock, but they have no right to take the water out of the stream and divert it to any other use. I believe the normal flow of the stream ought to be allowed to flow in its natural course, and I think the owner of the land above has absolute ownership in everything except the normal flow of the stream. This is the normal flow of the stream according to the rainfall. Although I believe the lower land has the right to have the water come down, the owner of that land as against the holders of the upper land had only the right to use the water in its normal flow for domestic purposes and stock. It is not my understanding of the law that the normal flow could be completely diverted by the owners of the waters on the upper lands. I believe it is right that the owners of the lower land, assuming

(Testimony of Mr. W. W. Goodale.)

the land reaches to the ocean, would have the complete right to the stream subject to the owners of the upper land making use of it for domestic purposes or for grazing. The owners of the upper land had the right to divert any water which arose on their land, whether they could use it for domestic purposes or not, and sell that right to others. I believe the owners of the upper lands on which the waters arose could sell all of such water to anyone they saw fit. I would like to change my testimony to the effect that the owner of the upper lands had nothing but the right to use the water on the land itself. Whoever the owners of such upper lands sold to could do exactly the same thing with the water as the owners themselves. I think the Bishop Estate had a perfect right to sell the waters of those lands above Paalaa and Kawailoa to other people than the Waialua Agricultural Company. My idea is that the normal flow of that stream could not be interfered with. There must be water allowed to run from the mauka land and run into that property. Anything in excess of the normal flow could have been taken and sold elsewhere, just as the water in the Waiahole ditch is being taken and used on Kahuku plantation. Twice I have been on a board of arbitration to fix water rights on Maui plantations, and those ditches run for miles across the country. The conditions there are the same as conditions might have been here and there were people looking for this water. I don't say that the normal flow was of no value. If anybody were to

(Testimony of Mr. W. W. Goodale.)

live on that land, make any use of it for cattle or residence purposes, they had a right to take water out of that stream for their domestic purposes. We took chances in diverting those waters from the upper lands, our chance being that the water would have been cut off above us. It would never have paid us and it doesn't pay us now to have the ditches there for the normal flow of these streams. The value of the normal flow of that stream was one of value to the owners of that property for domestic purposes and stock. The only value to the owners of the Holt property of water from the Helemano Stream was for domestic purposes and stock. We purchase water by contract from the Wahiawa Water Company at $6.17 per million gallons delivered at the outlet of the Wahiawa Reservoir. That is for water stored at the reservoir and delivered at the reservoir.

I considered we were taking a serious risk in connection with the water situation on the Holt lands. Until the execution of the Bishop Estate lease on May 5, 1910, (Exhibit L), or at least until the conclusion of negotiations in December 1909, we had no definite assurance of being able to get the waters from the Bishop Estate lands above and east of the Holt lands, which is the tract of land controlling the waters flowing in to the Helemano ditch. We began constructing the Helemano ditch in 1907 or 1908, and before we were able to get those upper waters we had expended about $20,000. At that time we owned 7/27ths of the Holt

(Testimony of Mr. W. W. Goodale.)

land. The developments of the land originating on the lands east of the Helemano tract consisted of the Opaeula ditch, the intake of which is on the point marked "N" on the map, which ditch ran over to the Bishop Estate lands and into which, including the storage reservoir, we expended up to 1909 about $60,000. The water from the intakes marked "F" and "G," being from Poamoho and Helemano streams, were taken down and made common to the water that came from the Wahiawa reservoir in the Wahiawa extension ditch, and were used to the extent they could be used in the waters of Helemano and carried across to the Bishop Estate lands. In dry weather the water would be lost in the ditch. At times there would be no flow of water at all and at other times there would be a full ditch. The Wahiawa extension ditch is used for the purpose of carrying water from the Wahiawa dam through the extension ditch and on to other lands. The water carried in this ditch can be used anywhere along the line of the ditch or carried across to other lands. By reason of the fact that this ditch is used in connection with the Wahiawa dam, it would have no value in the hands of the owners of these lands although such owner might physically possess it. Without title to the water, it would simply resolve itself into a right of way. The Wahiawa water could be used on other lands, to the South of the map, Exhibit C.

(Testimony of Mr. W. W. Goodale.)

(Over the objection of Respondent witness testified:)

The Helemano ditch during the year 1909 delivered 1,904,684,000 gallons of water. During the year we added a new ditch out of the Poamoho gulch. While the stream in this gulch was small, it was subject to frequent small freshets that gave us water when the larger streams were not affected.

(Thereupon the following proceedings were had:

"Mr. CASTLE: (Interrupting) If the Court please, I think it should be understood that our objection goes to all this testimony on the flow of this water, in view of the introduction of the lease from the Bishop Estate.

The COURT: The objection may be considered as going to the entire line.")

WITNESS RESUMES: The following year we got three billion gallons from the Helemano ditch combined with the new Poamoho ditch. In my report for 1910 I say:

"This ditch now combined with the new Poamoho ditch, has given us 3,433,102,000 gallons of water for use on Helemano and the upper Kawailoa lands."

Up to th end of 1912, without a reservoir, it was purely a storm water proposition. I admit that. I put these figures in my report, but as a matter of fact it is perfectly absurd to me that I should have made any such report as to that flow in that ditch. Taking the Wahiawa system, which is a reservoir,

(Testimony of Mr. W. W. Goodale.)

a large reservoir holding 2,500,000,000 gallons, and is supplied by two good streams, the water being stored for use as required, there is a complete system of dams and the maximum delivery of which was 11,000,000,000 gallons a year, and it was measured by a weir and sold by measurement, and to state that one of the little gulches, the Helemano Gulch, produces in proportion 3,800,000,000 gallons, without any storage system, as compared with Wahiawa with that complete storage system, is perfectly absurd. The measurements on Helemano were taken by people who did not know how to measure water and I did not pay enough attention to it. We have not an accurate record of a real flow into that ditch. I put in a few years after 1910 what is called the Watson Self-registering Weir apparatus in some of the ditches, but I think I did not put it into this one. The ditches are not concrete lined.

In so far as the plantation railroad is concerned, I believe Waialua had a right to remove the rails and ties.

Referring to my report for the year 1909 I see that one of the first assets listed there is real estate $706,946.70. This was all of the land then owned by the plantation and included both cane and waste land. Referring to my 1911 report showing the total in 1910 I have the cane area fee simple lands as 2,406 acres and pasture lands as 1,611 acres. We were not carrying fee simple lands on our books at that time that were held by subsidiary corporations. That when my report in 1911 was made as

(Testimony of Mr. W. W. Goodale.)

of 1910 the total acreage of 4,017 acres for the plantation itself would be the same as it was in 1910. When the plantation was organized in October, 1898, the books were open for certain entries that I was instructed to make by the treasurer, and the way that those figures were made up I know absolutely nothing about. I believe these figures were the book value but the reason for placing the value on that land I don't know. It was the value placed on the land at that time by Waialua when setting up its books, and the showing made to the stockholders and others interested in the corporation. The only thing I can refer to before my time is a deed recorded in Book 186, page 261, a deed recorded by Edgar Frank Halstead of Waialua, which reads: "All tracts of land whatever in the District of Waialua, water rights, easements, etc.; all tracts of land, leases set out, etc., for the consideration of $630,000." If it is contended that $300 per acre is the value of cane land it is an excess value.

The land included in that $630,000 purchase was land entirely different from the land referred to in this suit. The location and elevation, large areas of taro land having water rights on the Kaukonahua stream, the fact that none of these were above the 200-foot level and extended down almost to the sea level.

The value of cane land in 1910, aside from water rights which might add materially to the value, and entirely apart from its use as cane land, would be ten times the annual rental. I look at this matter

(Testimony of Mr. W. W. Goodale.)

entirely from the position of a practical plantation man, and am not qualified to pass on any theoretical values. I base my statement on the fact that the lands were leased from a person who fixed the price we paid. That was the owner's opinion of the value of that land and we leased it at what he considered a fair rate of interest on his investment.

It is true that there may have been leases in the early days, such as the Waiakea lease in 1868, which were Government lands not subject to taxation, where ten times the rental would not represent present fair value, and to test this you would have to look to lands of a similar nature that could be leased for the same purpose. I would look to such average rentals and, as a cane proposition, figure what the lessee could afford to pay for it, considering that he has to pay for every crop of cane that he raises, rent for every two years of its growth, and during the initial preparation of the land and letting it waste at times, to a certain extent, as fallow land. That is the ordinary course of plantation life.

If the owner of a land feels that his piece is worth $5.00 an acre, whereas a fair rental might be $10.00 an acre, then nevertheless I think that the fair value of that land for taxation purposes would be ten times the $5.00 per year, or $50.00 an acre. In using my method I have considered the necessity of no relationship between the rental of the land and the value of the land for the purpose of reaching my conclusion.

(Testimony of Mr. W. W. Goodale.)

In 1910, of the land immediately below the tip of the Holt lands (west and to the south of the tip), about half was controlled by Waialua. Nearly all the land abutting on the Helemano stream below the tip of the Holt lands was owned or controlled by Waialua. (Witness indicated on Exhibit C certain parcels Waialua did not control.)

As of May 2, 1910, I did not classify other lands above the Wahiawa extension ditch as pineapple lands, except those under lease for pineapple purposes, judging from the fact there was not a single application for such lease from after October 1909 until way into 1911. I think the land I have classed as pasture land the directors of Waialua would not have sold for $2.00 per acre but would have leased on a basis of 20¢ per acre for pasturage purposes. Notwithstanding such existing pineapple leases, I would have recommended the leasing of the land I classed as pasture land at a rate of 20¢ per acre per annum for a 10-year period.

Re-direct Examination.

In 1910, ten times the annual rental was the accepted basis for ascertaining the value of agricultural lands. In regard to the amount paid the Wahiawa Water Company for water delivered, it was $6.17 per million gallons, which we took as we wanted it. We were charged with what was delivered to us upon our demand. The water from the Helemano and Poamoho streams was a storm water proposition, and in 1910 we did not have reservoirs for the storage of storm waters. The stream de-

(Testimony of Mr. W. W. Goodale.)

pended entirely upon whether rains were heavy in the mountains or not.

In estimating the value of cane lands at ten times the annual rental, I make no difference between improved and unimproved land. The lease is made in contemplation that such lands would be put into sugar. I believe ten times the annual rental was a basis both for sale and taxation. The average land purchases and sales of cane lands in the Waialua district pretty closely reflected such tax office basis. When we bought the Halstead Plantation we bought it as a going concern.

Re-cross Examination.

The Bishop Estate lands (Kawailoa), immediately adjoining on the north, closely approached the Holt lands in nature. Using the percentage basis in that lease, the rent on such Kawailoa lands would amount to about $6.50 to $7.00 per acre. This basis was agreed upon in 1898 when it was contemplated that the lands would be used for sugar purposes.

Re-direct Examination.

In 1908 and 1909, when the two Bishop Estate leases were combined, the fair rental was then considered and the waters above Helemano (Holt lands) added, all for the total minimum rental of $13,500.

MR. GOODALE

being recalled, without objection, on

Further Direct Examination

for Petitioner, testified as follows:

(Counsel for Petitioner, referring to Exhibit 17-A, which is a statement showing the cost of improvements on the Holt lands, May 2, 1910 to December 31, 1928, asked witness the following question:

"Q. I will ask you whether or not it is true that these various payments were made as indicated and charged as expenses for the current years in which they were made, before the net profit realized was entered?"

Thereupon the following proceedings took place:

"Mr. CASTLE: How is this particular fact material, how those particular payments were charged? We are not going into an accounting case at the present time. We are offering these merely to show the improvements which were put on the land. It has nothing to do with the profits; we have kept carefully away from the question of profits.

Mr. ULRICH: I propose to show that this does not represent any additional expenditure so far as the Waialua Agricultural Company was concerned, but these improvements have been put in and paid out of the land itself many times over, in the course of the management of the plantation. So far as being an additional hardship represented by an outlay, as represented here, if the true facts were

(Testimony of Mr. Goodale.)

known it would be seen that from holding these properties and putting in these improvements at this expense, there has been more benefit realized by Waialua, rather than a detriment, which goes to quite a different situation on the question of loss. If we had the case that they were out $400,000, we would have one situation, and if we had a case in which $1,400,000 had been already deducted and millions of dollars of profit is shown, we would have an entirely different situation, and no hardship involved at all.

The COURT: The only force as I understand that exhibit, may be as to the correction by counsel for Respondents. It is simply along the idea that they are out of pocket in the sense that they are faced with a loss for merely going forward with the use of the property on the basis of reliance upon ownership. In other words, as distinguished from a possible situation where I might buy a piece of property and be doubtful of my title, and let it lie idle on my hands until the lapse of time perfected my title, as against the proposition of buying my title and going forward with whatever inferences could be drawn one way or the other, or resuming the use of it. Whether that exhibit bears upon or supports any such inference is, of course, the ultimate conclusion which the court is attempting to make. I am simply trying to illustrate that we are not concerned or the

(Testimony of Mr. Goodale.)

court does not feel itself concerned with this exhibit, to draw a conclusion either one way or the other, that the company is out of pocket in a loss, as that is a phase of the subject which must be in abeyance until some accounting, if any is had, but purely the question of whether or not the company did utilize the properties as theirs, or did not use them as theirs; whether they relied upon their conveyance or did not rely upon their conveyance, that is the sole place of this exhibit in evidence. I did not know that Waialua Agricultural Company were trying to claim that they are out of pocket and have lost certain moneys represented by the improvements, but rather that they, by the use and exercise of ownership as if they were the owners—If I misstated it I am subject to correction.

Mr. CASTLE: Your Honor has stated and we agree with that statement.

Mr. ULRICH: My thought was,—I really wanted to be sure that it appears in record, that this was being offered to show an element of hardship which would be involved in the loss of cancellation, raising a certain detriment which would be and is being suffered by Waialua. Now, if it appears as a matter of fact, that the true situation represents not a detriment but a distinct benefit, there would be no occasion to determine upon any theory established or any idea of laches during the time

(Testimony of Mr. Goodale.)

there was to determine over the period over which it could be invoked. I believe it is the showing which should be allowed in that connection.

Mr. CASTLE: It is to show that we have gone ahead in good faith and put in improvements with the understanding that we owned it.

The COURT: Will you please read the question again?

Q. 'I will ask you whether or not it is true that these various payments were made as indicated and charged as expenses for the current years in which they were made, before the net profit realized was entered?'

The COURT: The court will permit that question. By overruling the objection the court is not intimating that it will reopen the question of what was the net profit. You may answer the question if you can."

The Court further allowed Respondent's objection to go to the line of questions.)

WITNESS RESUMES: All of those improvements were paid for out of the general funds of the Company, without any reference whatever to profits derived from the lands upon which they were placed, or any other lands of the Company. All of the improvements listed on Exhibit 17-A are new improvements on the property since May 2, 1910, except for the improvement referring to the Helemano Upper Ditch in 1917, of $10,159.70, which was an enlargement of that particular ditch.

(Testimony of Mr. Goodale.)

(Respondent's Exhibit 17-A was received in evidence, and is in words and figures as follows:

STATEMENT SHOWING COST OF IMPROVEMENTS MADE ON HOLT LANDS FROM MAY 2, 1910 TO DECEMBER 31, 1928.

Date	Description	Cost
1928-1928	Pump #10 Complete (Poamoho)	$207,137.27
	Railroads	53,066.86
	Buildings (Including Domestic Water System)	41,572.08
1919	Helemano 15 Reservoir	8,259.70
1916	" 4-A "	2,915.30
1912	" 6-B "	2,494.36
	" 6 "	1,274.95
1917	" 9-C "	2,783.10
1912	" 11 "	5,455.07
1915	" 12 "	4,321.85
1917	" Upper	16,025.36
	" " Ditch	10,159.70
1911	" " Res. Outlet Ditch	4,695.30
	Wahiawa Water Extension Ditch (1/3)	2,896.28
	Poamoho Branch Helemano Ditch	1,148.25
	Helemano 54" Siphon	3,959.75
1918-1920	" 6" "	5,969.22
1926	" 3-A "	150.00
	Opaeula 54" Siphon (½)	494.62
	Waterways	24,661.40
	Lining Ditches	1,949.70
	Drainage Ditches	425.00
	Flumes	4,193.50
	Camp Sewerage	722.00
	Roads, Bridges and Fences	6,121.75
	Development of Upper Lands	1,130.05
	Telephone Lines	796.67
1928	Pump 10-A Complete	4,690.00
1922	Electric Plant	5,168.65
		$424,637.74)

(Testimony of Mr. Goodale.)

Each item was considered as expense for the current year, and after considering it with other expenses our profit for the year was figured.

(Counsel for Petitioner then endeavored to question the witness relative to the net profits made by Waialua during the period covered by the exhibit, which questions, upon objections made by the Respondent Waialua, were not allowed by the Court.

Counsel for Petitioner then attempted to show the details of the various net profits over the entire operations of the Company for each of the years covered by the exhibit, which, being objected to by the Respondent Waialua, objections were sustained by the Court.

Counsel for Petitioner then offered to prove the net profits made by Waialua from 1912 to date, which the Court, upon objection, refused to allow them to do, ruling that:

> "The court does not feel that it is a proper proposition to include in the record the claim of an exact net profit on the entire operations of the company. Counsel will understand that the Holt area involved in this case is but a small part of the plantation area, and the Court refuses to go into the segregation at this stage of the proceedings as to what profit if any was attributable to the Holt area as distinguished from the rest of the area of Waialua or the rest of the operations of the Waialua Agricultural Company."

(Testimony of Mr. Goodale.)

Counsel for Waialua stated:

"We will admit there was a surplus for each and every year as set forth in that exhibit." (Ex. 17-A.)

Counsel for Petitioner then made the following offer of proof:

"We offer to show that there is a net profit over a period of occupancy, prior to the time when this woman could have acted, then after the death of her father, of many millions of dollars. We offer to show the proportion of approximate area of these lands, which contributed to that loss considering the element of value, which also so contributed for the purpose of showing a comparison between the items of expenditure and the items of profit, as bearing upon the question of whether a detriment has resulted by reason of any laches of this plaintiff petitioner * * *"

Which offer, being objected to, the objection was sustained.)

KEAWE KANE

was called as a witness for Respondent, was sworn, and testified through the official Hawaiian interpreter as follows:

Direct Examination.

I knew John D. Holt and his daughter, Eliza Holt, down at Makaha. Eliza was between seven

(Testimony of Keawe Kane.)

and eight years old when I first knew her. I also saw her when she was a little baby. Eliza lived at Makaha with her father until she came to Honolulu. I saw her and her father both at Makaha and Honolulu. John D. Holt talked to me in Hawaiian. He and his wife likewise conversed in Hawaiian. There was no sign of Eliza being ihepa, lolo or pupule. One of Eliza's eyes was slightly slant but not very much. There was nothing unusual about Eliza to attract my attention. With her cousin, Annie Holt, they walked together, played together and talked together.

Cross Examination.

At Makaha sometimes I lived at John Holt's place, sometimes at my own home. As I remember, I came down here first from Kau, Island of Hawaii, in 1875, so that I was living out at Makaha when Eliza Holt was born. I was a workman for John D. Holt. It was I who killed and butchered the cattle if occasion arose, and I used to distribute the beef to the people there, so that I have always been in the presence of John D. Holt. Eliza Holt spoke to her mother in Hawaiian. Her mother had a little slant to her eye just the way Eliza did. Annie Holt (Kentwell) seemed a little older than Eliza.

"Q. Mr. Keawe Kane, do you remember the occasion—

"You see this gentleman sitting here, Mr. Hite?

A. I have seen him but I don't quite recognize him.

(Testimony of Keawe Kane.)

Q. You remember——

A. By the way, whose son is he?

Q. He is Mr. Hite's son?

A. Is that so?

Q. You remember, or do you remember the occasion on which you had a talk with Mr. Hite and your son-in-law? I don't know your son-in-law's name.

A. The name of my daughter who is married,—the husband of my daughter,—the name of the husband of my daughter is Uluihi. I wonder if he is the husband of my daughter? (Indicating Mr. Hite.)"

What I actually observed Eliza Holt do is this: that she was all right so far as talk was concerned; she was all right so far as play was concerned; she was all right so far as kaukau and eating was concerned. It is true I have forgotten somewhat. You must bear in mind I am getting old. I remember certain things and certain things I do not remember.

KALUNA KEAWEKANE

was called as a witness for Respondent, was sworn, and testified through the Hawaiian interpreter as follows:

Direct Examination.

I knew John D. Holt and his little daughter Eliza Holt. I first knew them when they lived at Makaha. She was about seven years old when she and her

(Testimony of Kalima Keawekane.)

people moved up here to Honolulu. Eliza Holt used to play with the children of my husband. Eliza went to school here in Honolulu. I knew them here at their home in two different places in Honolulu. She appeared to me to be all right. I used to talk to both John D. Holt and Eliza Holt in Hawaiian. Eliza was all right and used to talk to us.

Cross Examination.

When I used to come over to see the Holts, Eliza Holt would run over and tell her father and say to him, "Here comes Mama." Her mother told her to call me Mama because I am her mother's cousin. I was born at Makaha and was raised there and lived there. I was married once before and we have sixteen children. I saw Eliza Holt after she came to town at Apua where they lived. She went to school here in Honolulu. I saw her here in Honolulu drawing pictures and writing something in English which I could not understand. Had she been a lolo she could not have drawn pictures. She was at that time fourteen.

Re-direct Examination.

Eliza Holt could draw pictures and write. I heard her engaged in conversation with Annie Holt in English, but the English language I cannot understand. I saw her read—at least heard her read—something from a book. She was drawing pictures and writing and having a conversation with Annie Holt. That is the last I saw of her.

(Testimony of Kaluna Keawekane.)

Re-cross Examination.

(Question by counsel:)

"Q. You don't know what she read and you don't know what she was writing, and you don't know what the conversation was that she was having with Annie?

A. How could I? I do not understand English?"

Eliza Holt did not have either brothers or sisters.

SOLOMON KEAU PULE

was called as a witness for Respondent, was sworn, and testified through the Hawaiian interpreter as follows:

Direct Examination.

I live at Waianae and knew John D. Holt and his daughter, Eliza Holt. They were living at Makaha. I saw Eliza Holt when she was a mere child. When I left Makaha she was about four years old. She was like other children who were playing around there.

Cross Examination.

I was a cowboy at Waianae and lived about two miles away from the place where Eliza Holt lived. All I remember is that I did not notice anything wrong with her.

DAVID HELEMANO

was called as a witness for Respondent, was sworn, and testified through the Hawaiian interpreter as follows:

Direct Examination.

I knew John D. Holt and his daughter Eliza, knowing the latter from infancy to womanhood. Her mother was my sister. Eliza Holt was not ihepa but was perfectly good.

Cross Examination.

I was living in the John D. Holt home when Eliza was born and lived there for three or four years after when I moved to Makua. I next saw her in Honolulu at the fish market in company with her mother. Eliza Holt was one of the brightest children around Makaha. In playing hide and seek she would shut her eyes and count up to ten like the other children. In counting in the game of hide and seek she was quick and better than most of the other little children, a brighter girl than Annie Holt. In my opinion, from my observation of Eliza, she was a more intelligent and brighter child than her cousin Annie Holt. I remember coming up to Mr. Hite's office with Mr. Nuuanu, Deputy Sheriff of Waianae, on December 21, 1928. I talked with Mr. Hite through Mr. Nuuanu as interpreter. On that occasion I told Mr. Hite that I knew Eliza Holt at Makaha, that she was feeble-minded or ihepa, and that she talked as though she did not know what she was talking about. I told him she was weak-minded. I told him that when she was

(Testimony of David Helemano.)

a big girl she would play with little children, that she would laugh and shake herself in a foolish way. That she would call out in a silly way, "Who are you, who are you all?" I was then relating the story of her actions in former days. When I first saw her she was weak-minded. Afterwards everything was clear. From the time I saw her commencing to play with other children up to the time I last saw her she improved herself.

Re-direct Examination.

I do not understand English. Leaving out the word "feeble-minded" Eliza Holt never did anything in my presence that caused me to believe she was ihepa, lolo, or pupule.

Re-cross Examination.

The conversation that I had in Mr. Hite's office was a conversation in which I spoke in Hawaiian through an interpreter and he spoke to me in Hawaiian.

JOE KAPELA

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live at Waianae and knew John D. Holt and his daughter, Eliza Holt. I knew them at Makaha. When I first saw Eliza she was about two and a half years old. I have not seen her since she was

(Testimony of Joe Kapela.)

about four years old. When I talked to the members of the Holt family I talked with them in Hawaiian. I visited the Holt family many times when I used to go down as a cowboy and drive cattle. This was both before and after Eliza's birth. She seemed to me all right. She had one of her eyes crossed peculiarly.

Cross Examination.

I did not see much of Eliza Holt but have heard her talk to her mother. What I mean to tell you is that I do not remember anything particular about her one way or the other, as to her mental condition.

JAMES KAAIENA HELENIHI

was called as a witness for Respondent, was sworn, and testified through the Hawaiian interpreter as follows:

Direct Examination.

I am sixty-five years old and was born at Makua. I knew John D. Holt and his wife Kaahanui. I was a cousin of Kaahanui through our grandfolks. I knew Eliza Holt when she was a baby and I should judge that she was six or eight years of age when I last saw her. I did not see her after they moved to Honolulu. While living down at Makua I would make visits to the John D. Holt home at Makaha, sometimes two visits in one week and one in another. When Eliza Holt was a little child

(Testimony of James Kaaiena Helenihi.)

she was brought to Makua by her grandfather. I saw her there at Makua and also at Makaha. I talked to Eliza Holt and she answered me. I used the Hawaiian language to both John D. Holt and Eliza Holt. She appeared to me to be a normal child.

Cross Examination.

My business at Makua was farming, fishing and that of a cowboy. It was Eliza Holt's grandfather, through her mother, who brought Eliza to Makua. Eliza would say to me, "Aloha, Papa." She recognized me very quickly when I said to her, "Aloha, pepe Kaahanui iili" (Aloha, little child—or baby—of Kaahanui). Eliza's mother had a cross eye similar to Eliza's. All that I know about Eliza Holt is from seeing her when she was brought to my place as a small baby or small child, when she was about the place from time to time, and when I would go over to visit them.

Re-direct Examination.

At Makua I also taught school, being a Hawaiian teacher.

KAMOKU KEAKUA

was called as a witness for Respondent, was sworn, and testified through the Hawaiian interpreter as follows:

Direct Examination.

I was born at Makua and knew both John D. Holt and his daughter, Eliza Holt. I am a relation of

(Testimony of Kamoku Keakua.)

Kaahanui (Eliza Holt's mother). I lived with Kaahanui and John Holt for five years; then I went back to my place at Makua. During the time I lived with Kaahanui, Elia was friendly, would come to sit in my lap and call me uncle. She played just as other children did, and from my observation of her she was normal.

Cross Examination.

While I stayed at John Holt's house I attended school at Waianae. I was then some fourteen or fifteen years old. In John Holt's house there lived John Holt, Kaahanui, myself and my younger brother. Eliza Holt was a year old when I went there to live. I slept at the John D. Holt home and also stayed there during vacations. I stayed there because Kaahanui was my cousin's sister. I helped with chopping wood and cooking. Eliza was six when I last saw her. I do not remember Mrs. Cushingham, then Mrs. James Holt, being around there. I saw her children playing and going back to their place. There was another family there but they were living at a considerable distance from me. I don't remember seeing Annie Holt in all the time I was down there. I do remember George Holt, Chris Holt and Eddie Holt there. Eddie Holt looked all right mentally also. Chris Holt I remember also; he was living at Makaha-uka, about four hundred or five hundred yards away from the John D. Holt house. When Eliza was a child of five or six she looked all right except that her eyes were

(Testimony of Kamoku Keakua.)

crossed. There was no difference in her condition as compared with the other children, so far as I observed. If anything different happened after I left there, it is up to those witnesses to describe her condition, but during my stay there there was nothing the matter with her. I remember seeing her here all the time during my stay.

MRS. ELLEN K. LORENZEN

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live in Honolulu, and have lived here for thirty-nine years. I knew Eliza Holt, I think about 1902 or 3, when her mother died. I came in contact with her in my sister's home—Mrs. John Holt's home (John Holt, son of Owen Holt). At present I am the Assistant Probation Officer and have been in that work for eight years. My work as such officer consists of work in Honolulu with respect to dependent children, delinquent children and sometimes defective children. I have worked with feeble-minded children and had a chance to observe how they act. Eliza Holt always impressed me as being a very timid child. In my opinion she was not feeble-minded, ihepa, lolo or pupule.

Cross Examination.

I remember talking with you (counsel for Petitioner) when you asked me if I thought Eliza Holt

(Testimony of Mrs. Ellen K. Lorenzen.)

was an imbecile, or feeble-minded, and I said I didn't think I could describe her that way. I said she was a backward, timid child. I don't remember telling you she was not normal. My acquaintance with Eliza Holt was at my sister's home. My contact with her was not close. She would talk to my sister. All I saw was that she was normal when she was with my sister. I remember stating I couldn't state she was feeble-minded. I don't remember the other statement. She seemed to understand my sister and when she would talk to her she would answer, and she was neat and clean. I do not remember telling Mr. Hite (likewise counsel for Petitioner) in the lobby three weeks before the trial started that I had always considered Eliza Holt as lolo. I do not remember a conversation with Mr. Hite in the presence of Mr. John Holt, my nephew. I don't recall the conversation at all. I remember meeting Mr. Hite on the street when I suggested the names of witnesses who may have known Eliza. My observation of Eliza was merely casual.

MRS. MINNIE PALONEY

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live in Honolulu and was at the Catholic Sisters' School when Eliza Holt was there. I was in school with her for about one and a half years. I did

(Testimony of Mrs. Minnie Paloney.)

not know her before I went to school there, but I did see her after that period. I would see her going to church or meeting her in the church yard. I left school in 1898 and she was in school when I left. She played with us, playing the same games and that sort of thing. She was a very polite girl. She had drawing lessons with us, sewing lessons and pulling threads, doing that just like the other girls. I have seen her read. She dressed herself and took care of herself, being very neat. We all ate together and her table manners were always good. I never saw her being disobedient to the Sisters. We each had our own lockers and the girls took care of their own lockers, Eliza taking care of her locker just as the other girls. I do not recall anything different in her conversation from the others. Eliza was just like the other girls; she played with us, talked with us and did everything the other girls would do.

Cross Examination.

I was in the same room with Eliza Holt. I was about eleven years old and I think in the primary grade. In those days the schools were very backward in their lessons. I was not in the same class with Eliza Holt. I first went to Fort Street School but I was taken sick and stayed out for one or two years before going to the Catholic Sisters. This is my recollection. I was in a higher grade than Eliza Holt but in the same room with the same teacher. Sister Margaret was teaching at that time. I don't remember just what we read, but

(Testimony of Mrs. Minnie Paloney.)

with the Catholic Sisters we learned more catechism than anything else. I don't know what type of work the girls were doing in Eliza Holt's class. Eliza was there all the time I was there. I think I left school before she did. I don't know whether there was any change in her grade while I was there. I think Eliza was in the lowest class. I heard her in class read to the Sister. I can't tell you what I heard her read, but it was the kind of lessons they had in the class. I remember Eliza standing up in class and doing certain recitation, little articles. If there has been testimony in this case that she was not able to read the simplest words my recollection is such that I would not say that it was untrue. I cannot say that she can read anything more than the simplest words. I have not been doing any work for Waialua in this case, getting witnesses or anything. I have not personally interviewed any girls or women with the idea of getting them to testify for Waialua. I just gave the names to Mrs. Bernice Spitz.

The only firm that has offered me consideration was Petitioner's firm when Charlie Hite offered me five hundred dollars to testify for the Holts. He was the first man who called me into his office. He said, "If we win this case, Minnie, we will give you five hundred dollars. That's a big piece of money." I refused to do it. The money was offered if I could get Eliza's schoolmates to testify for Petitioner. The offer was that if I would go and get the witnesses and testify before this Court that

(Testimony of Mrs. Fisher.)

Eliza was ihepa and lolo I would get five hundred dollars.

MRS. FISHER

was called as a witness for respondent, was sworn, and testified as follows:

Direct Examination.

I live in Honolulu and at one time went to the Catholic Sisters School. I knew Eliza Holt at the school. I think I went there first in 1893 or 1894 and left in 1899. Eliza was in school all the time I was there. I was in the same class with Eliza and we moved from one room to another. She moved at the same time that I did. Eliza Holt played with us during the play periods just as the others did and she seemed perfectly normal. She did sewing, both fancy and plain. She practiced her piano but whether she did her practice right or wrong I don't know, but I heard her practice. She dressed herself, took care of herself, and her table manners were just the same as the others. She took her one bath a week, the same as we all did, getting into holokus (Mother Hubbards) for the purpose, and then all bathing at the same time. Eliza Holt took her first communion, for which they had to know their catechism by heart.

(At this point Respondent offered for identification a catechism and a church history which were later received in evidence as Respondent's Exhibits 6-A and 6-B. Respondent's Exhibit 6-A is by order

(Testimony of Mrs. Fisher.)

of the Supreme Court a part of this record and is hereby referred to and incorporated herein.)

WITNESS RESUMES: I studied from the catechism, both Eliza Holt and I studying from the same book. Every question in the book is supposed to be answered. Eliza was in the same room so she must have studied the church history. She could read but she was slow. She could also recite. We went from the first grade to the second grade. The girls studied reading, writing, geography and drawing. The girls went home once a month. Eliza was always glad, like the rest of the girls, to get out for the one day. She was normal.

Eliza Holt wrote a little poem in an autograph book I had, but I have not that book now. I remember the words that she wrote in my autograph book:

"When land and sea divides us,
And you no more I see,
Take pen and ink and paper,
And drop a line to me."

She wrote it in one of those books and she copied it in my autograph book. All of my classmates wrote in this autograph book. You have to know practically the whole catechism by heart before you take your first communion, and Eliza Holt did take her first communion. She took her communion at the same time that I did. The catechism was studied in class and the teacher would ask questions

(Testimony of Mrs. Fisher.)

on it and you would answer those questions. The church history was also done in the class room.

Cross Examination.

I was in the small grade when I first went to the Catholic Sisters, and in the third reader when I left. I think I was about two years in the small grade. Eliza Holt and I were together in the same room and she went right along with us. It is my recollection that she was in the third grade when I left and was reading out of the third reader. I was promoted twice, although we remained in the same room. I was nine or ten when I came to school and left when I was about fifteen. I do not know how old Eliza was, but approximately the same age. I started catechism just as soon as I went to school and by the time I was in the second grade I had memorized the answers. Eliza knew the catechism as well as I did. She was slow but she got there all right. I have heard her recite the Apostles' Creed. We had to say that every day and couldn't help remembering it. Eliza was confirmed before I went to school. In order to be able to take communion in those days they put you on retreat for a couple of weeks before you take it, and you studied the catechism all the time, and you couldn't talk to any of the girls for two weeks before taking first communion. Communion now does not involve an examination as to the knowledge of church history and catechism, but at that time it did. I remember

(Testimony of Mrs. Fisher.)

seeing Eliza going to communion. We all went in a line to the altar.

In regard to the church history, the teacher would ask us questions and the children would answer. Eliza wasn't always ready. I don't say she was always ready; she had her faults. I wasn't bright myself. What we had to study she answered, though there were times when she didn't answer. The only thing we had to know fluently was the catechism. Eliza Holt was just like the rest of the girls; she made mistakes and so did I; she was not perfect, nor were the rest. I didn't say Eliza Holt was bright. She was slow but went right along. She was as bright as I am, and I am not too bright myself. I am below the average and Eliza Holt would be just about like me. I did not see anything wrong with her.

MRS. BEATRICE ROSS

was called as witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live in Honolulu and was at one time a student in the Catholic Sisters School. I knew Eliza Holt there. I started when I was about six years old and am forty-four now. We were there together for about five years. I left the school in 1901. I was above Eliza Holt but at play periods had occasion to observe her. She played in a normal manner just

(Testimony of Mrs. Beatrice Ross.)

like the rest of us. She was not quarrelsome. Eliza Holt did sewing and drawing, in sewing doing the different ways of stitching, embroidering and crocheting. Eliza took piano lessons. I have seen her dress herself and take care of herself. The girls all took their meals together and I observed nothing peculiar about Eliza. The girls took their baths together and Eliza could care for herself in that respect. I heard Eliza Holt read in the second reader. Just what she read I can't remember. There were times I went to her room and heard her read, for we older girls were sent in to look out for the smaller ones. I have seen her father come to the school and Eliza was very fond of her father. The girls went home once a month and she was very happy and delighted to go home, just like the rest of us.

After leaving the Catholic Sisters I met Eliza at a couple of places. She used to visit a sister of mine and quite often I used to be there. I have observed her at such place and she was very affectionate towards the children there. She helped me during the day to look after them. We had meals together, and the children were there. Basing my opinion on acts I have seen in my presence and conversations I have had with Eliza Holt, I believe she was normal.

Cross Examination.

I went to the Catholic Sisters in 1891. Eliza was not there then and I think I had been in the school three or four years before she came, and then we

(Testimony of Mrs. Beatrice Ross.)

were together for about five years. When Eliza first came I must have been in the third reader and I left when I was in the eighth. There was a primary grade below the first grade and Eliza Holt was in that primary grade first. Eliza was the same age as I am. I know she went as far as the second or third grade, having started in the primary, but can't remember just how far she went. I think she was about nine years old when she first came. I remember her better when she was at the age of ten or eleven. I think she was in the first grade then, as she kept being promoted a little bit. I do not necessarily remember the fact of Eliza's promotion at the time but I remember hearing it after a few years in school. This is only my recollection. Eliza Holt came there in 1894 and I think she was in the second grade in 1897. I heard her reading a little bit from the third reader. Eliza was inclined to be a little cross-eyed; she had a little defect in her eye. After leaving the Catholic Sisters I remember keeping her company and having meals with her at my sister's place, and Eliza looking after my sister's little children. She was very fond of these little children and she would help me to dress them.

(Testimony of Marie Myers.)

MRS. MARIE MYERS

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I have lived in Honolulu all my life and went to the Catholic Sisters School when I was about seven years old, attending school until I was eighteen. I knew Eliza Holt at the Catholic Sisters. I think she came there about two years after I did. I was in a class above her. During recess we played together. I do not remember having seen her read or write but she had her piano practice periods at the same time I did. During play period I liked to tease her. She told me her father was raising chickens and pigs, and I thought it was funny because the rest of the girls never spoke of anything like that. I had an idea that it was just Orientals who raised pigs and chickens. She played just like the others did. Basing my answer on the things she did in my presence and my conversations with her and her conversations with others, at the time I was in school with her, she was normal so far as I know.

Cross Examination.

I was about fourteen or fifteen years old, I imagine, at the time Eliza Christian was playing there. My recollection of Eliza is during the play hour at recess when we all mingled together. I left the Catholic Sisters before Eliza did. She was cross-eyed. My recollection of her over this period of years is merely that as a little girl I remember she

(Testimony of Mrs. F. H. Norton.)

was there, and I remember nothing in particular except she used to say her father raised pigs and chickens, and she was cross-eyed.

MRS. F. H. NORTON

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I have lived in Honolulu all my life. I knew Eliza Holt and her cousin Annie Kentwell. I first met Eliza in the boarding school in the Convent. She was there before me. I don't quite remember when I started but I was there at the age of six or seven. I think she was there about one year while I was there. I became acquainted with her and she was very friendly. She was in a higher grade than I. I was not in the same room so I never had opportunity to hear her recite. I only knew her during the play period when she played with us just like other girls.

I knew her later out at Waikiki, as I lived near the Kentwells. I would play with her every afternoon and go in swimming. I remember she lived with the Kentwells. From my contact with her and the conversations I had with her, both in school and out at Waikiki, she seemed perfectly normal, just as normal as I was.

Cross Examination.

I am thirty-eight years old and when I went to the Convent I was quite small. Eliza and I did get

(Testimony of Mrs. F. H. Norton.)

along in school and after school I met her again. I left the Catholic Sisters before Eliza did. At Waikiki Eliza Holt was living with the Kentwells and her father. I myself did not go into their house but I would wait until Eliza came out to play with me. I was about eleven or twelve years old at that time and I think Eliza was between sixteen and seventeen. I did not know that she had a baby. We delivered poi to the Kentwell house. I would not know how we would have described a person in those days who, although old in years, had the mentality of a child. I would not have known what "ihepa" and "lolo" meant. I don't think I have even seen a person who was feeble-minded. My testimony that I am giving you as to Eliza's mental condition is my recollection of things that I remember as a little girl six or seven years old when I started to school. I definitely remember her mental condition, what she did and said to me.

MRS. WILHELMINA PIERCE

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I have lived in Honolulu all my life and went to the Catholic Sisters School when I was about nine years old. Eliza Holt was at this school before I was. I remained in school about four years. I was

(Testimony of Mrs. Wilhelmina Pierce.)

in Eliza Holt's sewing class. She could sew. I know she took music lessons. She was in a lower class than I, so I never had occasion to hear her class work. She attended communion and confession. So far as personal habits are concerned, she dressed herself, took care of her bed and took her own bath. I knew her during play periods when she played just as the other girls did. Basing my answer on her acts in my presence and any conversations I had with her, it is my opinion that she was normal. She was not ihepa, lolo or pupule.

Cross Examination.

I am forty-two. I don't remember whether Eliza left the Catholic Sisters before or after I did. I myself was in school four years but I do not know just how long during those four years Eliza Holt was in school. Eliza Holt was a tal.r girl than I, but as to her age I don't remember. In regard to music lessons, we went to our studies at the same time together—the same music period. I have seen her go in and take music lessons. I have not seen her at any time except there at the Convent. She was in a lower grade than I. I knew nothing about the progress she made in her studies there. I mean that I did not see anything to show that she was not normal, and that is all I mean to say.

I remember an Alice Martin who is now Mrs. Fisher. She was in a higher class than I at the Convent.

(Testimony of Mrs. Wilhelmina Pierce.)

Re-direct Examination.

I do remember that Alice Martin was there at school and in a class ahead of me. She was an older person.

MRS. MARY SIMERSON

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I was born and raised here in Honolulu. I knew Eliza Holt when I went to the Catholic Sisters. I started there in 1893 and she came in a year after I did. I was there for six years but Eliza left before I left. I have not known her since she left the school. I was not in any of her classes but I would meet her during the play period when I would talk with her. She always dressed neatly. She and I did not eat at the same table. As far as I can remember, she played just like the other girls. Her attitude towards her father was very affectionate. The girls went home the last Saturday of each month and she was anxious to get home like the other girls. Based on her acts in my presence and conversations with her, she appeared to me just like the other girls.

Cross Examination.

When Eliza Holt came to the school she was in a grade below me. The only time that I had any-

(Testimony of Mrs. Mary Simerson.)

thing to do with her was when she would be playing in the yard. She generally played with everybody, although she was with a younger group. When I went to school I was thirteen years old. All I wish to say is that what I saw of Eliza Holt I did not see anything out of the way. I did not give her any tests to see how much she knew or could learn. If any of the Sisters have said that she had the mentality of a very young child I would not be in a position to say that was not true. I would not be in a position to know anything about the progress she made in her studies? All I mean is from seeing her around there I did not see anything out of the way.

MRS. HARRY BANNISTER

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live in Honolulu and knew Eliza Holt at the Catholic Sisters School. I started in 1889. I knew Eliza Holt there for about four or five years though she was not in any of my classes. During the recreation period I heard her reading. She took care of herself in regard to her personal habits just the way the other girls did in the school. I ate in the same dining room with her but not at the same table. My contact with her was during the play periods when I talked with her. Basing my answer

(Testimony of Mrs. Harry Bannister.)

on her acts in my presence and on conversations had with her, I would say she was normal. She was not pupule, ihepa, lolo, or any of those Hawaiian words.

Cross Examination.

I am forty-three years old. I went to the Catholic Sisters School when I was six years old and remained there until 1900, being there for about eleven years. I knew Eliza Holt when she played with us in the yard. She was in a lower class than I, although pretty near my age. I remember she read from a primer and that she read pretty good. I heard her read, although I don't know the year. She read more than just the simplest words. I have seen her crochet, knit and embroider. Eliza was cross-eyed and dark complected, with dark eyes. I lived in the same dormitory with her. The girls did not have room-mates but all roomed in dormitories, each girl having her own bed. She slept in the dormitory with us. I don't remember how many girls slept in that dormitory but there were a great many of them.

MRS. M. A. WRIGHT

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I have lived in Honolulu all my life and knew Eliza Holt at the Catholic Sisters School. I went

(Testimony of Mrs. M. A. Wright.)

to school in 1886 when I was about six years old. Eliza went there in 1894 and I left in 1897. I was not in any of her classes. After leaving school I saw her just once when she passed me with her father. I came in contact with her during the play period where I talked with her and where she played just like the other girls. Basing my answer on actual conversations with her, she was normal.

Cross Examination.

We did not have grades in those days—merely the ABC classes. I was in the C class. I don't know anything about the progress she made in her classes as I wasn't in the same class with her. I went to communion with the rest of the girls, but I never saw her go to communion. I slept in the same dormitory with Eliza where maybe twenty or thirty girls were. There were some younger girls and some older girls in that dormitory. The Sisters changed us whenever they liked. I have seen Eliza sewing and crocheting. I likewise saw her going to church when we girls went to confession. She did not go to communion with me but she went with other girls. I have not tried to get anybody to come here to testify for the Waialua Company.

The

DEPOSITION OF
DR. CHARLES JAMES DOUGLAS

taken in England on behalf of Respondent, pursuant to open commission, was read into the record as follows:

Direct Examination.

I live at Abingdon, England, and am a licentiate of the Royal College of Physicians in Ireland; also of the Royal College of Surgeons in Ireland. I am a member of the British Medical Society and a registered medical practitioner. I have practiced in my profession for a period of some forty-eight or forty-nine years. In the course of such practice I have from time to time had occasion to advise upon cases of mental abnormality, both feeble-mindedness and insanity.

On the 17th, and again on the 19th, of February, 1923, I went to 159 Woodstock Road. On the 19th I saw Mrs. Kentwell and explained to her the object of my visit. Then I had a conversation with Mrs. Eliza Holt Christian alone. At first I asked her a few questions to gain her confidence, as she was suffering from an attack of influenza. I wanted to find out if she thoroughly understood her position with regard to signing a document to enable Mrs. Kentwell to receive her money. She said yes, that she thoroughly understood that, and had every confidence in Mrs. Kentwell and that even if she were advised to the contrary she would take Mrs. Kentwell's advice in preference to anybody else's; that

(Deposition of Dr. Charles James Douglas.)

she had absolute confidence in her affection and love for her and good will towards her. That was the first part of the conversation. I think that would be about eight or ten minutes. I asked her other questions which I can't remember now, to satisfy myself as to her general outlook on life, which was fairly normal. I got no answer that did not satisfy me, but what the particular questions were I can't remember. Mrs. Christian's part in the conversation would be more or less a question and answer. I could not say that she really enlarged upon matters but she certainly showed no hesitation in giving me an answer to any question that I asked. So far as I observed, she appreciated my question, understood and answered intelligently.

Then Mrs. Kentwell asked me to stay for a cup of tea. I stayed and we had general conversation. During that time I observed as keenly as I could the attitude of Mrs. Christian and was confirmed in my previous impression that her attitude was quite normal. She took a certain part in the conversation but not a prominent part. They told me about their life abroad and talked about local events. Mrs. Christian struck me as a bad neurotic and was suffering from the effects of an attack of influenza at the time. Mrs. Christian told me that she was married and had lived with Mrs. Kentwell for the last seventeen years, living with her husband for one year, who was very cruel to her, and they separated. He is still alive. She further said she

(Deposition of Dr. Charles James Douglas.)

went to live in New Jersey with Mrs. Kentwell and came to England in 1909. When a child, Mrs. Christian suffered from some lapse of memory but now her memory is quite good. I gathered this during our conversation, although I mention here that, while gathering this information from Mrs. Christian, I was struck by her minute attention to details and by her evident affection for Mrs. Kentwell and her children. I now am refreshing my recollection from a letter which I wrote at the time. This is the sum total of my recollection which I incorporated in my letter immediately after the conversation. Mrs. Kentwell called on me some little time ago and asked if I were going to give evidence, saying she thought that it would be better for me not to give evidence and suggested I should not give evidence; that there was other evidence that might conflict with what I had stated. But I said, as far as I knew, the evidence I gave at the time was the truth and I should abide by what I had then stated as the facts.

Cross Examination.

I am not an alienist or an expert. My practice has been a general practice but I have frequently had to deal with mental disease as a general practitioner or I have passed my patients on. Recently, in having mental cases, I have called in Dr. Good. I retired September last. (Testimony taken November 1928.) I did not have a mental case within the last year, that is to say, a case which required consultation, but there is hardly a day one does not

(Deposition of Dr. Charles James Douglas.)

come across a case that the mental processes must not be investigated. Insanity is an acute affection, generally superinduced by some organic trouble—organic in the brain. Feeble-mindedness may also be induced by some infirmity in the brain but is generally associated more with early life and the borderline is very hard to define. Most insane persons are feeble-minded in some direction but every feeble-minded person is not necessarily insane. I am not an alienist and am not familiar with the Binet, Yerkes or Bridges test.

I explained to Mrs. Kentwell that I was coming on behalf of Mr. Garnett (a London solicitor). I knew that the question had arisen as to whether or not a certain company or individual was going to be willing to advance moneys to Mrs. Christian or to her attorney. I knew that if she was normal the moneys could be had, and if not normal they could not get the money. I understood that Mrs. Kentwell hoped they could get the moneys. After I first spoke to Mrs. Kentwell she withdrew and left me alone with Mrs. Christian. I do not know that I indicated that in my letter at the time, but I did see Mrs. Christian alone. The conversation was more in the nature of questions and answers. I cannot remember any particular sentence at this time except that I know that she said she had much confidence in Mrs. Kentwell; that she had been kind to her all her life; she had always appealed to her and would be quite willing to be guided by her in

(Deposition of Dr. Charles James Douglas.)

preference to anyone else. I don't mean to say that Mrs. Christian, of her own initiative, said that, but that was the result of probable questions on my part. I was anxious to find out, in the first place, if she understood the responsibility of signing a document for anybody to act for her, not necessarily Mrs. Kentwell. I first put the question to her to find out if I considered she was mentally capable of understanding that by signing a document she was giving power to another person to act for her. After ascertaining what I thought was a fair ground for considering she understood that thoroughly, I raised the question about Mrs. Kentwell, and she said she preferred Mrs. Kentwell to have the handling of her business affairs, although I would not swear to any particular word. As far as I can remember, I took for granted that she could read and write. There was no abnormality so far as I could observe. She was reasonably educated. Even if she were not able to compute, she might be quite able to understand a statement and to assent to it or dissent from it.

(Thereupon the following questions and answers followed:)

"Q. Did you also take it for granted she was able to compute small figures?

A. I took it for granted. There was no abnormality so far as I could observe. She was reasonably educated * * *

Q. In other words, among the things which led you to consider her normal, were not only

(Deposition of Dr. Charles James Douglas.)

the questions and answers which you put to her, but certain other things which you naturally assumed to be the case?

A. Yes.

Q. If I were to tell you some of those assumptions were totally wrong, and for example that the woman cannot add two and two, cannot make the simplest computations, would that affect your opinion in any way?

A. Not as to her being capable of understanding a statement and assenting to it or dissenting from it.

Q. Would it affect your opinion as to whether she was a perfectly normal person or feeble-minded to any extent?

A. If that were demonstrated I should certainly think that it would point to a certain abnormality in that particular direction.

Q. And would indicate she would not be wholly normal?

A. Not absolutely normal, but as I said before, there is no absolute standard of normality mentally. That might not have affected the determinative faculties at all. Even if she were not able to compute she might be quite able to understand a statement and to assent to it or dissent from it.

Q. What do you mean by understanding a statement and assenting to it or dissenting from it?

(Deposition of Dr. Charles James Douglas.)

A. There are cases where people are not able to calculate, but it does not affect the mentality as regards relationship * * *

Q. Would you say, Doctor, that a person who was mentally normal could, we will say, be put through a course of instruction extending over a period of seven years or more and never be capable of learning how to compute or make simple additions or subtractions?

A. I should say she was not normal in that direction.

Q. That she was mathematically abnormal?

A. Yes.

Q. Supposing it were to develop that she was unable to read, how would that indicate an abnormality? Would that be another direction?

A. Unable to learn to read?

Q. Yes.

A. Well, certainly that would have to be an abnormality to a certain extent.

Q. If it were to develop to a certain extent, instead of being able to read, as you assumed, she was unable to write, would that affect the conclusion you reached?

A. Not as regards being capable of understanding a statement.

Q. So all you meant to say when you said she was normal was, she was capable of understanding a statement?

A. Yes.

(Deposition of Dr. Charles James Douglas.)

Q. And assenting or dissenting from it?

A. Yes.

Q. You would not mean any kind of a statement? On the assumption that she could not compute, she could not understand the statement that three and four made seven?

A. She might accept your statement that was so, although she might not be able to accomplish the process herself.

Q. Is that what you mean by assenting?

A. Yes.

Q. In other words, agreeing?

A. Agreeing.

Q. Does willingness to agree to a statement to your mind indicate necessarily normality? Suppose I told her three and four were nine and she agreed?

A. It is hardly a parallel case to making a statement in reference to an ordinary transaction * * *

* * * * * * *

Q. If you had put the question to her, 'Would you be quite satisfied to have Mrs. Kentwell handle your affairs for you?' and the answer was 'Yes,' would you consider that a normal question?

A. Yes; but considering the evidence I had other ways of a fairly normal condition * * *

Q. The only evidence you had was the answer?

(Deposition of Dr. Charles James Douglas.)

A. That was the only evidence I required to an opinion.

Q. It was the normality of those answers that led you to this conclusion?

A. Yes."

I am not absolutely certain whether I learned the matters of family history at the tea table or whether I learned from the conversation first, but I was very glad to accept a cup of tea and the possibility of staying for a little while so that I might have confirmed, without being observed, my previous conception of Mrs. Christian's condition. I cannot remember seriatim the conversation which ensued, and I could not say definitely just what of the family history I got from Mrs. Kentwell and what from Mrs. Christian. I am in my seventy-third year. I do not recall Mrs. Kentwell calling up by telephone the day after I saw her and Mrs. Christian. I never talk professional matters over the telephone as a habit and I have not the slightest recollection of telephoning her.

The

DEPOSITION OF EDWARD L. MACK

taken in New York on behalf of Respondent, pursuant to open commission, was read into the record as follows:

Direct Examination.

I reside in Lakeland, Florida. I am an attorney at law, duly admitted to the courts of New Jersey

(Deposition of Edward L. Mack.)

and Florida. I was first admitted on March 20, 1907. I have also been a notary, authorized to administer oaths as such in the State of New Jersey, Union County. I was such notary on June 13, 1907.

(Witness was thereupon handed a document described on the cover as, "Certified copy of confirmation of lease, Eliza R. P. Christian to Annie Holt Kentwell, recorded in Book 298, pages 1-2, Registry of Conveyances for the Territory of Hawaii at Honolulu," which document was later received in evidence as Respondent's Exhibit 13-A.)

WITNESS RESUMES: Someone was introduced to me as Eliza R. P. Christian and I took her acknowledgment on this document. I asked her if she executed it freely and voluntarily, as the laws of New Jersey then required in the case of an acknowledgment by a married woman, using, as I remember, the statutory words. She answered in the affirmative and then acknowledged the execution of the instrument before me. I remember the occasion fairly distinctly. I have not a very clear mental picture of Eliza R. P. Christian except that, as I recollect it, she was a woman of approximately my own age and rather small and not attractive. There was nothing in her appearance or manner which impressed her upon me very strongly. As to whether she impressed me as one of rational or irrational mind, I would prefer to answer that by saying I cannot remember anything that she did or said that would lead me to suspect that she was

(Deposition of Edward L. Mack.)

not of sound mind. I did not on this occasion observe anything unusual about the appearance or demeanor of Mrs. Christian. After Mrs. Christian signed this instrument I executed it as Commissioner of Deeds in accordance with the laws of New Jersey.

(Witness was then shown a document described on the cover as, "Certified copy of deed, John D. Holt et al, and Albert Christian, to L. L. McCandless, recorded in Book 300, pages 195-197, Registry of Conveyances for the Territory of Hawaii at Honolulu," which document was later received in evidence as Respondent's Exhibit 13-B.)

WITNESS RESUMES: Refreshing my memory as to dates, the instrument was executed in my presence on October 26, 1907, at Elizabeth, New Jersey. It was signed in my presence by John D. Holt and Eliza Holt Christian. She signed the paper in my presence and I took her acknowledgment in regular form as Commissioner of Deeds. I thereupon explained to her the contents and purpose of the instrument and asked her if she executed the same for the uses and purposes therein expressed, freely and voluntarily and without any constraint, compulsion or fear on the part of and from her husband. She answered in the affirmative. My recollection is that following the execution of that instrument I asked them if their former home was in Hawaii. We talked for two or three minutes about the Islands. As to whether her acts or con-

(Deposition of Edward L. Mack.)

versation were those of a rational or irrational mind, all I can say is that there was nothing in her appearance or in anything she did or said which led me to suspect that she was not of sound mind. I had no personal interest in either or both of the instruments executed before me. As a result of the facts I observed on these two meetings, I think Mrs. Christian was normal. I would rather answer that by saying that I do not remember anything she did that would lead me to think she was not normal. There was no reason for me to scrutinize Mrs. Christian with the idea of seeing whether she was sane or not. She did not give the slightest evidence of not being perfectly all right.

Cross Examination.

I am forty-seven years of age. I am testifying to facts which occurred 21 years ago. In regard to these documents, that was the first time that I had ever been called upon to take an acknowledgment to a deed covering land lying outside of the United States, and that reason alone might explain why I can remember this occasion when I was taking so many acknowledgments. I do not exactly remember how long I had been a notary prior to that time, but after I left school I read law in the office of Judge P. H. Gilhooley in Newark for several years and my duties mainly were along the line of conveyancing. I might have been a notary public two or three years prior to 1907. I left New Jersey in December, 1909. Independent of the deeds, I do

(Deposition of Edward L. Mack.)

not remember the nature of the instrument. I have not my notarial record and have not refreshed my recollection from it. I do not think the New Jersey laws require such a record. I have no personal record of the transaction. The only times I saw Mrs. Christian, so far as I remember, were on the days of the acknowledgments, namely, June 13, 1907, and October 26, 1907. I do not think I knew any of the members of her family. My only means of refreshing my recollection is by reference to the documents themselves.

On June 13, 1907, it is my recollection that someone was with Mrs. Christian but I do not remember whether it was a man or a woman. I cannot place Lawrence Kentwell but the name has been sticking somewhere in my memory. In describing Mrs. Christian as small, I should say she was around five feet two, or three—or even one. When Mrs. Christian came with her father I remember that they did not look like Anglo-Saxons but they looked like foreigners. I suppose that suddenly dawned on me when I coupled that fact with the fact that they were conveying land in Honolulu—that they must have some native blood in them. I think the father and daughter were somewhat the same color. Because of an experience I had had shortly before that time, I was very punctilious in the matter of acknowledgments, observing every formality. The conversation at the first time was in the nature of questions and an affirmance. The second time my

(Deposition of Edward L. Mack.)

recollection is that the conversation about Hawaii was almost entirely between Mr. Holt and myself.

Re-direct Examination.

I have an independent recollection of Mrs. Christian, regardless of these instruments.

Re-cross Examination.

My independent recollection of the instruments was that they were both conveyances of lands in Hawaii. My recollection of Mrs. Christian was that she was a woman in the twenties.

(The documents above referred to were received in evidence, without objection. The first document was received in evidence as Respondent's Exhibit 13-A, and is dated June 13, 1907, and being a confirmation of a lease dated January 1, 1901, and being a confirmation by Eliza R. P. Christian to Annie Kentwell. The document is executed "Eliza R. P. Christian," and the two witnesses to her signature are L. K. Kentwell and Edward L. Mack. The acknowledgment form is as follows:

State of New Jersey
County of Union—ss.

Be it remembered, that on this 14th day of June, 1907, before me, a Commissioner of Deeds of New Jersey, personally appeared ELIZABETH R. P. CHRISTIAN, wife of Albert Christian, who, I am satisfied, is the grantor named in the within indenture, to whom I first made known the contents thereof, and there-

(Deposition of Edward L. Mack.)

upon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed, and the said ELIZA R. P. CHRISTIAN being by me privately examined separate and apart from her said husband further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed, freely, and without any fear, threats or compulsion of or from her said husband.

EDWARD L. MACK,
Commissioner of Deeds
of New Jersey.

Following the foregoing form is the certification, by the proper officer, of Mr. Mack's authority.

The second document was received in evidence as Respondent's Exhibit 13-B. and is (omitting the certification by the County Clerk) as follows:

13-B: Deed dated October 26, 1907, John D. Holt and Eliza Holt Christian to L. L. McCandless of land at Makua.
Recorded Book 300, pages 195-197.

KNOW ALL MEN BY THESE PRESENTS—That we,—JOHN D. HOLT—(a widower) and—ELIZA HOLT CHRISTIAN—, formerly of Honolulu, County of Oahu, Territory of Hawaii, but now residing temporarily at Elizabeth in the County of Union, State of

(Deposition of Edward L. Mack.)

New Jersey, for and in consideration of the sum of—TWO HUNDRED DOLLARS—, to us in hand paid by—L. L. McCANDLESS—, of Honolulu, County of Oahu, Territory of Hawaii, receipt of which is hereby acknowledged, have sold, and do hereby sell, bargain, convey, release and forever quitclaim unto the said—L. L. McCandless—, his heirs and assigns, all right, title, interest and claim in and to all those certain lands situate at Kaawa, Makua, in said County of Oahu, Territory of Hawaii, described in Royal Patent No. 5464, L. C. A. No. 9709, to Kuli.

TO HAVE AND TO HOLD—the same unto the said—L. L. McCANDLESS—, his heirs and assigns forever.

IN WITNESS WHEREOF—we have hereunto affixed our names and seals this 26th. day of October, 1907.

JOHN D. HOLT (Seal)
ELIZA HOLT CHRISTIAN (Seal)

EDWARD L. MACK

State of New Jersey,
County of Union—ss.

On this 26th day of October A. D. 1907, personally appeared before me—JOHN D. HOLT—and—ELIZA HOLT CHRISTIAN—, known to me to be the persons described in and who executed the foregoing instrument, and

(Deposition of Edward L. Mack.)

who severally acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth; and the said—ELIZA HOLT CHRISTIAN—, on a private examination by me separate and apart from her husband, acknowledged to me that she executed the same freely and voluntarily and without any fear constraint or compulsion of or from her husband.

[Notarial Seal] EDWARD L. MACK,
Notary Pubiic of New Jersey.)

The

DEPOSITION OF EVERETT L. BARNARD

taken in New York on behalf of Respondent, pursuant to open commission, was read into the record as follows:

Direct Examination.

I reside at New Rochelle, Westchester County, New York. I am an attorney at law, duly admitted to practice before the courts of the State of New York, having been admitted in the year 1900. I also have been a notary public, duly authorized in the City, County and State of New York and was such on June 14, 1907.

(Witness was then shown a document executed June 14, 1907, and described on the cover as "Certified copy of option, Eliza R. P. Christian to May K. Brown, recorded in Book 294, pages 246-249, Registry of Conveyances for the Territory of Ha-

(Deposition of Everett L. Barnard.)

waii at Honolulu," which document was later received in evidence as Respondent's Exhibit 14-A.)

WITNESS RESUMES: To the best of my knowledge, the original of that instrument was executed in my presence. It was signed by Eliza R. P. Christian in the Borough of Manhattan, New York City, on the date of the acknowledgment. After Mrs. Christian had signed it I asked her if she acknowledged it, and I followed the wording of the acknowledgment which was a little bit unusual. It was an old-fashioned thing and I was rather interested in it. She said "yes" or replied in the affirmative. I think she said "yes". No one prompted her to give that answer.

(Witness was thereupon shown another instrument dated the 14th day of June, 1907, and described on the cover as "Certified copy of deed, Annie H. Kentwell and hsb. et al, to May K. Brown, recorded in Book 282, pages 327-330, Registry of Conveyances for the Territory of Hawaii at Honolulu," which document was later received in evidence as Respondent's Exhibit 14-B.)

WITNESS RESUMES: The original of that instrument was likewise executed in my presence by Annie Holt Kentwell, L. K. Kentwell and Eliza R. P. Christian, on the date of the acknowledgment at the same time and place of the other instrument. On asking her if she acknowledged the execution of this instrument, Mrs. Christian said "yes", as I remember. No one prompted her as to her signature

(Deposition of Everett L. Barnard.)

and I took her acknowledgment in the regular and usual form. I had been down at the offices of Mr. Cook, where this took place, about this same matter previous to the signing of the paper, and my memory is I was there three times. Mr. Kentwell was there on each occasion and I think the two women. Mrs. Kentwell and Eliza R. P. Christian, were there on one other occasion other than the one when they signed the paper. I do not remember the exact conversation which then took place, other than a discussion of the transaction. I recalled I addressed a remark to the group, inquiring of them the reason for the reservation of a parcel which was reserved in the option, and one of the three replied that it had a patch of some fruit or vegetable they desired to retain, and the other two nodded an assent to that. My memory groups the two women in my mind. Neither of them stands out distinctly from the other. They were both alike, and at the time I had been told, I think, that they were related. The demeanor of both was ladylike and pleasant, and normal in every way. Nothing about them which was not characteristic of any New York woman of that age, either in their demeanor or attitude or dress. Mrs. Christian's appearance on June 14, 1907, was usual and ladylike, attractive, and not in any respect different from that of her companion. There was nothing unusual or extraordinary or noticeable about Mrs. Christian except that she was a foreigner. As to

(Deposition of Everett L. Barnard.)

whether the acts, conversation or conduct of Mrs. Christian indicated any soundness or unsoundness of mind to me, I had no thought about it and it never occurred to me. I signed as notary and affixed my seal to the documents. I was not a party to, or interested in, either of the documents.

Cross Examination.

The incident had a particular significance to me because I never had a similar proceeding. I had never done any work for Mr. Cook before or since. I had never had anything to do with real estate in Hawaii before or since, and I had never met, personally, any of the inhabitants of Hawaii before, so it does stick out in my memory for those reasons. Both of the women were foreign looking, as I remember, and my memory is that their complexions were rather dark and they were rather small. I think one was smaller than the other but just which I cannot say. My memory is that Kentwell was a pretty tall man. I think the women were shorter than he. Kentwell was more refined in appearance. His face was rather lean and his expression very alert, and he was a high-strung individual. I recall that he spoke, I think on each occasion, and that he was a wet smoker; he drooled down the lip. I think he was a foreigner but not so pronounced as the women.

As between Mrs. Christian and myself, I only recall two conversations: one was the acknowledgment of the instrument and my query as to the res-

(Deposition of Everett L. Barnard.)

ervation of the parcel. I cannot say positively who made the reply. Mr. Cook's office, as I recollect, was in the neighborhood of Hanover Square. I think I had been a notary five or six years before this, and shortly after that I gave up the active practice of the law and went into my father's business, but I have been a notary continuously ever since, although very infrequently taking acknowledgments. I know of no requirement in New York requiring notaries to keep records of acknowledgments they take. My only personal record is the documents themselves. My memory is that I drew the instruments here before me.

(The first agreement referred to, namely, the option dated June 14, 1907, was first offered in evidence by Respondent in connection with the deposition of Henry Holmes. It was next offered in evidence by Petitioner in connection with the deposition of Annie Kentwell, and lastly by Respondent in connection with the deposition of E. L. Barnard, and is in evidence as Exhibit 14-A. It is an option agreement reciting that Eliza R. P. Christian has an interest in and to certain lands under the will of her grandfather, Robert W. Holt, in the District of Waianae, Island of Oahu, which lands are called and known as the Ahupuaa of Makaha, and desires to sell the same to May K. Brown, her heirs and assigns, for the sum of $10,000, at any time within ten years from August 31, 1906. The recited consideration paid was $2,500 down,

(Deposition of Everett L. Barnard.)

plus certain rentals which, however, would cease upon the final payment of a further $7,500. The document is signed and sealed "Eliza R. P. Christian." It is witnessed by E. L. Barnard, his acknowledgment also appearing as follows:

City of New York
County of New York
State of New York
United States of America—ss.

On this 14th day of June A. D. 1907, personally appeared before me ELIZA R. P. CHRISTIAN satisfactorily proved to me to be the person described in and who executed the foregoing instrument, by oath of L. K. Kentwell, a credible witness for that purpose to me known and by me duly sworn, and she, the said ELIZA R. P. CHRISTIAN, duly acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein set forth.

E.L.B.

[Seal]

E. L. BARNARD
Notary Public, N. Y. Co.
My term expires March 30th, 1909.

Following the foregoing acknowledgment is the certification of the County Clerk as to Mr. Barnard's authority. The document was duly recorded in the Hawaiian Registry of Conveyances.

(Deposition of Everett L. Barnard.)

The second agreement referred to, namely, the deed dated June 14, 1907, was first offered in evidence by Petitioner in connection with the deposition of Annie Kentwell, and next by Respondent in connection with the deposition of E. L. Barnard, and is in evidence as Exhibit 14-B. By this deed Annie Holt Kentwell conveys to May K. Brown certain interests of hers at Makaha, Oahu, both in fee simple and in lease. Eliza R. P. Christian and Lawrence Kentwell joined in the deed by way of consent. Among the interests conveyed in the deed are the following, with also the following reservation:

"THIRD—All right, title and interest in and to that certain lease and the premises therein described, made by—ELIZA R. P. CHRISTIAN—to—ANNIE HOLT KENTWELL—, dated August 31st, 1906, and recorded in Liber 283, folio 459, reference thereunto being had will more fully and at length appear;

* * * * * * *

"FIFTH—All right, title and interest in and to that certain lease and the premises therein described, made by John D. Holt, Jr., et al to Annie Holt Kentwell, dated January 1st, 1901, and recorded in Liber 257, Folio 371.

* * * * * * *

"RESERVING—however to me said—ANNIE HOLT KENTWELL—all my right, title and interest of in and to that certain tract

(Deposition of Everett L. Barnard.)

of land consisting of about ten acres with the improvements thereon and appurtenances thereto known as the Homestead of John D. Holt Sr., and identified as the tract reserved in the former transfer by said John D. Holt Sr. to O. J. Holt, his brother now deceased, and further reserving all the rights or interests which I may hereafter acquire in and to the above described premises by and under the will of said Robert W. Holt, deceased, on the decease of said John D. Holt, Sr., anything herein contained to the contrary notwithstanding."

Then follows the release of L. K. Kentwell, husband of Annie Holt Kentwell, and thereafter appears the following:

"AND—, I, —ELIZA R. P. CHRISTIAN—, for and in consideration of the said sum of FIVE HUNDRED DOLLARS ($500.00)—, by said—MAY K. BROWN—, paid to the said —ANNIE HOLT KENTWELL—, and for the further consideration of the sum of One Dollar ($1.00), to me in hand paid by the said—MAY K. BROWN—, the receipt whereof is hereby acknowledged, do hereby consent and agree to the assignment of that certain Indenture of Lease made by me as Lessor, on the 31st day of August, 1906 and duly recorded in Liber 283, folio 459, to the Lessee therein named Annie Holt Kentwell and to the assignment, convey-

(Deposition of Everett L. Barnard.)

ance and transfer of all the right, title, interest, claim and demand and right of possession of said Lessee, Annie Holt Kentwell, to the said May K. Brown, and to her heirs, executors, administrators and assigns, forever.

"IN WITNESS WHEREOF—, we have hereunto set our hands and seals, at the City, County and State of New York, Borough of Manhattan, this 14th day of June, A. D. 1907.

ANNIE HOLT KENTWELL (Seal)
L. K. KENTWELL (Seal)
ELIZA R. P. CHRISTIAN (Seal).

Witness to signatures:

Initialled correction 2nd page made before execution.

E. L. BARNARD.

City of New York,
State of New York
County of New York
United States of America—ss.:

On this 14th day of June, A. D. 1907, personally appeared before me—ANNIE HOLT KENTWELL— and —L. K. KENTWELL—, known to me to be the persons described in and who executed the foregoing instrument and —ELIZA R. P. CHRISTIAN—, satisfactorily proved to me to be and known to me to be the other person described in, and who also executed the foregoing instrument, by oath of L. K. Kentwell, a credible witness for that

(Deposition of Everett L. Barnard.)

purpose, to me known and by me duly sworn, and they, the said —ANNIE HOLT KENTWELL—, L. K. KENTWELL— and —ELIZA R. P. CHRISTIAN—, severally acknowledged that they executed the same freely and voluntarily and for the uses and purposes therein set forth; and the said —ANNIE HOLT KENTWELL— upon private examination by me, separate and apart from husband, —L. K. KENTWELL—, further acknowledged that she executed the same freely and without fear, compulsion or constraint of her said husband.

[Notarial Seal] E. L. BARNARD,
Notary Public, N. Y. Co.
My term expires March 30th, 1909.

Thereafter follows the certificate of the County Clerk as to Mr. Barnard's authority.)

The

DEPOSITION OF
MISS ELIZABETH MARTZ

taken in New Jersey on behalf of Respondent, pursuant to open commission, was read into the record as follows:

Direct Examination.

I live in Elizabeth, New Jersey, and have lived there for about thirty years. I was born October 2, 1879. I was acquainted with Eliza Holt Christian in the years 1906, 1907 and 1908. She lived next

(Deposition of Miss Elizabeth Martz.)

door to me and lived there for about three or four years. We have talked together I should judge about once a week. We discussed just things in general. She was a short and dark lady, appearing to be a Jap. Basing my answer on the acts, conversations and conduct of Mrs. Christian, she was rational. I never saw any indication of temper on her part. Basing my answer on what I may have observed in the conduct or appearance of Eliza Holt Christian, as indicating anything relative to her mental condition, she was all right—she was all right in every way.

Cross Examination.

I suppose Mrs. Christian was about twenty when she was here. I do not remember distinctly everything that happened twenty years ago. Eliza's father and one young man was there. I don't know what his relation was, but there was Eliza's father and also a cousin or a sister—I don't know which. She was some relation anyway. The young man was, I should judge, about twenty-seven or so. They all appeared to me to be Japs. I think there were three children of Mrs. Kentwell. At the time we were in the milk business; both my mother and I went out to deliver milk. Occasionally, when we had milk for sale, they would come in and get the milk. We did not call on each other particularly but just as a neighbor we spoke as neighbors do, just a few words. I never visited in their home. I know nothing about Eliza's habits about the house or whether

(Deposition of Miss Elizabeth Martz.)

she could write or read or handle money. I never saw her write or read, know nothing of her ability to care for herself, never saw her handle money in any way. She had never no money. I did not know that she had an illegitimate child while she was living in Elizabeth. We were busy and I hadn't much chance to gaze around. I didn't notice her being with child. She would come in, however, once in a while, to get milk. I only saw her occasionally and did not see a great deal of her. I never noticed anything out of the way—she was sane. I never had occasion to test her mentality or anything like that, but she was all O. K. all right. I never saw her use a telephone and I don't know whether they had one in their house. She was not a member of the Negro race but to my opinion had a Jap appearance. I cannot remember any one thing she ever said to me.

Re-direct Examination.

I never saw anyone leading her around. She came over to my place herself freely, and when she came to my place and when I talked with her she was alone.

Re-cross Examination.

I do not know who the particular friends around there of the Kentwells were at that time, nor who used to call on them.

MISS A. Z. HADLEY

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I have lived in Honolulu many years and have taught school all of my life. I knew Eliza Holt indirectly with her cousins. I met her at her cousin's, Annie Holt Kentwell, down at her home in Waikiki. I visited Annie and Eliza was staying with Annie. I talked to Eliza just the same as I did with Annie. I wouldn't think she was anything but normal, so far as I saw her—so far as I had conversations with her. I remember nothing particularly about her except that she was a young girl playing around there at her cousin's home. I had conversations with her. We had tea together. I was there with the Sisters—Sister Beatrice and Sister Albertina from St. Andrews Priory. I think Eliza was there for a very short time attending St. Andrews Priory (an Episcopal school). I saw her there at the Priory with the other children. I am sure I would have noticed if she had not been normal. I would look after the children there at the Priory for the Sisters when the Sisters went out. I was at the Priory for four months, I think, in 1900 or 1901. I came down from Lahaina to spend the Christmas holidays and had to stay here on account of the plague in Honolulu. Practically, the Priory was my home whenever I came down from the other islands.

(Testimony of Miss A. Z. Hadley.)

Cross Examination.

I spent some time at the Priory every year from 1894 to 1908. I only remember Eliza at her cousin's, Annie Holt, at Waikiki. I have no distinct recollection of her at the Priory, and can't tell exactly when she was there. I only knew she was there. The only time I remember her was at Annie Kentwell's. I don't know how many times I saw her at Annie Kentwell's. I think Eliza was there most of the time. I couldn't remember the particulars of any conversation thirty years ago.

(Thereupon the following questions and answers followed:)

"Q. And when you tell us she appeared normal, or as far as you could see everything was all right, all you mean to say is that you didn't notice anything out of the way when you were, that is all, is it?

A. Yes.

Q. You understand—I do not know whether you do understand—we are not talking about a person who is crazy or demented. We are trying to gauge the mental age of the person?

A. Yes.

Q. You didn't give her any tests or try to see how much she knew about any particular subject with a view to determining whether she had a four-year old mentality or a six-year old mentality or an eight-year old mentality?

A. No.

(Testimony of Miss A. Z. Hadley.)

Q. And you are not in position to say what the age of her mentality was?

A. No, but I have come into contact with so many children in my thirty years of teaching I could tell pretty well.

Q. If you had made a test you could tell?

A. No, I wouldn't have to make a test. I could tell pretty nearly."

I am merely giving you my present recollection of something that happened a great many years ago.

Re-direct Examination.

Eliza was there and we talked to her and she would come over and talk to us.

MRS. ANN PARKER

was called as a witness for Respondent, was sworn and testified as follows:

Direct Examination.

I live in South Kohala, Island of Hawaii. My husband is tax assessor there. I formerly lived in Honolulu before I got married. I went to school at the Catholic Sisters Convent and was three years old when I started. I was there a great many years. I knew Eliza Holt there very well. I was there ahead of her and I was there as long as she was in school. I was not in her class but Eliza and I worked together. She could read perfectly and

(Testimony of Mrs. Ann Parker.)

write as well as I. She took piano lessons. She could sew, she was very clean and tidy. She was never disobedient to the Sisters. We played together during the play period. She played like other girls. I knew her outside of school at her home. Eliza and I were playmates and very intimate. Basing my answer on the acts I saw her do in my presence and conversations I had with her, she was in my opinion very normal. Such Hawaiian words as "ihepa," "lolo" or "pupule" were never used in those days.

Cross Examination.

I was born in 1874 and started at the Convent when I was three years old. I was married when I was twenty and had left the Convent perhaps a year before I married. It is my best recollection that I remained in the Convent until I was nineteen, something like that. I was married at Kealia, Kauai, remained three months there after my marriage, and then took a trip around the world. I am living on Hawaii now with my second husband. I was at the Convent most of the time Eliza was there. When I was in the Convent as a boarder Eliza was also there as a boarder. At first she took music. She was there five years and I was there all the time. I was married in 1894 and was born in 1874. After I was married I used to visit the Convent. The name of my first husband was Stephen Gray Otis King. My wedding anniversary was December 27th, but I don't remember whether the year was 1894. My maiden name was Mary Cummins.

EMILY WERY HUDSON

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live in Hilo, Hawaii, but at one time lived in Honolulu and attended the Convent of the Sacred Hearts in Honolulu. I knew a girl there by the name of Eliza Holt. I started school at the Convent somewhere around 1890. I remember Eliza just before I left school in 1898. Eliza and I were in the same room but she was in a different division. In play periods we used to be together and she was all right. She used to talk to me and I to her, and we conversed together. I can't remember what our conversation was about but she seemed to be all right. I don't remember whether we had sewing during the play periods. The girls used to take music lessons but I don't remember about Eliza. She played like the other girls. Basing my answer on the conversations I had with her during these play periods, and her acts during such periods, she was normal.

Cross Examination.

I think I was about eight years old when I first went to the Convent. I don't remember when Eliza first came but she was at school some time before I left. Eliza was younger than I. There were two divisions in our room; she was in one and I was in the other. Eliza and I were rather chummy; we used to sit together and chat together. This was when I was about sixteen or seventeen years old.

(Testimony of Emily Wery Hudson.)

She was a smaller girl than I, and younger. When I say she was normal, she knew everything she was doing. She knew what she was talking about. I never saw anything out of the way. I don't remember anything about reading or mathematical problems. She was not in my division.

MRS. C. J. HUCKSTEIN

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live at Olaa, Hawaii, but was born and raised in Honolulu. I went to school at the Sacred Hearts Convent, starting about 1889. I think I left in 1900. I knew a girl there by the name of Eliza Holt. She came after I had started to school and I was ahead of her. I had no occasion to hear her recite in any of her classes. I was a big girl and she was a little girl at that time, so we didn't have any mingling in the lessons. I had no contact with Eliza during the play periods but did see her at school for some four years.

After she left school I met her on the street occasionally. I always stopped and chatted with her. She recognized me. In school I did not talk to the younger girls very much but I would meet Eliza occasionally and stop and have a little chat with her, ask her how she was, and say hello, Eliza, and

(Testimony of Mrs. C. J. Huckstein.)

she would always smile and talk to me. I never saw anything about her that would make me think she was not normal. I am a school teacher and have been teaching school for fifteen years.

Cross Examination.

I did not have close or intimate association with Eliza at the Convent and I know nothing about her studies. My observation of her was merely a casual one. I never heard her recite and do not know what progress she made in her studies. I do not know whether she could read or write or do sums. My occasion of coming in contact with her would merely be when all the girls were together somewhere for some reason or other. I would see her at church services, in the dining room and at assemblies for the whole school. I had no particular reason for singling her out for observation. I would just ask her how she was and if her father had been to see her lately. She loved her father. After leaving school I saw her several times around town for a period of two, three or four years after I left school. She was just like any other child, so far as I could see.

Re-direct Examination.

After leaving school I used to meet her now and then in the fish market and sometimes sitting in front of where McInerny's Shoe Store is now; I think Mr. Kentwell had an office upstairs. Those are the occasions when I talked with her.

(At this point it was admitted by both counsel that the stenographer's note books in the annul-

(Testimony of Mrs. C. J. Huckstein.)

ment proceedings in the matter of Eliza R. P. Christian, in Honolulu in the year 1904, could not be found in the records of the local court.)

(At this juncture counsel for Waialua offered in evidence the annulment proceedings being numbered 2935 entitled: "Eliza R. P. Holt, by Annie Holt Kentwell, her Guardian, vs. Albert Christian." The only record on file was the decision and decree, the decree incorporating the allegations of the petition. The record was admitted, the same taking the number of the record at that time, Divorce No. D. 2935 and also Exhibit 7.

The decree reciting the allegations of the petition sets forth among other things the following language:

> "That since her birth the said minor, Eliza R. P. Holt, has been a person defective in intellectual powers and incapable from mental imbecility of taking care of her own person and property * * * up to the present time never has the said Eliza R. P. Holt been capable of having or understanding the ordinary relations of life, being possessed only of the most infantile intelligence, and that it has been a notorious fact and is at this time among those who know her that the said Eliza R. P. Holt has been a mental imbecile and been incapable of knowing or conducting her affairs in any manner whatsoever and now is, and always has been a mental imbecile."

(Testimony of Mrs. C. J. Huckstein.)

After such recitation the decree reads:

"Whereas, after full consideration of said testimony and of the arguments of counsel for the respective parties, said Honorable George D. Gear, Second Judge as aforesaid did render and file his decision herein on the 4th day of March, 1905, finding that 'plaintiff has not shown such a case of incompeteney as to justify the court in annulling the marriage;' and

"Whereas, the term of office of said Honorable George D. Gear has expired without any decree having been made or entered in said cause; and

"Whereas, the Honorable Alexander Lindsay, Jr., is the successor in office of said Honorable George D. Gear;

"NOW, THEREFORE, it is hereby ordered adjudged and decreed that the marriage of and between said Eliza R. P. Holt and the said Albert Christian is not void for any cause or reason alleged or set forth in plaintiff's said petition, but that said marriage was and is valid and legal and binding on the parties thereto; and that said petition be and the same is hereby dismissed with costs.

ALEXANDER LINDSAY, JR.,
Second Judge of the Circuit
Court of the First Circuit.

Dated this 6th day
October, A. D. 1905."

(Testimony of Mrs. C. J. Huckstein.)

The decision in the case reads:

"In this case it seems to me that the plaintiff has not made out such a case as under the authorities is required to be made out in order to entitle her to a decree annulling the marriage between herself and the defendant. While it seems to me that it perhaps would have been much better for the plaintiff never to have married, and the conduct of the defendant in his wooing and subsequent marriage is not to be commended but should on the contrary be severely criticised, nevertheless the plaintiff has not shown such a case of incompetency as to justify the court in annulling the marriage. For this reason a judgment should be entered for the defendant. Gear, Judge."

(Counsel for Petitioner informed the Court that he was in receipt of a cable from the Commissioner in England theretofore authorized to take the written depositions of Annie Kentwell, on the reopening of her cross-examwination, and of Mr. Bennett, the bank manager in Oxford, which latter witness had charge of, or could testify to, the personal bank account of Lawrence K. Kentwell during May 1910. Counsel for Waialua objected to the reading of the cable, whereupon counsel for Petitioner agreed that anything that appeared in the cable was for the advice of court and counsel and

(Testimony of Mrs. C. J. Huckstein.)

not to be regarded as evidence. With this understanding, counsel for Waialua consented that same be read, and counsel for Petitioner read the cable, which stated in substance that Mr. Bennett had been authorized to and was now prepared to testify to the said Kentwell account, and that he would testify that 7164 pounds, 15 shillings and 10 pence were deposited to the personal account of Lawrence Kentwell on May 10, 1910. Counsel for Petitioner represented to the Court that Mr. Bennett's answers to the other matters sought of him by the interrogatories having been answered and being en route to Honolulu, he moved to re-open Petitioner's case for the purpose of taking the additional testimony referred to. On objection of counsel for Respondent the Court ruled that testimony as to whether Eliza R. P. Christian got the money on May 2, 1910 would be of very slight benefit to the Court in arriving at the conclusion that she was incompetent, and that it would likewise be immaterial as to just which one of the group received the money at the time it was paid, and ruled:

> "The Court at this time will deny the request for a motion to hold up the case further on this testimony."

Counsel for Petitioner stated that he would present the matter in the form of a written motion, to which the Court ruled that on the oral motion presented it was not prepared to grant the motion.)

MRS. FRANK F. FERNANDEZ

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live in Honolulu and at one time went to the Catholic Sisters School. I was born in 1882 and started school at the Catholic Sisters when I was six or seven. I left there in 1902. I knew Eliza Holt at the school but she was in classes a great deal below me. I knew her there all the time that she was there. I did not come in contact with her in any of her classes but did in going to Mass and going to church. She played the piano. I taught her myself for about two months, giving her music lessons on the piano. I taught her a little exercise,—the first study book, the beginner's book. It took me about a month or two months to teach her that very same thing. That is the only thing I taught her. In the end she knew it. I think she was a shy girl but I did not notice anything wrong with her.

Cross Examination.

Eliza did not learn very quickly and she was not bright. She knew very little music, as I was just teaching her. It was beginner's music. I didn't notice anything wrong with her. She seemed perfectly all right to me. There was nothing about her to attract my attention. I took her like any other girl. I don't remember the year I started teaching her music, but I do remember teaching her. When I got through teaching her she would just go to the

(Testimony ow Mrs. Frank F. Fernandez.)

school yard or she would go to her room and I to mine. I was helping her try to practice during practice hour at school. We had to practice piano for an hour and at that time they asked me to help her in taking her lessons. The teacher would take her twice a week for half an hour and I helped her along during the practice hour. The exercise was some five or six lines. I would teach her with the right hand and teach her with the left hand, and when she knew both she would play both hands together. She already knew the notes, already knew her lesson. I was simply helping her to see that she got along with her practicing. I had a little trouble with her but she got along all right later. I was just asked to teach her that, so she could play it before her father.

MRS. CLEMENT K. QUINN

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live in Honolulu and have lived here a number of years. I went to school at the Sacred Hearts Convent. I was born in 1876, first going to the school when about three years old. I think I left when I was about seventeen. Eliza Holt had just come to school as I left. I think I was there for about two years while Eliza was there. I am all

(Testimony of Mrs. Clement K. Quinn.)

mixed up about the dates, as I haven't thought about that. Eliza was not in any of my classes. I came in contact with her during play periods. I talked with Eliza and she to me. After she left school I used to meet her on the street and talk with her like I did with the rest of the girls. She knew me then and talked with me. In my opinion she was a normal girl.

Cross Examination.

At the Sacred Hearts my name was Lulu McWayne. Eliza was a regular boarder. I used to go to the Convent for music. After I left school I went every day for nearly two years taking music lessons. It is possible that it was during that period that I saw Eliza. Although not in her class, we all knew what went on in that school. I saw her recite and heard her recite. I think I can recall Eliza reciting over this period of years. She was in the primary grade. We all went into one room on certain days and heard them recite. I don't remember the year, nor do I remember any particular recitation. I was in school about two years after she came there so I know it was during that time that I heard her recite.

MRS. FRED PETERSEN

was called as a witness for Respondent, was sworn, and testified as follows.

Direct Examination.

I live in Kaimuki, Honolulu, and went to the Sacred Hearts School on Fort Street. I knew a girl there by the name of Eliza Holt in 1896. I was in school at the Convent for four years. Eliza and I were in the same class but different divisions. I also came in contact with her during music hours when we were taking music lessons on the piano. I took my music lessons sometimes before and sometimes after her, but from the same teacher. Eliza Holt talked to me. She was in a different dormitory from me. I met her also in the yard during school hours when we played together. I did not know her after she left school. From the contact I had with her as a school mate, in my opinion she was normal.

Cross Examination.

I am forty-five years old. I don't remember how old Eliza was in comparison with my age. She was about my size. Whether or not she was in a higher or lower division in my room I don't remember—it is so long ago. When I said that Eliza was a normal child I mean by that that I saw nothing out of the way.

W. A. GREENWELL

was called as a witness for Respondent, the oath being waived, and testified as follows:

Direct Examination.

I am a member of the Hawaiian Bar and was admitted in 1905. At present I am connected with the firm of Robertson & Castle and in 1909 and 1910 was with the firm of Castle & Withington. I had been there since 1905.

(At this point witness was shown Exhibits 1-A, 1-B, 1-C and 1-D for identification, the same purporting to be copies of letters from Eliza Christian to James L. Holt, dated respectively December 7, 1909 (1-A), December 7, 1909 (1-B), January 29, 1910 (1-C), and March 11, 1910 (1-D), and was asked if he had ever seen those letters before, to which witness replied that he had. Thereupon the following proceeding took place:)

"Q. When and under what circumstances did you first see those copies? Just explain to the court.

A. I think it was sometime in the month of April, 1910, Jimmy Holt,—J. L. Holt, came into the office to see Mr. Castle, W. R. Castle. Mr. W. R. Castle wasn't in and he spoke to me. I asked him what he had come in for and he said he had come in with reference to this Holt purchase; that he had some correspondence that he wanted to see Mr. Castle about, and leave it to me, and I read the correspondence and after I

(Testimony of W. A. Greenwell.)

had read the correspondence it was turned over to one of our stenographers with instructions to have these letters copied for our records.

Q. What was done with the originals, Mr. Greenwell, if you know?

A. The originals were handed to Mr. Castle by myself, for him to read them. Before those letters went out of the office I had compared them with the stenographer who made the copies.

Q. When you say "went out of the office" what do you mean by that?

A. These letters were turned over to Mr. Holt afterwards.

Q. Did Mr. Holt have anything to say to you about the originals, as to whether or not he wanted them back?

A. Yes, he said he could not leave them with us and wanted to take them away.

Mr. LEISURE: I offer these letters in evidence."

(Counsel for Petitioner objected to the admission in evidence of the letters upon the ground that they were typewritteen copies of letters; that the witness did not purport to know the writing or signature of Eliza Christian, that he merely testified to having copied certain writings handed to him by Mr. Holt, and that such identification was insufficient and that there was no evidence that the material contained in

(Testimony of W. A. Greenwell.)

the writing had been produced by Eliza Christian.

"The COURT: It may be relevant, Mr. Ulrich, upon the question as to whether or not what notice, if any, there was, the purchaser had at the time of the purchase, bearing upon the question irrespective of whether the letters were received from the purported signer or not. That would have a bearing upon the question of information, that information was at hand in the mind of the purchaser at the time of the transaction in question.

Mr. ULRICH: That might be true if they are received only for that purpose. If they are offered for the purpose of showing that the letters were written in fact by Eliza Christian, I submit that they could not prove it by this witness. They might have a bearing upon the question as to what the mental attitude of the purchaser was, from material handed to him by Mr. Holt and on that theory I imagine they might be received.

The COURT: It might be relevant on the question of Mr. Holt's testimony in this case,—in connection with that testimony and the testimony of this witness that these documents emanated from Mr. Holt to the purchaser in question, and that would be evidence to be taken into consideration, with Mr. Holt's statement that he called attention to the purchaser that the seller was incompetent.

(Testimony of W. A. Greenwell.)

Mr. HITE: He did not so testify, your Honor.

Mr. ULRICH: I don't remember.

The COURT. There is somewhere where it was expressed explicitly.

Mr. ULRICH: The evidence was, as I remember it, that she was incompetent.

The COURT: I think he went stronger than that. I won't say that it was positive and explicit, but the inference apparently attempted to be made by Mr. Holt was that the purchaser's side, or rather at that time, the furnisher of money side, was well aware of the situation that he was dealing with. Wouldn't these letters be evidence irrespective of their source, as letters,—their original source,—in connection with the question of whether they emanated to the purchaser from Mr. Holt, and be admissible in evidence?

Mr. ULRICH: Anything having to do with dealings between Mr. Holt and Mr. Castle as between them, and any representation made by Mr. Holt to Mr. Castle, or any evidence bearing upon the question of representation or lack of representation which he claims to have made, might have its place. My objection goes to the admission of these as letters of Eliza Christian.

The COURT: I understand that your objection really is as to the use that may be made of them, rather than insisting that they are not

(Testimony of W. A. Greenwell.)

part of the entire record that can be considered so far as it is material or proved in the record.

Mr. ULRICH: My objection goes to the materiality of the evidence as admitted, on the grounds that it is not proved that these letters—that there might be a wrong inference drawn from them if they are permitted to remain in.

The COURT: Without drawing an inference and without ruling as to how far the letters can be used as evidence, the court feels that the identification is sufficient for the purpose at least of using the letters in connection with the transaction with Mr. Holt, and notice or knowledge of the Waialua Agricultural Co., at the original transaction, as to what they were dealing with. The court will overrule the objection in so far as it goes to that phase of it and allow the Exhibits to be marked in the record as the same numbers. 1-A, 1-B, 1-C and 1-D.

(EXHIBIT 1-A)

Oxford, England, December 7th, 1909.

Mr. James L. Holt,
Honolulu, T. H.

My dear James:

With regard to the proposition made to you in my behalf by Mr. Lawrence K. Kentwell in his letter of October 12, 1909, as to allowing me Fifty Dollars ($50.00) per month, until such

(Testimony of W. A. Greenwell.)

time as you are able to dispose or buy my contingent interest in the Ahupuaas of Halemano and Wahiawa situate in the district of Waialua, Oahu, T. H. for the sum of Forty-Five Thousand Dollars ($45,000.00) Ten Thousand Dollars of which to be paid to me in cash upon the execution of a warranty deed duly signed and delivered and the balance of $35,000.00 bearing no interest upon the death of my father John Dominis Holt.

It is to be understood of course that the monthly allowance which you will advance to me from time to time shall be deducted from the sum of $10,000.00 on the final consumation of the deal.

Trusting that you will do all you can in my behalf in getting this matter through satisfactory and kindly remember me to all the family at home, I remain with aloha,

Sincerely yours,

(sgd) ELIZA HOLT CHRISTIAN

(sgd) JOHN D. HOLT.

(EXHIBIT 1-B)

Dec. 7, 1909.

Dear Cousin Jimmie:

Papa and I received your nice letter and we are very glad to get it. Papa's eyes is getting better now and he is going to write to you too.

(Testimony of W. A. Greenwell.)

We received the dried fish and it was really nice and we all enjoyed it very much. I like Oxford very much and Papa like it too. Papa wants to buy a farm here and live in Oxford. Lawrence and Annie are very kind to me and give me everything I want. Papa takes his drinks at meal time now and goes out for a walk every day. He does not drink so much now as he used to in Honolulu. He is good now. I have signed the paper you asked me to and Lawrence is sending it back to you and when you sell Waialua you can take back all you have given me. How is Lena and the children and how is uncle Jim. Give my best love to them all. I want to wish you all a very merry Christmas and Happy New Year.

I must close my letter now, I remain,

Your loving Cousin,

(Sgd) ELIZA.

(EXHIBIT 1-C)

Jan. 29. 1910.

Dear Jimmie:

As Papa was writing to you by this mail I thought I would write you a few lines. We are having very nice weather just cold and nice and reminds me very much of San Jose. It snowed the other day just enough to cover the ground and everything looked so pretty. The trees and houses nice and white. Alice was caught in the

(Testimony of W. A. Greenwell.)

snow coming home from school. It just beautiful here then. Elizabeth to - . I was so disappointed when I did not get the fifty dollars. Do you think you can arrange and send me the money for we need it. Do try and send me for I need it now and may not need it by and by. Pretty soon I will have to get me a suit for spring. I have a winter suit but will be too hot for spring. Will you try your best please and sent it by this return mail. Whatever you will give me I shall give it back when the deal is made, Papa says that he knows you will send it when we ask you. You are trying your best to sell Waialua. I hope you will succeed for we must have some money as we are so far away from home and everything lasts so. I won't be able to write a very long letter as the mail closes early. Give my to Lina and also the children and Uncle Jim and your dearself.

I remain,

Your loving Cousin,

(Sgd) ELIZA.

(EXHIBIT 1-D)

March 11, 1910.

Dear Jimmie:

Papa says he does not want Albert Christian to have a cent of our money and he wants to come back and get a divorce for me and we

(Testimony of W. A. Greenwell.)

want to stay with you when we come back and Papa says for you to have someone come up to S. F. to meet us as Lawrence can only take us as far as there because his vacation is very short and Papa wants you to send him $750 if you can as soon as this letter reaches you so that we can start sooner. Papa says he feels very sorry to leave Annie and the children but he thinks it is for the best and wants you to get a divorce for me when we come back. With love from Papa and myself please remember me to Uncle Jim and Lena. I must close my letter.

I remain,

Your loving cousin,

(sgd) ELIZA.

WITNESS RESUMES: I went into Mr. W. R. Castle's office in 1899. Mr. Castle was in by himself, although Mr. Weaver was associated with him. I was the office boy, clerk, searcher of records, and things of that kind, in 1899. I was informed by Mr. Castle and the bookkeeper that various persons came to Mr. Castle with money for investment and he would invest the money for them. If the money was invested in the form of mortgages the mortgage was given by the mortgagor to Castle as trustee, which was the regular practice when I was in the office. We had an abstract in the office covering other interests in this Holt land and as the interests would be bought, the abstract would cover that interest. I

(Testimony of W. A. Greenwell.)

looked into this particular interest a few months before it was bought. The fee the firm received for the work in connection with the purchase of this interest was $2500.

Cross Examination.

The fee of $2500 that was received by the firm of Castle & Withington for the work done in connection with this purchase included such work as the investigation of title and the services of Mr. Withington in England. We did not receive any fee that I know of from Mr. James L. Holt, and so far as I know, that was the only fee paid to the firm. I know that Mr. Holt got back the letters, Exhibits 1-A to 1-D inclusive, because he told me so. He said that Castle had given him these letters. I remember that at that time—these particular letters.

(Respondent's Exhibits 15-A and 15-B were received in evidence, without objection, being two powers of attorney from Eliza Holt Christian to Henry Smith, of Honolulu. Exhibit 15-A is a power of attorney in general form, dated January 11, 1923, and signed "Eliza Holt Christian," and sealed. It was signed and sealed in the presence of J. Rose, a notary public, in Oxford, England, and was witnessed by Annie H. Kentwell in Oxford, England. The acknowledgment was taken by J. Rose, the notary, and bears the notarial seal.

Exhibit 15-B is a general power of attorney, Eliza Holt Christian to Henry Smith of Honolulu, dated

(Testimony of W. A. Greenwell.)

March 16, 1923. It was signed by Eliza Holt Christian in the presence of P. Bates, a notary's clerk in the County Hall, Oxford, England, and by H. W. Hansford, a notary's clerk also in the County Hall, Oxford, England. The notary's certificate is as follows:

> I, JAMES ROSE of the City of Oxford in England, NOTARY PUBLIC duly authorized admitted and sworn DO HEREBY CERTIFY that Eliza Holt Christian the person named in the Power of Attorney hereto annexed personally came and appeared before me this day and duly signed sealed and delivered the said Power of Attorney in my presence and in the presence of P. Bates and H. W. Hansford the attesting witnesses thereto.
>
> IN TESTIMONY whereof I have hereunto subscribed my name and affixed my Seal of Office this Sixteenth day of March One thousand nine hundred and twenty-three.
>
> (Signed) J. ROSE,
> Notary Public.

Thereafter follows the certificate of Tom Basson, Mayor of Oxford, attesting to the fact that James Rose is a duly authorized, admitted and practicing notary public in the City of Oxford.

The foregoing Exhibits 15-A and 15-B, being original exhibits, are by order of the Supreme Court

(Testimony of W. A. Greenwell.)

of Hawaii, made a part of this record and are hereby referred to and incorporated herein.

Respondent's Exhibit 15-C was received in evidence over the objection of Petitioner, being the original Memorandum of Adoption dated June 12, 1918, between John D. Holt, of the first part, and Lawrence K. Kentwell and Annie K. Kentwell of the second part. Exhibit 15-C is a memorandum of adoption executed in London before Richard Westacott, Vice Consul of the United States, by which John Dominis Holt, designated as of Oxford, County of Oxford, in the United Kingdom of Great Britain and Ireland, purports to adopt the six minor children of Lawrence K. Kentwell and Annie Kentwell, of said Oxford, "as his own children, with all rights and privileges unto them belonging, as if they were the natural children of the said party of the first part, including the right to inherit as his heirs at law." The Kentwells agreed to the adoption in similar language. The document further provides for a release of parental control and rights over the minor children on the part of the Kentwells, the document ending with "TO HAVE AND TO HOLD hereupon and hereafter all the rights and privileges of adopted children; and said party of the first part hereby declares said children as his heirs at law." The instrument was signed at the United States Consulate in London by John D. Holt, Lawrence K. Kentwell and Annie H. Kentwell, in the presence of

(Deposition of Dr. James C. Masson.)

R. Westacott and M. Mellon, and acknowledged by Richard Westacott, Vice Consul of the United States.)

The

DEPOSITION OF DR. JAMES C. MASSON,

taken in Rochester, Minnesota, on behalf of Respondent, pursuant to open commission, was read into the record as follows:

Direct Examination.

I live in Rochester, Minnesota, and have lived there for a period of sixteen and a half years. I am a surgeon and a member of the Mayo Clinic. My particular branch of surgery is general surgery, specializing a little more in gynecology. I have been connected, or associated with Mayo Clinic for this period of sixteen and a half years. I attended Toronto University and Toronto University Medical School, graduating from that medical school in 1906. After that I spent a year in the Sick Childs Hospital in Toronto, three months in the Manhattan Maternity in New York, and as an interne in the Toronto General Hospital. Then I returned to the Manhattan Maternity as a resident physician of that institution. There were six internes in the Manhattan Maternity, and myself as the resident physician. I was such resident physician on January 1, 1909, and had been such resident physician since

(Deposition of Dr. James C. Masson.)

April of 1908. The Manhattan Maternity Hospital is located on East 60th Street, New York City. I had charge of the routine work of the hospital, assigning the internes to the vario cases and acted practically in the capacity of medical superintendent. I differed from a medical superintendent in that such superintendent as a rule has nothing to do with the actual caring for of patients, whereas I was responsible for practically all the normal cases, and in the abnormal cases was in consultation before one of the attendants was called. There was also a lady superintendent, and the nurses were directly under her charge. I knew the duties of the nurses and assigned them to the cases. I continued as such resident physician until some time in April of 1909. I performed my duties daily and continually from January 1 up to and including January 23, 1909.

Since the case of Eliza Christian has been brought to my recollection, I remember her. She was the only case, to my knowledge, that had a precipitous labor on one of the elevated stations before being brought to the hospital. Furthermore, she was a foreigner, and was the only patient, for whom I cared, that was born in the Hawaiian Islands. The hospital had private wards and Eliza Christian was in a private room all of the time that she was in the hospital. There were no other patients in that room. I don't think I saw her until she was in bed, she having been brought to the hospital in an ambulance. I could not give the date from independent recollec-

(Deposition of Dr. James C. Masson.)

tion, but refreshing my recollection from the record, it was January 1, 1909. I am referring to a photographic copy of the record which was in my original handwriting in pen and ink. Referring again to the record, Eliza Christian continued under my observation to January 21, 1909. As a part of my duties I called on patients at least once a day. I made the rounds right after breakfast every day unless I was engaged on some operative work at the time. I sometimes called oftener than once a day. I called on Eliza Christian at least twenty-five times, the total number of calls being more apt to be thirty or thirty-five. This was part of my regular routine.

On my visits I talked to Eliza Christian and the subject of conversation was always in regard to her condition. I always got what I considered satisfactory answers to questions asked her, and looked upon her as a rather diffident foreigner who did not speak a great deal of English. I remember she spoke with the accent of a foreigner. She was a very obedient patient and gave no trouble to the hospital authorities, as I observed her. Nothing irrational in her demeanor was noticed by any of the hospital staff. I considered her quite normal. I never observed anything irrational in her demeanor, nor did she do anything in my presence which seemed to be irrational. I observed nothing abnormal in her demeanor, nor did she do anything in my presence which impressed me as abnormal.

(Deposition of Dr. James C. Masson.)

"Q. Please state whether or not she conducted herself in your presence and so acted as a person would who was normal mentally?

Mr. RICHARDS: Same objection.

A. I considered her so."

I observed nothing irrational in her speech or which impressed me as irrational. I observed nothing abnormal or which impressed me as abnormal in her speech. I observed her speech when I talked with her. She did not talk much, which I attributed to her foreign birth. I observed nothing irrational in her speech.

(At this point witness was shown a photographic copy of a birth certificate in the County of New York.)

WITNESS RESUMES: I recognize my handwriting. The original, of which this is a copy, was signed by me. The certificate shows the following: "Baby Christian; Female; Dark Brown; Jan. 1st. 1909; 3rd Ave. "L" Station 59th St.; Eliza Christian; Eliza Holt; 345 Ramway Ave., South Eliz. N. J.; Hawaiian Islands; 23.0; 1; James C. Masson; Jan. 10th, 1909." (Said paper being the copy of the birth certificate was marked Respondent's Exhibit 1, attached to and made a part of the deposition.) It was my duty to give a birth certificate to the Health Department of New York City of every child born under the care of the hospital.

(Deposition of Dr. James C. Masson.)

I have here in my possession certain hospital records, part of which relate to a child called "Baby Christian" and the other part to "Eliza Christian." In so far as the records pertaining to Eliza Christian are concerned, there are five sheets of them. Each of these sheets now herewith presented to me is a photographic copy of the original sheet. (Said papers or sheets were thereupon marked as Respondent's Exhibits 2, 3, 4, 5 and 6.) I recognize them as correct copies. The record throughout refers to Eliza Christian and to no one else. It is the record as was ordinarily kept as a part of the hospital routine by the Manhattan Maternity Hospital. It was my duty, and one of the nurses', to keep this record. I did not keep them all, but this particular record is all in my own handwriting. The information put into the record was obtained by examination and questioning of the patients. From my examination of the record I should say there were at least two nurses who had to do with the keeping of the nurses' chart. Their duties would appear on Sheets 4 and 5, which are marked here, for identification, Exhibits 5 and 6. It would be my duty to fill in the other sheets, namely, the sheets numbered as Exhibits 2, 3 and 4, and the records appearing on those sheets were made by me in my own handwriting.

It was likewise part of my duty to see that the hospital nurses performed their duty with respect to the keeping of this record. The keeping of such

(Deposition of Dr. James C. Masson.)

record was a matter of at least bi-daily routine. The patient's temperature was routinely taken, morning and night. It was my duty to see that the chart was kept recorded and that all records were put on the chart and medication was noted when given, and any special treatments were also noted by the nurses. I am speaking from my knowledge as to routine in hospital work. There is nothing to show that there was any other physician in attendance. This record, therefore, was kept as a part of the regular hospital routine and in the discharge of my duties and the duties of the nurses who may have attended the patient. The signatures appearing are my signatures.

Referring to the first three sheets marked for identification, Exhibits 2, 3 and 4, the only part that is not my handwriting is one entry on January 3, 1909. I myself had to put into the record her (Eliza's) condition on admission, the circumstances of her admission and the examination on discharge. From the fact that the case was an abnormal delivery—a precipitate delivery—I nevertheless remember that it was looked upon as a normal, spontaneous delivery. The patient was admitted in good condition and had a normal course all the time in the hospital.

It was my duty to put into the records the physical condition of the patient, both on admission and discharge, and during the period while the patient was in the hospital. If, for instance, the patient

(Deposition of Dr. James C. Masson.)

had a boil or a fever, or had been delirious, or had any physical ailment, that would have been brought to my attention. If there had been anything about her mental condition, that would have been noted and would have been brought to my attention. That would be considered under "complications" on my chart (Ex. 3), and under "Remarks" on the nurses' chart (Ex. 6).

If I had observed that the patient was abnormal mentally, it would have been my duty to note it. The same would be true if I had observed that the patient was mentally deficient, mentally incompetent, or feeble-minded. It likewise would have been the duty of any nurses in attendance to make such notations with respect to any observations of mental condition. If someone else had given me information as to condition I would probably have to check it up.

The record gives no indication anywhere that this young woman impressed me as mentally abnormal or as mentally deficient or as mentally incompetent or as feeble-minded. So far as my observations went, and speaking from recollection as refreshed by the hospital record, it is true that Eliza Christian was not mentally abnormal in any respect. On the same basis, she appeared to me to know what she was doing and what she was saying all the time. I considered the answers which she gave me to questions I put to her as intelligent answers and responsive to the question. It is exceptional that a

(Deposition of Dr. James C. Masson.)

child should be born while the mother is on the way to the hospital. It does, however, happen occasionally, and I would say that probably six or eight so happened during the year I was in the Manhattan Maternity Hospital. I can remember, for instance, that one full term and one miscarriage happened in an ambulance, and two others happened in the doors of saloons not far from the hospital.

Cross Examination.

The greater part of my training and experience has been in surgery and gynecology. I have specialized in those fields with the exception of a period of about three years when I was in private practice. After Eliza Christian's admission to the hospital I had to make daily rounds—at least once a day—having to do with anything in regard to the general health of patients, particularly in matters concerning childbirth and the after effects of childbirth. Other than the records which have been placed before me, I remember that the birth of Eliza Christian's baby was a precipitous one and I was first in attendance after her delivery. At this time I have no recollection of any particular sentence Eliza Christian may have used in talking with me, or any particular recollection of statements or conversations. It is, in all probability, true that any conversations with her would be with reference to her physical condition following childbirth. I never made any examinations as to the degree of her

(Deposition of Dr. James C. Masson.)

mentality or used any of the tests recognized by alienists. I did not make any observations as to whether she could add two and two, subtract, read, write, memorize, appreciate the value of money or property, or observations as to her standards of morality.

Referring to the birth certificate, the question mark would indicate there was some doubt as to who the father was. It would not necessarily indicate any such doubt in the patient's mind—simply that it was not her husband—a matter which we never go into. I do not remember whether a man named Lawrence Kentwell accompanied her. I might have obtained some information from him if he did come. In the normal course of inquiry I would have asked her if she had a previous child, and the record would indicate that she did not tell me so. Eliza Christian was of a dark race but not a negro, having the complexion that I ordinarily look upon as found in Hawaiians,—a light brown color. I don't remember the color of the baby, for the babies of both dark and light mothers are often the same color at birth.

Feeble-mindedness would mean that there is just lack of development, and the state of feeble-mindedness might be anywhere from a child starting to develop up to maturity, whereas insanity would really mean an abnormal state. I made no special tests in regard to her mentality. Eliza Christian was not talkative. She did not volunteer statements

(Deposition of Dr. James C. Masson.)

and what she said was practically always answers. In a majority of the questions the only answer called for was either yes or no. Her talk was broken. Eliza Christian was small and appeared to be in the early twenties. I take it for granted that the child left the hospital with the mother, for the discharge for the baby and the mother are made on the same day. I have no independent recollection of that fact but apparently the child was in good condition on discharge from the hospital.

In January of 1909 there were probably between twenty and thirty patients in the hospital whom I had to see each day. I have had no occasion to recall this case till about a month ago when Mr. Castle wired or telephoned to me. I then recalled the fact of the precipitous labor and it was reported in the hospital that the patient was wealthy. It is true that to a large extent my opinions as to mentality are based upon negative factors. I particularly remember, however, that she caused no trouble or inconvenience to any of the hospital staff during her stay in the hospital, which would likewise be a negative factor. As regards cleanliness, I do remember that on Eliza Christian's admission there was nothing noticeable in that regard.

My opinion about Eliza Christian's mental condition during the time she was under my care, is based on my memory of her, refreshed by an examination of the chart. I am not familiar with the medical distinction between the words "idiot,"

(Deposition of Dr. James C. Masson.)

"imbecile" and "moron." My opinion is that a feeble-minded person is one who does not have the intellect of a person of his or her year normally. I do not claim to be an expert or particularly trained or experienced in mental diseases. I have not observed to any extent persons of the same race as this patient but I did spend four days at a fishery in Alaska waiting for a boat, and most of those there waiting for the boat were Hawaiians. I made no inquiry in regard to the schooling which Eliza Christian had. If it should appear, after seven years of average school training, that she was unable to read the simplest of words, to add two and two, to memorize simple sentences of six or eight words, it would, in my opinion, indicate that she was subnormal mentally. Likewise, if she was unable to point out distinctions between woods and metals, or between fruits and vegetables, or between different types and kinds of animals, it would indicate a subnormal mentality, if she understood at the time what was meant.

Re-direct Examination.

If, as a result of my observations of Eliza Christian, she seemed to me to be possessed of the mentality of a child of five or six or seven years, I would have made a notation of the fact on the hospital record.

Re-cross Examination.

I talked with Mr. Castle for perhaps a half hour and he went over the facts in connection with my

(Deposition of Dr. James C. Masson.)

experience with Eliza Christian. He did not explain to me what any of the other testimony in this case was or should be.

Further Re-direct Examination.

At the time of the conversation with Mr. Castle it was stated I would be asked primarily about my recollection of Eliza Christian, based on my observations of her.

Further Re-cross Examination.

"Q. Do you remember any particular or specific questions which you ever put to this patient, or any particular instance during your observation of her, which called for any mentality on her part beyond that of a child of any particular number of years of age? The question calls for any particular incident, happening or event.

A. No."

(Following the admission of the foregoing deposition in evidence, Respondent also offered in evidence the hospital sheets and records hereinabove referred to, which were marked Exhibits 2, 3, 4, 5 and 6 for identification, but the Court refused to admit the same in evidence, in words as follows:

"The COURT: Before we begin this morning, I will say in regard to the Masson deposition that the court has read it with the excep-

(Deposition of Dr. James C. Masson.)

tion of the hospital record, and in that connection—the hospital record I think is offered on page 22 of the deposition,—my general opinion on that offer is that it does not come within the exception of the statute as to the admissibility of evidence. Secondly, that the hospital record or any doctor's record of the treatment, would not of itself be original evidence, but could only be used in so far as to refresh the doctor's recollection. He used this record in his original testimony to refresh his recollection in so far as it gave him an opportunity to verify or correct, or check his observations as to the mental condition. But as a hospital record, as such it should not be open for general inspection. In that connection, under the general objections, as well as under the court's idea of the use of records of that sort, the court will refuse to admit the hospital record as part of the deposition, and will instruct the clerk forthwith to separate the sheets referring to that hospital record and seal them in an envelope, properly identified as a record accompanying the Masson deposition, excluded from evidence by the court and not allowed in the general reading of those records. But they may be attached to the deposition and will be received as part of the deposition."

The

DEPOSITION OF DR. JAMES T. WAYSON,

taken on behalf of Petitioner in Honolulu, pursuant to open commission, was read into the record as follows:

Direct Examination.

My name is Dr. James T. Wayson. I came to Honolulu in November, 1894. I practiced medicine shortly after that, probably in 1895, and have practiced medicine continuously here since then. I have had experience in the matter of persons mentally defective. During the early years whenever Dr. Herbert, superintendent of the insane asylum, took his vacations, I occasionally took his place. Then only occasionally in 1923 I had charge of the insane asylum during the time immediately after Dr. Schwallie left. In a general way I had cases that came up occasionally. I have had the average experience of the average physician.

I know Eliza Holt. I cared for her in a professional capacity for a number of years. I was the regular family physician more or less for the John D. Holt family and many other Holts. Whenever Eliza required a physician I was her doctor. My professional services were rendered as family physician to the Holt family, and more particularly for Eliza Holt, from back in 1895 for ten or fifteen years until she went away, and I saw her on and off until she left Hawaii.

(Deposition of Dr. James T. Wayson.)

From my personal observation of her, matters that came to my personal attention, the fact is, I know she was feeble-minded all the time I was acquainted with her. This condition of feeble-mindedness was called to my attention in the following way: her physical characteristics showed she was of low mentality, and sometimes when she came down to my office Mrs. Kentwell would telephone to see whether she had arrived there. Sometimes after coming to my office she would play around in the yard and I would have to send her home because she didn't have sense enough to go there. She would come to the office sometimes with her father and sometimes alone. I never undertook to see whether she understood an oral conversation, but left most of the supervision of what I had to do with those who had the care of her. In the matter of conducting a conversation with her, in treatments and things of that sort, I naturally depended on those who had charge of her to carry out the instructions.

"Q. Was it necessary for them to carry out your instructions?

A. Entirely so, yes. That is, a part of it."

(Over the respective objections of Respondent on the ground of the nonqualification of the witness the Court permitted witness to testify as set forth in the following paragraph.)

(Deposition of Dr. James T. Wayson.)

Throughout the time I knew Eliza extending from the time she was a child up to later years of maturity, I always considered her as a feeble-minded person. This is true as to the latter part as well as the earlier. From my observation of Eliza's mental condition I am of the opinion she inherited it, and it was, to the best of my knowledge and belief, a permanent condition. As of the time she left here, a woman of nineteen or twenty, I would say that from my knowledge of the condition of her mind she was incapable of fully realizing the meaning and significance of a legal document such as a deed or conveyance. Even if the document were read and an effort were made to explain it to her, from my observation of her I don't think she had enough mentality to appreciate it more than the time being.

I never had occasion to study mental diseases especially. I am one of the oldtimers and we didn't specialize then like they do nowadays. We had a course in mind diseases as part of our education, my medical school being the University of California. I have never considered myself an expert although I have given my opinion on the stand in matters involving mental conditions several times and the testimony has been received by the court. When I get to be an expert I'll reach the stage of being dry rot.

(In response to questions put by the court Dr. Wayson testified as follows:)

(Deposition of Dr. James T. Wayson.)

The matter of study of mental diseases, hereditary matters, is a big subject to give in a few minutes. If you want to get at the matter of heredity, I'll give you a case right here in this case: John D. Holt, the father of Eliza Holt, was an alcoholic-deteriorate in that stage. I had occasion to commit him for alcoholism and she showed a low mentality. That would be a specific indication in this case.

It is pretty hard for me to go back over the thirty odd years I have been practicing, although I have been in the Jones murder case and things of that sort, and my experience here of taking the history of cases entering the insane asylum. I was never what you gentlemen classify as an expert. I have never gone into any elaborate method of studying congenital cases, although I have studied works on what is transmitted from father to child, but not especially. In the cases that I had, I took the family history.

(Resuming his testimony on direct, Dr. Wayson said:)

I testified as a witness in the Hall trial where Eliza was a complaining witness in a rape case, and as a matter of justice warned the Grand Jury to take her testimony carefully as she had said she was ten months pregnant when from her physical condition this was impossible. My memory is hazy and I don't remember whether I confined her with her first child but know that I was to do so. The

(Deposition of Dr. James T. Wayson.)

only questions I asked her at that time were the necessary questions having to do with her physical condition. I had no occasion to treat her specially for feeble-mindedness.

Cross Examination.

Honolulu was a small community in 1894 or 1895; Eliza made no such particular impression on me that I could tell you really when I became her physician. It is hard for me to say when I first knew. It is like taking care of the Smith family. There were so many Smiths and Holts I can't go that far in my memory. My office was at 445 South Beretania Street. I don't remember telling the Grand Jury that I never made any examination of Eliza as regards her feeble mindedness. I know of no necessity of making an examination of that sort. She was a half-wit and you could see it. In the Hall trial I don't remember the particular statement made but, leaving the question of insanity out there are several degrees of mental defectives, namely: imbecile, idiot, and latterly another, moron. That is all a matter of individual opinion. If you want to you can get a half a dozen books on mental diseases, and if you want to go nutty, read them. As far as the study of the mind today is concerned, it is just as much in its infancy as it was thirty years ago. Each fellow wants to get up a new grade or classification. It is utterly impossible for anybody to keep that in mind, I don't care who he is. While I don't re-

(Deposition of Dr. James T. Wayson.)

member telling the Grand Jury that Eliza was half-way between, I'll say that right now. She had the appearance of being below par mentally. I don't go in for this mental expert stuff—it is discreditable to the medical profession. Either side can buy the mental experts over. I have been in the business and know the men. All I know is that I have been called to tell what I knew of Eliza Holt. That is all I know. A lot of these tests are tommyrot, and I don't know anything about these recent tests now used by experts.

Re-direct Examination.

With respect to the degrees of mental defectives, the lowest is idiocy, next imbecile, next a moron. An idiot is a person with no understanding at all; insanity is a disease of the brain affecting the mind. Take the case of feeble-mindedness,—you can take a person who is feeble-minded and train him to do things that would bring up his mentality to a certain extent. Take a feeble-minded person today and train him and he would be able to earn a living for himself, depending upon the degree of feeble-mindedness, but the low mentality still remains.

Re-cross Examination.

I very likely told the grand jury that Eliza was not insane, because she was not, nor was she an idiot.

Re-redirect Examination.

(Over the objection of the Respondent on the ground of the nonqualification of the witness, and

(Deposition of Dr. James T. Wayson.)

the fact the witness stated he was not an expert, the Court permitted the witness to testify as follows:)

Upon the basis of the classification of an idiot as one having no mentality to one having a mental age of two years, an imbecile being one having a mental age from two to seven years, and a moron having a mental age from seven to fourteen years, I would classify her as an imbecile rather than a moron, nor do I class her as an idiot, nor insane. I know of no physical injury she might have received to her head.

MEKIA KEALAKAI

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I am the bandmaster for the Hawaiian Band. I held that position for about six years, then another two years with the band at the Boys' Industrial School, and this year I am back in my position as bandmaster of the Royal Hawaiian Band.

I visited Oxford, England, with my wife in 1919, and visited the Kentwells in Oxford. I lived in the Kentwell home for about two weeks and met in the home a girl by the name of Eliza Holt. I talked with her and she talked to me. She appeared to me to be the servant of the family, for she did the cooking, washing, cleaning and everything. We

(Deposition of Dr. James T. Wayson.)

all ate together. The children would assist Eliza, and Mrs. Kentwell would also wait on the table. Every morning Eliza cooked the breakfast, washed the dishes and after that cleaned the house, because Mrs. Kentwell didn't generally allow her to stay with us. She would say, "Eliza go to your room; go and do your duties." At lunch and dinner Eliza would also cook the meals and wash the dishes. In my opinion Eliza was a normal girl.

Cross Examination.

I went to England in 1919 on the Lapland from New York to Liverpool. We arrived during either May or June. In Liverpool we took the train for London and were there until October or November. I played at the Savoy Hotel. We lived in London at a rooming house on Kingston Road. My wife and I went down to Oxford on an invitation from Mrs. Kentwell, either in October or November before I left London for Paris. We roomed in the Kentwell house upstairs. Old man Holt slept in one small room and we slept in a room across the way. I think there were four or five girls there then. Eliza was living there at the time. I can't tell you which her room was. Sometimes Mrs. Kentwell helped with the cooking. I know that Eliza did the cooking because I went out in the kitchen. There was no other maid around. When Eliza would set the table then we would all sit down and eat together. After that both Eliza

(Deposition of Dr. James T. Wayson.)

and the children washed the dishes. I remember a girl by the name of Alice but don't remember the names of the others. John D. Holt was up in his room and in the parlor. There was nothing the matter with him physically nor with Eliza. I did not see Eliza with any baby belonging to her. I think the kind of stove Eliza used was either gas or oil. I do not think she did any gardening. Mrs. Kentwell didn't allow her to talk to us. Eliza seemed afraid of Mrs. Kentwell. Eliza did not talk at the table. Mr. Kentwell was not there; he was in China. Eliza was neat and clean about the house. I have seen her cleaning the various rooms. I mostly stayed in the house with the old man (John D. Holt); we sat in the parlor and talked old times. Eliza seemed a young woman and there was nothing particularly wrong in her appearance in any way except her eyes were a little bit crossed. I think she was born that way. She was short and slim.

MRS. MILLIE KEALAKAI

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I am the wife of Major Kealakai, the bandmaster, who has just left the witness stand. I went with him on his tour of Europe in which we visited London and Paris. We visited the Kentwells at

(Testimony of Mrs. Millie Kealakai.)

Oxford for about two weeks. This was in 1919, November, as I think. I knew Eliza Holt while I was there and talked with her. She did housecleaning, cooking and setting the table. Sometimes the girls would help. There was no other outside person doing cooking. The girls also helped with the table. Eliza ate with us. After the meal was over Eliza cleared the table and I helped her sometimes in that work, as did Mrs. Kentwell and the girls. The girls also helped Eliza in general house work. From my observations of her and her acts, and the conversations had with her, she was normal.

Cross Examination.

I was participating with my husband in his musical engagement in London. We went to Oxford on Mrs. Kentwell's invitation and stayed with them there in their home for two weeks. I don't remember how old the Kentwell girls were, but Alice was a big girl. I don't remember the names of the others. Eliza was not an unusually good cook, but just a good cook. I have been in the kitchen with my husband when we sat and watched Eliza cooking. I only remember talking to Eliza about how she was, or that sort of thing. There was no maid working in the house at the time.

MRS. KEKUMANO

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live in Honolulu and have lived here pretty near all my life. I was born in 1872 and went to the Convent from the time I was five until I was twenty-four. I think that Eliza Holt was there for about two or three years while I was. I used to take care of her with the other small children. I used to watch the children and she was one of them that I took care of while the Sisters were away. She played in a normal manner as other children play. I talked with her while I was in school and she talked and acted in a very normal manner. After she left school once in a while I would come across her with her father and I would say hello to her and she would reply.

Cross Examination.

I think Eliza must have been about nine years old when I first saw her at the Convent. While I was there she was a boarder. This was the time I knew her. While I was supervising the children I would look at her work as I did with the others. I do not know whether she was changed from one grade to another while I was there but I knew she was studying. She was with the small children. She could read a little bit.

Re-direct Examination.

Eliza did sewing with the rest of the children, doing little handkerchiefs and small pieces of work.

JAMES D. DOLE

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I first came to Hawaii in November, 1899, and moved out to Wahiawa the 1st of July, 1900, beginning raising pineapples during 1901. I did the actual planting and growing of them myself. We started canning in 1903, the summer of 1903 being the first pack. I have been in that business ever since and am now president of the Hawaiian Pineapple Company. I can state in a general way the condition of the pineapple industry around May, 1910. The condition in 1910 was very depressed, following the secondary reaction from a very severe depression in the summer of 1908, which lasted until the spring of 1909. In the spring and summer of 1909, business was greatly improved, due to the advertising which had been carried on by the association, but, either due to letting up on that in succeeding months or some other reason, the business became depressed in 1910; still more so with the profits in 1910, which were generally very low, and that condition of depression existed during practically all of the year 1910.

We began experimenting with fertilizers very early,—in 1906 or 1907—but for some years we were not sure that they did any good and they were not used to any great extent for a good many years after that. It is only in the last five or six, or perhaps eight, years that large quantities of fer-

(Testimony of James D. Dole.)

tilizers have been used. The question of fertilizers in 1910 was in a very much experimental state.

The caterpillar tractors came into use about 1912 or 1913. We imported the second caterpillar tractor that came to the Islands. That was in use at Koloa and it was not very successful because they were not well made in the beginning. They were not successful by the year 1910. The caterpillar tractor became one of the major factors in permitting the pineapple industry to be carried on on a large scale. Motor trucks were used only to a slight extent, if at all, in 1910. I don't think we had any as early as 1910.

The iron sulphate spray came into use during the early months of the year 1916. It has proved its usefulness for spraying, on almost all pineapple areas to some extent, but the principal thing it has done is to make available for pineapple growing very large areas of soil where pineapples couldn't grow before. The successful commercialization of this spray, beginning in the spring of 1916 made possible the utilization of a large area of lands. The type of lands on this island where the spray is used is principally the shallow, black soils some little distance from the Koolau mountains and some little distance from the Koolau plain. Probably it is the richest soil for pineapple growing, but it was practically worthless for pineapple growing until the ability to supply iron directly to the plants by means of this sulphate spray was developed. (Witness then referred to the map, Exhibit C.) The lands below the red lines, below the lands under lease, were no good for pineapple purposes in May, 1910.

(Testimony of James D. Dole.)

It is the iron sulphate spray which has made these lower lands available for pineapple cultivation. It is also a fact that even without the sulphate spray it is a question whether these lower lands would be useful as they are today if it had not been for the paper mulch which was tried out in the early months of 1920 and put in general use in 1921 and 1922.

I should say that the pineapple industry became a firm and assured industry after emerging from the post-war depression in the middle of 1921. At that time the industry had shown its ability to withstand a depression and, with the control of new diseases, the industry was on a firm basis. Even in 1910, in obtaining money from the banks, our company could not get a credit without an underwriting agreement, and that agreement was underwritten by large stockholders and myself.

In a general way the lands from Paaluhi Gulch over to Helemano Gulch was as far as people thought they could raise pineapples. They were all taken in, including considerable area at the upper end, which is a very shallow soil and which has proved very expensive to raise pineapples on. (Witness then referred to a particular field on the map which was largely a failure.)

The lands shown on the map were not all leased by ourselves but the parts indicated by me indicate in a general way the lands which at that time, in 1910, were considered land that would grow pineapples. As far as elevation is concerned, I am referring to the land above, where the letter "R" is

(Testimony of James D. Dole.)

written. Even in those lands there were spots where there was excess manganese but pineapples could be produced.

The Ii Estate lands in Waipio I know, particularly the upper part. The Hawaiian Pineapple Company had leases on certain areas. These Ii Estate lands were, for the most part, more accessible to the railroad, more accessible to the main road; there was less brush and trees; the land appeared to be less crude and there was less of this shallow upper land. The Ii Estate lands were probably at that time more attractive to lease. They were likewise not as much broken by gulches.

In May 1910 the fair market value of the land in general under pineapple lease would be $75 to $100 an acre, which might be taken for the entire tract as a whole.

Cross-Examination.

The depression in 1910 in the pineapple industry was primarily a case of marketing conditions. It is impossible to separate the marketing view from that of cultivation because the two are bound together. If a man is raising pineapples that he is selling for less than they cost him he naturally feels gloomy about it, whether he is raising good pineapples or not. The agricultural end of it was not in a particularly good condition. We were having great difficulty in making pineapples grow the second time we planted them. We were taking in some additional lands, so were having, I believe, some increased areas, but we were not increasing our plant-

(Testimony of James D. Dole.)

ings at that time. I do not say, from the standpoint of production of crops, it was any worse in May 1910 than a year or two before, but due to the tremendous difficulties of marketing during the previous years the heart had been taken out of the canners and they were having trouble in marketing the goods. This reacted on the growers and took the heart out of the growers, so while in 1910 the canners were getting their courage back to can more heavily the growers were not in very good shape.

The volume of production in the pineapple industry increased very rapidly up to and including 1908. As a result of that rapid increase, this depression was brought about which took some years to thoroughly work out. There was a decrease in 1910.

The great difficulty occurred among us in the year 1907. Our pack at that time had practically more than trebled. It did that, however, in a very active canned goods market. Business conditions up to the time of October or November of 1907 were extremely active, so this pack was entirely contracted for and sold to the trade, but it wasn't put into consumption. The result was that when we followed that up with a pack in 1908 that was double the pack in 1907, we found ourselves with an enormous stock on hand. As a matter of fact, on February 1, 1909, we carried over the equivalent of 70% of our previous year's entire pack. In the early part of 1909 prices were dropped. Extensive advertising began to pull us up in March 1909 and conditions looked better by the time of the summer pack of 1909, but there was a slowing up after that

(Testimony of James D. Dole.)

and generally a very depressed condition or failing in the industry, although we had the acreage to increase our planting in 1909 and again in 1910. We were taking a chance on conditions; growing the pineapple and selling the canned product was our real business. Fresh fruit was inconsequential. The market was set in a very accurate way by the law of supply and demand and we tried to guess in the early part of the year what prices would be warranted by the existing supply and demand. At the beginning of 1910 the market was rather dull. At the end of 1909 we had quite a heavy carry-over but not as distressing as the year before.

The piece of land which I pointed out, on my direct examination, as suffering from a manganese condition was our own lease, marked "Lease 100." About 1500 acres of this lease were ours. The manganese condition was not taken care of until the use of the iron sulphate spray in 1916. Prior to 1916 we would not have taken any such additional land. In 1912 we leased some 746.21 acres about in the location as marked on the map. That land did not have as much manganese condition as the lower land.

I know of no other areas which at that time were susceptible for development of pineapples in the Holt lands without the sulphate spray. I have been all over these lands on foot and on horseback. We used to go over them almost acre by acre in those days because wherever we found these areas of soil with manganese—at that time we didn't know what

(Testimony of James. D. Dole.)

it was—we left it alone. Part of the land under lease to others was of this character.

My testimony of a value of $75 to $100 per acre applied to the land that we leased. In regard to other leases, some of the areas were pretty well selected and in some other leases the people made a mistake by taking them. My basis of value is reached by figuring what we ourselves would have been willing to pay for land at that time if we had had the money, and also by figuring the rental, and not a straight capitalized basis,—rather, on how much we would have to pay to buy the land than to pay rent on it, say for ten years. At that time, with the doubt in regard to the lands, we figured we would rather pay rent on a short term than take up a long term lease. I don't know of any pineapple lands that were being sold at that time unless it was some of the Pupukea land. I doubt if we would have offered that much for land but if it had been put up to us and we could have brought a particular area we had under lease at $75 an acre, I think probably we would have gone out and tried to raise the money to buy it. At over $100 an acre I don't think we would have tried to do business at all. It is impossible for anybody absolutely to determine a value. At that time we had $499 in the bank. Most of the lessees at that time were not responsible people but we turned out to be. A capitalization of rental which would be considered fair and conservative today would not have been at that time. If you are going to figure anything on rental basis

(Testimony of James D. Dole.)

I would guess that it would be about ten times the annual rental. Our average rental was about $8.00 an acre per annum.

(In response to a question by the court, witness stated:)

"A. Judge, there were no buyers and there were no sellers of pineapple lands. It is a conjecture of what we would have paid. As I said, at that time there was so much uncertainty in regard to the continued production of pineapples on these areas we didn't know whether we were going to make it a permanent agricultural crop or not. There are very few crops which are raised year in and year out on the same land.

The COURT: So I understand your problem was in getting some land and trying some crops on it, and moving on to new areas, or rather developing the same areas?

A. It looked for a while that we might have to move on to new areas, which would mean that the whole business would be very short lived, but we were working all the while to produce a condition where we would have a permanent agricultural production, which we have reached now and hadn't reached until 1921."

Redirect Examination.

There was a very serious depression in 1914 and 1915 in regard to the pineapple business. My testimony as to value is based not only on the knowledge of the land but my knowledge of other pineapple leases in existence.

MRS. WILHELMINA PIERCE,

recalled as a witness for Respondent, testified as follows:

Direct Examination.

On cross-examination I told counsel for Petitioner that I knew one of the Martin girls when I was in school, but that Miss Martin is not Mrs. Fisher sitting there who was a witness for respondent. I was referring to the Martins up in Kona.

Cross-Examination.

The Miss Martin that I referred to when you examined me before is not the lady who is now Mrs. Fisher. I do remember Mrs. Fisher. She was in my class. On my Direct I testified Eliza Holt was not in my class, but I don't remember if she was or not. Mrs. Fisher sitting here, then Miss Martin, was in my class.

Redirect Examination.

I don't know whether Eliza Holt was in my class or not, but I do remember that Miss Martin, who is now Mrs. Fisher, was in my class.

JOSEPH P. MEDEIROS

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I have lived in Honolulu all my life. I knew a girl by the name of Eliza Holt in the years 1902 and 1903. I was then a clerk for the Hawaii Realty

(Testimony of Joseph P. Medeiros.)

and Maturity Company under the management of Lawrence Kentwell. I saw Eliza Holt in company with Mrs. Kentwell at our office. I saw her several times; once for a perioa of practically two weeks at one stretch. She was brought in the office by Annie Kentwell and kept there away from her husband. I was instructed to see that Albert Christian would not take her away while Annie Kentwell would do some shopping around town. During those two weeks I had occasion to talk to her and she to me. The husband came around to or three times but didn't come in, knowing that I was there. She was kept away from her husband. Eliza Christian would pick up a magazine or the morning paper or the afternoon paper and read them. I have seen her do that.

Based on my conversations with her and on my observation of her, she was normal.

Cross-Examination.

I am president and manager of the Ideal Finance and Mortgage Company, having held that position since 1926. I was associated with Mr. Kentwell from the year 1901 to 1903. The Kentwells would ordinarily bring in Mrs. Christian around 9 or 10 o'clock in the morning, this was day after day, for a period of practically two weeks. She was left there with her cousin Annie Kentwell, and it was when Annie Kentwell went out that I was instructed to take charge. I would say from my recollection that Mr. Christian came around two or three times. I don't remember particularly what conversation I had

(Testimony of Joseph P. Medeiros.)

with Mrs. Christian. In regard to her reading, I recollect on one occasion she commented I suppose on what she was reading in the paper. It was some matter of news and we discussed the thing together. That is the only thing I do remember because she called my attention to that article and I glanced over it. Some trial was coming up about that time and an annulment of marriage. This was in 1903, as I remember, as I think I left Kentwell either in the month of November or October. I think that was around about September or October. The matter of reading a newspaper was a daily affair. I think if I remember correctly, the article was something pertaining to her case. I did not probe into the matter as I was a young fellow and sort of bashful myself. The trial was not going on then but I think the papers were filed—something to that effect. She wore glasses and was a little bit cross-eyed. Kentwell was in the office, too—both Kentwell and myself, in and out. George Kentwell used to come in, as well as a Mr. Decker and Mr. P. H. Burnette. After I left Mr. Kentwell I went to the California Feed Company as a collector and salesman.

CHARLES H. MERRIAM

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I entered the office of the Hawaiian Registry of Conveyances in August of 1900. I was Registrar of

(Testimony of Charles H. Merriam.)

Conveyances from August 1904 until I retired to take my present position as manager of the land department of C. Brewer & Company on August 15, 1918, in connection with sugar plantations. As Registrar I had of course the intimate handling of all transactions that came through the office, as the installation of the new system was then under way and all documents passed under my scrutiny. Further than that, I had an interest in the transactions passing through the office because I wanted to learn the localities of the different properties and was anxious to learn as much as I could about values and owners and otherwise.

My first experiences in going over lands on this island were in connection with pheasant shooting trips taken to Wahiawa, Waipio, Leilehua, Helemano (otherwise better known, or accurately known, as the lands of Paalaa), and also further to Kawailoa. These trips of mine were taken from 1900 until about 1915, the later few years rather more infrequently, but quite often in the earlier years. I knew the lands of Paalaa and Helemano quite well as of the time specified. I tramped over very large portions of such lands. Helemano was pretty heavily overgrown with guava and lantana in the early days. Sometimes we would cross Helemano gulch but not very often because it was pretty rough on the other side and it was a deep gulch to cross.

I knew Mr. Charles A. Brown, manager of the Ii Estate, who had charge of the Waipio lands on which we used to shoot and tramp over. The Waipio

(Testimony of Charles H. Merriam.)

lands were more open and less covered with guava and lantana. Mr. Brown was a good business man. I am familiar with the pineapple leases on the Ii Estate lands, referring generally to May of 1910, and also with the pineapple leases on the Helemano (Holt) lands. I am likewise familiar with leases for sugar cane purposes on both sides of the Holt lands. In my position with C. Brewer & Company I have a good deal to do with purchasing and leasing of cane lands.

Cross-Examination.

I have watched the development of these lands from the time I first saw them. I am familiar with cane land values and pineapple land values. My transactions with Brewer & Company have dated since 1918. Brewer & Company have no pineapple agencies but we have various lands on various plantations that are leased for pineapple purposes.

Continuing with Direct Examination.

I saw the actual development in the early days on these (Holt) lands themselves. Some land would be regarded as waste land—that is, the gulch lands and the rough, rocky lands which could not be cultivated. I regard land on its own merits; that is, it is a portion of a block of land which cannot (referring to sugar cane land), from its own waters, be irrigated—that the rainfall is not sufficient to produce a crop of cane in that elevation. I would consider such lands (Holt sugar cane lands) to have a market value quite similar to the adjoining lands, and would say that in 1910 it would be between $50

(Testimony of Charles H. Merriam.)

and $75 an acre for its value—possibly an average of $60 an acre. Regarding the pineapple lands, I would say that the average value of that land would be regulated largely by the market value as represented by the many leases of other lands adjoining this land and any lands at Waipio. I would place this value at $75 an acre.

Further Cross-Examination.

There are different classes of sugar cane land. If a land has water appurtenant to it sufficient to irrigate, then sugar land or sugar cane lands are worth more than pineapple lands. If sugar land has only water available from outside sources, then sugar lands are worth less than pineapple lands. If the owner of the sugar cane land has no water, then the land is worth much less than pineapple land.

The experiments on the Holt land showed that one could not get a good crop of cane at a high level. The value of cane land to an owner would also depend largely on how much available water he had and what this water would cost. Assuming there is no difficulty, so far as the water situation is concerned, and that there is ample water, cane lands producing 6¼ tons per acre for the crop would be worth $125 to $150 per acre. My basis of $75 an acre for pineapple land is from leases given to pineapple companies, Japanese and independent planters by land owners, running from December 1905 for a period of twenty years.

I have here a pineapple lease of 513 acres from the Ii Estate to J. D. Dole, from December 1, 1905,

(Testimony of Charles H. Merriam.)

which has a low rate for the first three years but thereafter for the remaining seventeen years is at the rate of $7.30 per acre per annum. I have another lease by the Ii Estate to the Honolulu Packing Company, commencing December 1, 1907, for 804.02 acres of land at $7.50 per acre per annum for the last fifteen years of the lease; another one to certain Japanese, commencing November 1, 1907, for approximately 93 acres at the rate of $7.30 per acre per annum; two others, one in 1908 and one in 1907, run at the rate of $10 per acre per annum. These leases I have referred to were some of the large lands; there are many smaller leases that are hardly applicable here. There is also another large lease, namely, to the Hawaiian Pineapple Company on the basis of $8.00 per acre on the Holt lands. I do not think that small areas—5 or 10 acres, for instance—are a fair criterion to go by for a large area of land. A lease, however, of some 1500 acres at $8.00 an acre would, in my estimation, be a fair average value for the Holt lands. Ten times the average rental is all we feel those lands are worth in the market. The Ii Estate lands, for instance—on which I referred you to specific leases—were leased to responsible parties. At the time of the lease they were better lands than the Holt and less costly to bring into cultivation. I am regarding land from the standpoint of value as land, the then existing condition of what the land earns, as the basis—I think the only basis that could be used. I am not acquainted with the cost of production or the pro-

(Testimony of Charles H. Merriam.)

ductivity of pineapple lands other than in part. I have understood from land owners what they considered to be a fair rental, in addition to the record evidence; that is to say, I have talked to certain land owners especially Mr. Brown, the manager of the Ii Estate, who was leasing lands to pineapple men for many years. I recognize the fact that leaseholds have a value in the hands of the holder. It all depends on circumstances. It is considered that the fee of the land under a long term lease, is less if the lease has more than its half to run, than when it is more than half run. If the use to which the land was put was such as to actually give that leasehold a premium value, such leasehold probably would have a premium value, but in endeavoring at that time to reach an estimate of the value of the land I do not think this leasehold premium value should be considered because it must run its term of years to bring back possession to the owner. In reaching my figure of $75 I considered nothing but this proposition of rentals on long leases. The Ii Estate lands (Waipio) are probably somewhat more valuable than the Holt because of the fact there is more transportation. The lands are better, to begin with, by virtue of very little growth on them. The Holt lands are further up, requiring greater cost of transportation for the product and were rougher in character and growth. From a general knowledge such as I have had of the two lands, the Holt lands are less valuable than the Waipio.

(Testimony of Charles H. Merriam.)

Redirect Examination.

Referring to availability of water, I mean the ownership of the water by the person owning the land. If a piece of land will not produce a crop of cane by virtue of its own appurtenances, then we do not call it cane land; we call it potential cane land. If you don't have water in the summer months you haven't got cane land.

Recross Examination.

My figure of $40 to $75 per acre for the Holt sugar cane lands is based upon the fact that they were not cane lands on their own merit.

CHARLES T. WILDER

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I am Tax Assessor for the First Taxation Division for the Territory of Hawaii and have been such assessor since February 1908. As such assessor I must ascertain and know the values of lands. Referring to the map, Exhibit C, I know those so-called Holt lands and have been over the same. I have made an examination of the lands to ascertain the value of them, as of May 2, 1910. I am familiar in general with market values and have been familiar with them from 1908 on. In connection with my business as Tax Assessor, I must consider the

(Testimony of Charles T. Wilder.)

market value of lands. Referring to the Holt sugar cane lands in 1910, I would say those lands were worth $50 to $60 an acre at that time. The pineapple lands would be worth $75 to $80 an acre at that time. I am familiar with the leases of the cane lands adjoining the Holt lands, as of May 1910, and also the pineapple leases as of such date. I know, also, the pineapple leases on the Waipio lands as of May 1910.

Cross-Examination.

I have been over the Holt lands even prior to 1910 in a general way. This value is without water available. Lands with water on them would be worth from $125 to $150 an acre. If the land had water available my figure would be the same. There were very few sales at that time. My valuations are based mostly on rentals received at that time. Sugar lands at that time in the Waialua district were based on leases at $5 an acre; for instance, the Emerson lease, made way back in 1898 or 1899. In 1910 it still had some 30 or 40 years to run and would be a fair criterion of the value of the land. Notwithstanding any change that might have taken place either in the sugar growing industry or in the lands themselves by way of improvements or expenditures which might have been made upon them, the basic value would have remained virtually the same. Even assuming that such additional expenditures represented a matter which could not be taken from the land, fixtures that inure to the land itself, I would not consider that the land had any increased

(Testimony of Charles T. Wilder.)

value. I would not think that a building upon a leasehold piece of property would increase the property value to any extent. If very extensive improvements were put on the property it might increase the value to some extent.

"Q. Isn't that merely a matter of degree, the extent to which that value would be measured by the importance that would inure to the value of the property?

A. You say waterways or water system. If you had no water to put in these waterways it would not increase it, but if you did it would increase it.

Q. We are not assuming taking waterways for the pleasure of it. We are assuming there are water ways susceptible of use. Wouldn't that increase it?

A. I don't think so.

Q. You don't think that land for cane producing purposes would be increased in value by the fact of being susceptible of putting in ditches and water systems on the land?

A. Not the land.

Q. Do you seriously mean that, Mr. Wilder?

A. I mean this: If you put ditches on the land with no water to put in them, I don't see where it could increase the value of the land."

If there is water on the land then you consider them. In fixing sugar cane values I also had in mind the Gulick lease and leases on other lands.

(Testimony of Charles T. Wilder.)

In 1910 a 2/3 interest in these Holt lands were assessed at $48,000. That was assessed to the administrators of the Holt Estate. I do not remember placing that value but as a rule my deputies consulted me on values.

Redirect Examination.

I am also familiar with the Bishop Estate lease on the Kawailoa lands adjoining the Holt lands. In referring to water being on the lands, I meant if the land itself had water rights sufficient to irrigate that area.

On

Further Examination,

with questions addressed by both counsel and the court.

If the owner of the land rented water, then the land would have an increased value. If there was water available and the owners could obtain it by lease or purchase, or any way, it would make the land worth $125 to $150 per acre. If water was purchased from the outside instead of having it available as appurtenant to the land, it would reduce the value to about $125. My figure of $50 to $60 an acre is based on the capitalization of rents. A fair rate of capitalization at that time would be 8% to 10%. If we take these Holt lands by themselves and assume that the Holt lands themselves do not own water rights, but there is the Wahiawa Ditch owned by others, then the value of those Holt lands would be $50 to $60 per acre. I am pretty sure that the

(Testimony of Charles T. Wilder.)

Bishop Estate lands (Kawailoa) have water rights and I took that lease into consideration also in fixing the value of these lands.

The

DEPOSITION OF HENRY HOLMES,

taken in Honolulu on behalf of Respondent, pursuant to open commission, was read into the record as follows:

Direct Examination.

I am a practicing attorney in Honolulu and have been a member of the Bar of the Supreme Court since about 1892. During the year 1912 I was acting as attorney for Mr. J. M. Dowsett. I met Eliza R. P. Christian for the first time in Oxford, England, in 1912 at the Kentwell's house. In addition to Mr. and Mrs. Kentwell, there were in the house the children of Mrs. Kentwell, John D. Holt (father of Mrs. Christian), and Mrs. Christian herself. Mr. J. M. Dowsett, my client, was the assignee of an option that Mrs. Christian had given to one May K. Brown in 1907 (Exhibit 14-A), and I went to England on behalf of Mr. Dowsett to exercise that option. (Witness was then shown the option and recognized the signature of Eliza R. P. Christian.) I saw Eliza Christian sign her name to the conveyance by her to Mr. Dowsett at the Consulate in London at the time she carried out the provisions of that option. I think her signature is unusual and is a striking

(Deposition of Henry Holmes.)

signature. It would be very difficult to imitate or forge.

(Witness was also shown and identified the intermediate assignment of the document, Exhibit 14-A, namely, from May K. Brown to William Matson, and then from William Matson to J. M. Dowsett, duly recorded in the Hawaiian Registry of Conveyances.)

WITNESS RESUMES: When I went to Oxford, the door was opened to me in the Kentwell home by Mrs. Christian. I told her where I had come from and what my name was, and she invited me into the house. I went with her into a sitting room and there I saw her father, John D. Holt, whom I had known in Honolulu. I then told them the object of my visit. John D. Holt said, "Kentwell is acting for us and you have got to tell Mr. Kentwell what it is you want." I stayed about ten minutes or a quarter of an hour with them, and we talked about Honolulu. I asked them how they liked living in Oxford and both of them answered. I remember John D. said that he found it very cold but he thought the country was very beautiful. Mrs. Christian said, "I think he doesn't like it because he misses his poi," to which statement John D. Holt agreed. In answer to the same question to her, Mrs. Christian said that she liked the cold, went out for one or two walks every day, usually with her father, and that she liked what she called "the life" in Oxford. The conversation was fairly general and was what was to be expected from a person arriving from Honolulu and

(Deposition of Henry Holmes.)

these two Hawaiians. Mrs. Christian seemed to be in very good health, judging by the color of her skin.

Within a week I met Mrs. Christian again at the same place in Oxford. Mr. and Mrs. Kentwell were there, the Kentwell children, John D. Holt and Mrs. Christian. My wife went with me. We were invited to stay to tea, which was served in the garden. Mrs. Kentwell said to Mrs. Christian, "Will you sit with us?" and Mrs. Christian answered, "No, I'll sit with the children." They had a table a short ways from us. There was a little general conversation. My wife or I would ask Mrs. Christian a question and usually get an answer, although I don't remember any particular part of the conversation. I do, however, remember one instance where Mr. Kentwell said that they would have some honey for tea, and asked me out to show me where he had his hives. He and I went out and put on masks. He had a big blow-pipe, lifted the top of the hive off, picked out the frame and went back to where the people were. The honey was cut out and some was given to the children and Mrs. Christian and some eaten at our table.

Mr. Kentwell seemed to understand the matter of the option very well, because of the experience that he had had in the case of Waialua when Mr. Withington went across. Kentwell stated, "If I could escape the obligation to carry out that option I wouldn't carry it out." We had a little discussion as to whether the whole amount could be claimed, inasmuch as this option went beyond the period

(Deposition of Henry Holmes.)

when I was there. He indicated very strongly the option would have to be carried out. Finally Kentwell stated that I would get what the option called for but no more. I was instructed by him to get counsel to settle the deed in London. I went to the Inner Temple in London and tried to get the deed prepared by Roger Bigman, a well known authority on trusts, wills and such like. He turned me over to a young man who was pushing ahead, Horace Freeman. I gave him the option, telling him what was wanted, and from that he drafted the deed from Mrs. Christian to Mr. Dowsett.

Before the execution of the deed, however, I saw Mrs. Christian at the hotel in Oxford. Mr. and Mrs. Kentwell and Mrs. Christian came to the hotel to dinner the night after the tea. John D. Holt didn't want to come. Mr. and Mrs. Kentwell, Mrs. Christian, my wife and myself were at dinner, which took place at about half past six or seven, and they were there until about ten. We talked about all sorts of things. Mr. Kentwell advised me to acquire John D. Holt's contingent interest.

In regard to conversations with Eliza Christian; she was a girl that would speak if she were spoken to. She is not a forward girl; shy, retiring, but never hesitated to answer any question which was put to her, but never would start a conversation. My wife talked to her. My recollection is that we met them at lunch the next day at the hotel. Eliza would talk when she was spoken to but I don't think otherwise.

I saw them next at the American Consulate in

(Deposition of Henry Holmes.)

London. Mr. and Mrs. Kentwell, Mr. John D. Holt, Mrs. Christian and I were there. The American Consul's name was either Westacott or Westmacott—I am not sure which. I arrived at the Consulate before they did. When they came in the Consul or Vice Consul said, "Oh, you Honolulu people are here again!"—evidently referring to the fact that he had met them when the Waialua transfer was made. He asked me what the business was and Kentwell said that they wanted him to take acknowledgments to three deeds. The first deed produced was the conveyance by Mrs. Christian to Mr. Dowsett of her share or interest in Makaha, according to the terms of the option. The Consul took the document in his hand and after looking over it asked Mrs. Christian if she understood that this was a transfer by her of some property in Honolulu, to which she answered yes. Then he asked her if she acknowledged that as her free act and deed—the usual form—to which she said she did. Before her signature was witnessed she signed the document before him and he witnessed her signature. I was present all the time.

(Witness having identified a deed dated May 21, 1912, Eliza R. P. Christian to John M. Dowsett, of her contingent interest in lands at Waianae, duly recorded in the Hawaiian Registry of Conveyances, the document was received in evidence as Respondent's Exhibit 4 in connection with the deposition of Henry Holmes. The document shows that it was executed by her and signed, sealed and delivered by

(Deposition of Henry Holmes.)

her in the presence of R. Westacott, Vice and Deputy Consul General of the United States of America in London, England. Then follows the acknowledgment by Mr. Westacott, the Vice Consul at the Consulate General in London, May 21, 1912.)

WITNESS RESUMES: There were two other deeds signed, one by John D. Holt and the other by Mrs. Kentwell. I had a certificate of deposit for what was the equivalent in England of $7500. This I tendered to Mrs. Christian but her father said, "Oh give it to Kentwell." I asked Mrs. Christian if that was all right, to which she said "yes," and I handed it to Mr. Kentwell. I also had C.D.'s for Mrs. Kentwell and John D. Holt. The deeds were separate and the money was handed to them separately.

After the execution of these deeds, we went to a moving picture show. In 1912 moving picture shows in England were not common, but this was more than usual because it was colored pictures of the Durbar in India. Mr. and Mrs. Kentwell, John D. Holt, Mrs. Christian, my wife, and I went to the pictures. Mrs. Holmes had joined us at the hotel on the way. At the pictures I explained to Mrs. Christian something about the Durbar, for apparently the meaning of that word was not commonly understood. After seeing one of the films, John D. Holt left, saying to me that there was a very good fish shop near the theater.

Regarding any indications of abnormality about Mrs. Christian on any of these occasions: No, I saw

(Deposition of Henry Holmes.)

nothing and heard nothing that would possibly raise that question in the mind of anybody who had a mind of his own.

Cross Examination.

Mrs. Christian appeared to me about twenty-six or twenty-seven years old. When she opened the door I explained to her that I had come from Honolulu representing Mr. Dowsett. Her response to my inquiry as to whether I might come in was merely indicating that I might. There was no other conversation at the door, but probably an invitation to come in. I had known John D. Holt, Kentwell and Mrs. Kentwell before I arrived in Oxford. In the sitting room Mr. Holt spoke probably more words than Mrs. Christian but Mrs. Christian's answers for the old man were what struck me because they threw a good deal of light on the answer that the old man gave. I remember the answer of Mrs. Christian about the poi very well; I remember the old man saying that the beer in Oxford was very good. Mrs. Christian then spoke up and said, "He only gets it for dinner and supper." When I asked when Mr. and Mrs. Kentwell (who were out) would return, Mrs. Christian said, "They are out of town but they are coming back tonight." I said, "With the children?" She said, "Yes, with the children." John D. didn't answer that question.

Immediately after I got back to my hotel I wrote quite fully to my employer, Mr. Dowsett, a faithful

(Deposition of Henry Holmes.)

account of what happened, not putting in the details of the casual remarks but the general tenor of the conversation. Mr. Dowsett, has that letter. I did not write at the time with a view of indicating particularly what was said or done by Mrs. Christian. There was nothing in my mind by way of an endeavor to examine her particularly in any particular respect. My description of Eliza in the conversation I have testified to is that she was a person who would speak only when spoken to. I do not remember ever having an extended or even long conversation with her. Her vocabulary was like that of a Hawaiian girl, rather limited. I had no conversation with her about the details of the transaction before us. The transaction called for no negotiations. I went there to exercise an option she had given five years ago. I simply intimated to them, her and Mr. Kentwell, that Mr. Dowsett was prepared to exercise his option, and understood that the details would be handled by Mr. Kentwell as Mrs. Christian's business agent.

On the occasion that we were having tea in the garden, Mrs. Christian did not join in the general conversation. There was no shortage of space necessitating her sitting with the children instead of with us. I don't think there was six or seven feet between the two tables. The dinner at the hotel was in a private dining room. There was nobody there but ourselves. Mrs. Kentwell, as I remember, sat at my right and Mrs. Christian at my left.

(Deposition of Henry Holmes.)

The people were naturally sufficiently close for a conversation to be entered into between one and any other one. There was nothing in the situation which would impress itself on me any more than any other dinner party fifteen years ago. I do not remember anything Mrs. Christian said at the dinner, although I wrote Mr. Dowsett what Mr. Kentwell said. At the luncheon the next day Mrs. Kentwell offered to show my wife the colleges in Oxford. I am almost sure that Mrs. Christian referred to one of the colleges which she liked best. I do not remember anything else she said. At the Consulate, the three certificates of deposit were handed over to Mr. Kentwell, Mrs. Christian saying nothing to this. At the moving pictures she did not enter into a conversation about the Durbar. The only thing Mrs. Christian said was "yes" to the questions put her about having acknowledged the instrument, no other conversation. I believe that Mrs. Christian's diffidence about conversation was partly because people of the Hawaiian blood look upon the white man as somewhat superior and they defer a great deal. Mrs. Kentwell, on the other hand, had no hesitancy about talking, and the Hawaiians have a very good name for that type of person. When leaving the pictures I think Eliza was just as eager as her father to get to the fish shop.

Mrs. Christian's interest in the property at Makaha amounted to a one-third interest. There

(Deposition of Henry Holmes.)

were other interests outside, including the John D. Holt interest. I purchased from Mrs. Kentwell whatever interest she had. I think I paid her about $750 and John D. Holt about $1750.

Eliza spoke Hawaiian no more than I would expect a white person to who had lived here a long time.

(Respondent's Exhibit 5-M, a lease dated October 7, 1899, Trustees B. P. Bishop Estate to John Emmeluth and Albert E. Nichols, of the lands of Paalaa at Waialua—term 21 years, rental $5550—was received in evidence without objection. This lease was surrendered for nonpayment of rent.

Counsel for Waialua then stated in response to a request that he produce certain vouchers further than those already produced that he was a director of Castle & Cooke and knew that the rule is in effect that after seven years no vouchers back of that period are kept, that under his instruction an examination had been made of the records of Castle & Cooke and that it had no other vouchers other than those produced in court. He stated, We could find no other vouchers than are produced already. Counsel for Petitioner accepted counsel's statement that such was the fact.

> "The COURT: Your statement, Mr. Castle, is that you had a search instituted at the office of Castle & Cooke and Castle & Withington's, and you find no other vouchers affecting this transaction?

(Deposition of Henry Holmes.)

Mr. CASTLE: Yes, that is correct.

The COURT: How long has the seven-year rule of destroying vouchers of that character, older than seven years, been in force and effect?

Mr. CASTLE: I could not say. I should say the last ten years.")

A. LEWIS, JR.

was called as a witness for Respondent, the oath being waived, and testified as follows:

Direct Examination.

I am a member of the Bar of the Supreme Court of Hawaii. I arrived here July 4, 1900, and went into the practice of law after that. In 1910 I entered the Bank of Hawaii, becoming vice president and manager of the bank, and was there for ten years. Thereafter I practiced law, was a financial agent, Treasurer of the Territory of Hawaii for a period, and president of the Pacific Trust Company for a period. I am now engaged as a financial agent and attorney at law. In my business, particularly in the banking business, I had occasion to know the rates of interest on mortgages in May, 1910, or about that time. Such interest rate was 7% on a loan based on 60% of the appraised value. On agricultural lands it would be between 7% and 8%. Generally speaking, an undivided interest is worth less than the fractional part

(Testimony of A. Lewis, Jr.)

of the whole, particularly if it is less than a majority interest. A loan with that security alone, without other security to improve the equity, would not be favorably considered. A contingent undivided interest would only be looked upon in connection with other security. You would have to go back to the personal worth of the borrower.

Cross Examination.

In figuring a fair rate of discount for a future interest, the problem presented would be one of whether there was a certainty—no speculative interest—presented in the problem. With a certainty you take one rate; if it is not a certainty, you would have to take another rate. The rate would likewise be governed by the community in which the problem is presented. In 1910 in Honolulu I can't say that the rate would be less than 7%; it might approach 8% or as high as 10%. In the present instance, namely, that of the interest of Mrs. Christian, there is a problem dependent on two lives: first, of a woman twenty-four years old, and a man seventy-one years old. It is plain sailing that the younger person is presumed to outlive the older person, but that does not necessarily follow. This involves a chance which might be taken by speculators, and the only way they are going to pay for the risk is capitalizing it at a high rate of interest.

(Testimony of A. Lewis, Jr.)

Re-direct Examination.

There are other problems involved here than the question of just insurance problems; there is a business risk involved.

JAMES L. COCKBURN

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I have been connected with the Bank of Bishop & Company for thirty years. In 1910 I had charge of the loans of such bank, which would include mortgages. The average in 1910 on real estate mortgages was perhaps rather over 7%. We would loan not more than 60% of a conservative appraised value. Our bank did not to any extent take agricultural loans. They were generally of long duration and banks like to limit real estate loans to a reasonable time. Agricultural loans would take a higher rate of interest than the 7%—certainly not lower. I do not think we have made loans on undivided interests unless such interests were put in as a sort of sweetener with other securities.

Cross Examination.

There is a difficulty with undivided interests in the case of mortgage foreclosures, so that even a small undivided interest would detract from the loan.

T. D. COLLINS

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

My business is public accounting, auditor and tax solicitor. I have a company of my own and have been engaged in such business for eight years. I am also authorized to practice before the Bureau of Internal Revenue. I am familiar with tables showing the present worth of sums of money, and have prepared a table in consultation with other firms of accountants.

(Respondent's Exhibit 16-A was received in evidence, without objection, and reads as follows:

The Present Value of $1.00 due 20 years hence:

7% — .25842
8% — .21455
9% — .17843
10% — .14864

Sum	Rate	Present Value
$1,000.00	7%	$258.42
	8%	214.55
	9%	178.43
	10%	148.64

Cross Examination.

The present value of $1,000, postponed for a period of eight years, at 6%, is $627.41.

JOHN GOMES DUARTE'

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I am Deputy Tax Assessor for the District of Waialua and Wahiawa. Prior to that, I was surveyor and civil engineer for the Waialua Agricultural Company, a work which continued for about twenty-five years. The map, Exhibit C, comes from a map which I made myself. (Witness thereupon indicated on the map certain small holdings of taro lands carrying water rights at the lower part of the Map, Exhibit C.) I have been all over the lands indicated on the map and the lands above the map. The ditches indicated on the map were constructed in 1907 and 1908, primarily for the purpose of catching the storm waters in connection with the Wahiawa ditch.

Cross Examination.

By storm waters I mean particularly heavy flows which come down during heavy rains, and which otherwise would flow off and be lost. When we have heavy rains there is a great quantity of water that comes down there to these ditches and these ditches are apt to catch those waters and bring it to that elevation. Those ditches are there for the purpose of bringing those waters to the desired elevation. We could not build it way down at sea level or 50-foot elevation as we would not realize any benefit from it at all. These storm waters are waters which

(Testimony of John Gomes Duarte.)

reach the point where they are picked up. The whole flow of the stream is storm waters. There is some water always in the gulches, which I wouldn't consider very much, half a million or a million gallons, but not enough to justify any expenditure. We built the ditch not to catch a million gallons but to catch storm waters, twenty to forty million gallons. Waters in excess of 500,000 gallons would be storm waters.

JOHN H. WISE

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I am a Hawaiian by birth. I received my education at the Kamehameha Schools in Honolulu and then at Oberlin College in the United States. I was also connected with the Archives of the Territory of Hawaii. I am now professor of the Hawaiian language at the University of Hawaii and the Kamehameha Schools.

"Lolo," as a word itself, is just as broad as the English word "foolish" or "fool." The word "lolo," however, originated from the word "paralyzed." When a person has lost the use of his limbs, arm, leg, or both arms or both legs, they call that "mai-lolo." The word "mai" must be prefixed to the word "lolo" in order to define that kind of lolo. Then "lolo" came in use as to one whose mind is

(Testimony of John H. Wise.)

not quite clear on certain things. I doubt whether it goes to the extent of being weak-minded, but it is called, I think, in English, "simple-minded."

As to the word "ihepa," I think the word originated with the word "hepa," and the letter "i" was gradually prefixed. It refers more to the language that you use in answers to questions. If questions are not answered properly they generally call that man "hepa." Likewise, when the talk is not very clear in expression, it is called "hepa." It is a sort of hesitancy in speech and not answering the question according to the sense—probably not quite to the point of the question asked. "Ihepa" did not extend to feeble-minded. The Hawaiians never had any language to describe a person who was feeble-minded because it is quite a stretch from feeble-minded to a person with a good mind—a smart mind. "Lolo" would lean more towards feeble-minded, but not quite far enough to mean feeble-minded.

The word "naaupo" is a closer word to feeble-minded than the word "lolo," but I doubt very much if Hawaiians would ever extend "naaupo" to mean feeble-minded. "Naaupo" comes from two words: "Naau-po." The Hawaiians believed that the seat of knowledge came from the stomach; so "naau" means stomach, and "po" means dark; from that they get the word "Naau-po," meaning "your thinking apparatus is dark."

(Testimony of John H. Wise.)

Cross Examination.

I am familiar with a certain dictionary of the Hawaiian language originally compiled by Mr. Lorrin Andrews, Sr., and some years ago revised by the Reverend Henry Parker. I do not consider it a very authentic book and I do not think Mr. Lorrin Andrews, Sr., and Mr. Henry Parker had a very good knowledge of the Hawaiian language. I think my own knowledge is better. Although the Andrews dictionary is a public work, I do not think it can be relied upon. When the Andrews dictionary refers to "hepa" as "idiotic; destitute of ordinary intellectual powers," I believe they are both incorrect. I intend to publish a work myself and will show that Andrews and Parker were wrong in a good many instances. For instance, a good many of Hawaiian common words are not even in the Andrews-Parker dictionary. You must remember there are certain Hawaiian words which cannot be put into English and there are certain Hawaiian words which have no English equivalent, but Andrews and Parker have taken the English equivalents and tacked them on to some of the Hawaiian words, believing they would fit, but they don't. I have never seen a reliable dictionary of the Hawaiian language, and in my opinion there has never been published a Hawaiian dictionary that was reliable.

(Testimony of John H. Wise.)

Re-direct Examination.

(Witness was shown an earlier edition of the Andrews dictionary dated 1865 and was referred to the word "hepa," which is there described as "shaking of the limbs; palsy; sitting in silence," or, as an adjective, "mischievous, false, lazy.")

WITNESS RESUMES: "That is more to the point."

Re-cross Examination.

I think that the later dictionary is a distinct falling off in the reliability of the word because Parker left out several words that are in the earlier Andrews dictionary. I have never heard or known of the use of the words "hepa" or "ihepa" by Hawaiians to mean "feeble-minded." If any Hawaiians here testified that "ihepa" means "feeble-minded," that to my mind is an extraordinary thing.

WILLIAM L. STANLEY

was called as a witness for Respondent, the oath being waived, and testified as follows:

Direct Examination.

I am a member of the Hawaiian Bar. (Witness was thereupon referred to a statement in a letter by Annie Kentwell that he, Judge Stanley, had told her counsel, Mr. Campbell-Lee, that he knew that Mrs. Christian was non compos mentis. Counsel for Petitioner, in objecting to questions along

(Testimony of William L. Stanley.)

this line, stated, "Mrs. Kentwell is not in a position to substantiate all the evidence in her deposition. If that is true, I submit it is not what she gives of her own knowledge but is relayed through another." The court overruled Petitioner's objections to questions to Judge Stanley on this point.)

WITNESS RESUMES: It is not true that I knew that Mrs. Christian was non compos mentis. I did not know Eliza Holt at all, and I have never expressed any opinion whatever as to the mentality of Mrs. Christian, of which I was absolutely ignorant.

(At this point counsel for Respondent, pursuant to an earlier request of counsel for Petitioner for a list of payments to Eliza R. P. Christian as rentals under the lease or as consideration for the execution of the lease (Ex. A-8), submitted a list of payments, which statement was received in evidence without objection as Petitioner's Exhibit A-36.

Such exhibit consists of over four pages of detailed cash payments as required under the terms of said lease of March 17, 1905, from April 1, 1905 up to and including April 1, 1929, and also in the increased amounts under the extended lease from the Helemano Real Estate Trust in 1920 (Ex. A-3). The schedule likewise shows rentals still being paid under the terms of said original lease (Ex. A-8) as to one one-twenty-seventh interest still outstanding, and also as to another outstanding one-twenty-seventh interest leased under said

(Testimony of William L. Stanley.)

original lease (Ex. A-8) and extended for a further period of 19 years from April 1, 1930, at an increased rental from April 1, 1919. (Ac. Ex. 10). It shows that the rentals provided for under the lease, or extensions, were paid regularly by Waialua to the parties lessor therein named or their assigns or successors, totalling some $172,208.55. It shows no payments of rentals to Eliza R. P. Christian and no payment of money to her for her execution of the instrument. It was stipulated that the exhibit contained a complete list of the payments of rent under the lease, and also no payments of money to anyone for the execution of the lease.

Counsel for Respondent in connection with said exhibit stated: "Yes, these are the payments under the lease, except also there is that 1906—I mean the payment to Annie Kentwell in London, in connection with this deed, of Five Thousand Dollars. Annie Kentwell was paid for her interest in the lease.")

Respondent rested.

(Petitiner then offered in evidence part of the instructions given by the court in connection with the case of "Territory of Hawaii vs. Hall" in May 1902, in which the mental condition of the complainant is called to the attention of the jury and the jury is directed to consider that circumstance

in rendering a verdict. Upon an objection being interposed thereto, same was sustained by the court and the offer refused.)

MRS. HESTER LEMON

was called as a witness for Petitioner on rebuttal, and having been previously sworn, testified as follows:

Direct Examination.

I am Custodian of the Records of Vital Statistics in this Territory. I have with me the register of marriages from 1891 to 1896 for the entire Territory of Hawaii. These records show that Marie Cummings (Respondent's witness Mrs. Ann Parker) was married to S. G. Otis King November 13, 1894, at Kealia, Island of Kauai.

CHRIS HOLT

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

I knew Keawekane who testified as a witness here. I did not see Keawekane, who testified for Respondent, living at the John D. Holt place. He was either a cousin or a nephew of Mrs. John D. Holt, my aunt. He and his family lived at Makua, about six miles from Makaha, and his father and Mrs. Holt's father went fishing. I was familiar with all

(Testimony of Chris Holt.)

of the people who were living in John D. Holt's home whenever I was down there. I am in a position to say that Keawekane never did live there. He used to bring fish over to my aunt and take home taro, maybe once a week or twice a month—I don't remember exactly.

Cross-Examination.

My testimony is confined to the vacation periods in which I went to Makaha—for the vacations when I was attending school at Punahou. I do not know anything about what happened while I was not there.

FATHER VICTORINIS

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

I am connected with the Catholic Cathedral on Fort Street. Before a person can be admitted to Communion they must have a certain knowledge of the Christian doctrine. At the present time, and ever since 1910, children are not admitted to make their first Communion until eleven or twelve. The practice today is Confirmation after the first Communion.

Cross-Examination.

I arrived in Hawaii October 10, 1911, but first came to Honolulu in 1915. The Church would have confirmed feeble-minded people since they con-

(Testimony of Father Victorinis.)

firmed children. I do not know of my own knowledge of any instance where a feeble-minded person was confirmed. In 1894 and up to 1910 a certain knowledge was required of the Christian doctrine, and that catechism was written out in question and answer form for that express purpose. Prior to 1910, therefore, when children took their first Communion, they had to know their catechism.

Redirect Examination.

Previous to 1910 children were admitted to Communion at the age of ten, eleven or twelve.

MISS ADELAIDE FERNANDEZ

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

At one time I attended the Sisters' Convent up on Fort Street. I know a woman around town named Minnie Paloney. Mrs. Paloney came out to my house two or three times and talked to me about this case. I have not heard the word "ihepa" used before 1924.

MRS. HATTIE WALTERS

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

I knew Eliza Holt at the Catholic Sisters. When I first went there she was in Sister Marceline's class, and I was in Sister Margaret's class. I knew a girl by the name of Alice Martin, who is now Mrs. Fisher; she was in the same class with Eliza Holt. Alice Martin in her first year was in the same class with Eliza Holt. She was promoted but Eliza remained behind. I left school before either Alice Martin or Eliza Holt. I know a woman named Mary Ann Wright. She interviewed me twice with a view to procuring my testimony in this case.

Cross-Examination.

I had been to school before I went to the Catholic Sisters. A number of small girls were left behind besides Eliza. Eliza was the biggest. When Alice Martin was promoted Eliza was still in the baby class. Alice Martin started in a little higher grade; one a little higher than the babies. I remember distinctly that when Alice Martin went to school she started in the baby class.

MRS. ANNIE K. HARRIS

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

I am the mother of Mrs. Matilda Norton, and used to deliver poi to the Kentwells. My daughter used to be on the beach with me at that time. We didn't have big water at that place; the water comes up to the knee. If the water was too high we didn't allow any of the children to go down to the water. They generally played around the beach; they simply played on the beach and got their clothes wet. I know Minnie Paloney. About two weeks ago she took me up to some office,—whose it was I don't know, but it was to the office of that gentleman (indicating counsel for Waialua).

Cross-Examination.

We had no bathing suits in those days. The children would use their ordinary clothes and when I asked my daughter why her clothes were all wet she would say, "I went in swimming with Eliza Holt."

CHARLES M. HITE,

called as a witness in rebuttal on behalf of Petitioner, the oath being waived by counsel for Respondent, testified as follows:

Direct Examination.

My name is Charles M. Hite, and I am a member of the firm of Ulrich & Hite, attorneys practicing

(Testimony of Charles M. Hite.)

aw in Honolulu. I heard the testimony of Mrs. Paloney in which she said that I had offered to pay her the sum of $500 to be a witness in this case. Her testimony is absolutely false. I have known her for a number of years and have helped her in various troubles of her own of a private nature. She was in my office in the month of July and I talked to her at that time as I have talked to scores and hundreds of people. I asked her if she knew Eliza Holt. She told me that she did; that she had gone to school with her. I asked her if she considered she was feeble-minded, and she said no, she was not; I think she was feeble in the head." Then I pressed her for details, but she could give me none, and that matter ended except that I then took up with her—knowing that she was friendly with Carrie Robinson and some of the oldtimers in town—the matter of seeing for me some of these Hawaiians, Mrs. Lillie Auld, Mrs. Carrie Robinson, Mrs. Manuel Reis. I told her that I had been unable to see these women and asked her if she would kindly see them for me, and she said she would. That is the last time I saw her in my office.

Cross-Examination.

I don't know the date, but know it was in the month of July. I was admitted to the Bar in 1917 and have been practicing in Honolulu ever since, with the exception of my War service. This is by no means my first litigation. I believe that I am fairly familiar with the ethics of the profession, interview-

(Testimony of Charles M. Hite.)

ing witnesses and the presentation of evidence in courts. The majority of the witnesses produced by my firm in this case have spoken the English language.

"Q. Mr. Hite, in addressing Minnie Paloney and others in this case, did you suggest to them first that Eliza Holt was ihepa before you asked them what they knew about the case?

A. May I answer you this way: In Minnie Paloney's case I do remember that I asked her first of all whether or not the girl was feeble-minded. I would like to go ahead and answer the rest of your question. My procedure all depends on circumstances; whether a person is willing or unwilling to talk—(here witness was interrupted by counsel for Respondent.) I have not first suggested to the witness that Eliza Holt was ihepa before I asked them what they knew about the case."

MRS. ELLEN LORENZEN

was recalled to the stand for

Further Cross-Examination

by the Petitioner, and testified as follows:

It is not a fact that a few weeks before this trial started I had a conversation here in the Judiciary Building at which were present Mrs. Miriam Auld and Mrs. Joe Dwight, during the course of which conversation I said that Eliza Holt was not normal;

(Testimony of Mrs. Ellen Lorenzen.)

nor did I further in the course of any such conversation refer to an incident that I recalled when she jumped from a chiffonier on to a bed, in a pregnant condition. I did not tell either Mrs. Miriam Auld or Mrs. Dwight that I had stated Eliza was jumping from a chiffonier on to a bed in a pregnant condition. I have never seen her jump from a chiffonier on to a bed and I did not say that.

(By stipulation of counsel, Respondent Waialua's Answer to the First Amended Petition having been filed, replication thereto was waived, and the replication to Respondent's Answer to the First Petition was allowed to stand in lieu of a second replication. It was further stipulated that the maiden name of Minnie Paloney was Mignonette Parker.)

MRS. CUSHINGHAM

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

I remember John D. Holt, his wife Kaahanui, his daughter Eliza, and sometimes a woman by the name of Kapele helping in the housework, being there in the John D. Holt household at Makaha. When I lived down there I knew a family known as Keawekane. At no time during the period I was there was

(Testimony of Mrs. Cushingham.)

there any person, young man or boy, other than those persons living in the John D. Holt home regularly or going to school from there. I don't remember that their little children played with Eliza or in the home of John D. Holt or in my house. The Keawekane family lived in Makua valley, living about a half mile distant from the home of John D. Holt. Kaahanui was a nice-looking woman, stout, but with no cocked eye or crossed eye..

Cross-Examination.

I did not personally stay in the John D. Holt household. We owned our own home. Keawekane used to visit at the John D. Holt home, but not to live. I believe he was a cousin of Kaahanui's mother. I could not say how often I saw him there, but I saw the whole family there. He may have spent the night there but not lived there for five years. I do not say that he never spent the night there. But that he lived there five years and went to school, that would be impossible. There were only two houses, John D.'s and ours. It is impossible for him to have lived in the house. The Makua cowboys were over at the John D. Holt home but I wasn't intimate with them. I have not seen Keawekane for forty years. I can't recollect him, for it is a good many years ago, and a person changes.

MRS. ROSALIE H. DWIGHT

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

I am a clerk in Judge Watson's court, and know Mrs. Lorenzen. I was present at a conversation had with Mrs. Lorenzen relative to Eliza Holt and to this case generally, some time shortly before the trial. She stated that when Eliza Holt was pregnant she used to get on top of the table and jump off, and she did not believe that any person doing that was normal. Mrs. Auld, Assistant Probation Officer, was sitting alongside of me.

Cross-Examination.

No one else was present except us three.

SISTER LEOCADIA

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

I have the record books showing the records of the attendance of girls. Consulting these records, Mignonette Parker (Respondent's witness Minnie Paloney) was a boarder for about three months from September 4, 1899 to December 4, 1899. In addition, I remember because I was there and she was here a very short time. If the books are exact, then that is the only time. Eliza Holt had left on

(Testimony of Sister Leocadia.)

June 18, 1899 and Mignonette Parker came the following September after Eliza had left. Consulting these same records Marie Cummings (Respondent's witness Mrs. Ann Parker) was a boarder here for about six years from December 1886 to July 1892, at which time she left. If Marie Cummings had come back here for two or three months there would be something in the records, but not for just a short time. Further consulting these records, we had a girl here named Lulu McWayne (Respondent's witness Mrs. C. K. Quinn) who was a boarder for about seven years. She entered July 1886 and remained until October 1893. She continued to take music lessons until December 1893, but she ceased to be a boarder in October 1893. I don't know whether she was taking music lessons but her name shows she bought a music piece in July, 1894. Alice Martin was a boarder for about four years, from April 1896 till April 1900. She wasn't well, and I don't think she was at the Catholic Sisters during all that time. She went home but she came back. I couldn't tell you whether Eliza Holt ever took Communion. I myself did not know her to take Communion.

Cross-Examination.

I am testifying from my account books which give the dates they pay their board. The other records were lost when Mother Judith had softening of the brain. They were swept in the box. I could not say from my own knowledge whether certain girls were in certain classes. If a girl came here for a visit, say for two weeks after she had left the Convent, it

(Testimony of Sister Leocadia.)

would not be reflected in the account books. A girl coming in from the outside for music lessons might meet boarders if they happened to meet in the yard or in the music room—naturally they would be allowed to talk, though Mother Judith was strict in keeping the two classes of pupils separate. My statement as to Alice Martin is solely from the account books. My account records are complete. I can say of my own knowledge that between 1894 and 1899 music pupils never played at all with the day pupils. Mother Judith was very strict about having boarders kept separate and having no communication with the outside.

I knew Mrs. Kekumano. I was present when Mr. Hite called up on the telephone and I suggested to Mr. Hite to call Mrs. Kekumano as a witness. I went to the telephone and asked her if she remembered Eliza Holt. As she had been here so long, she might know Eliza Holt.

(Counsel for Petitioner then asked that the other Sisters come forward, and the following transpired:)

"SISTER LEOCADIA: They refuse to come. The last time they told all they knew and could not add anything to their testimony. It was useless to come today they told me. During and since this case came up our daily and most fervent prayer to God has been that justice and truth will prevail, no matter how it comes out."

(Counsel for Waialua moved to strike such statement, but the Court took no action on the motion.)

DR. JAMES R. JUDD

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

I am a physician and surgeon, and have for many years last past practiced my profession in the Territory of Hawaii, and have been the physician attendant upon Eliza Yates Mackenzie. She is seventy-two years old and has had a great deal of illness, and at the present time she is confined in bed and has been in bed for several months with a broken hip. It is common with old people. She has a good memory for past events at times—a very active memory. Of recent events her memory is not as good. That is a matter which is common with old people. I have never made any special observations as to her memory. I am not a mental expert; I could not give any scientific summary of her mental condition unless things were checked up; for instance, she might repeat a thing accurately, and the next time subsequently alter it in some way, but considering her age and her illness, I should say that she has a fairly good memory—at times confused, uncertain and unreliable.

MRS. MIRIAM AULD

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

I am the Assistant Probation Officer for girls, working with Mrs. Lorenzen. I heard Mrs. Lorenzen and Mrs. Dwight talking, and Mrs. Lorenzen said, "What do you think of a girl jumping from a table when she is pregnant?" I heard the name Eliza used, and a statement that a normal girl would not do that.

Cross-Examination.

Mrs. Dwight is a daughter of James L. Holt, one of the named Respondents in this case.

JOHN D. HOLT, JR.

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

(Over the objection of Respondent, on the ground that the same was not proper rebuttal, witness testified:)

I recall a conversation where Mr. Hite was present in which Mrs. Lorenzen discussed Eliza Holt's mental condition. I remember the exact words. She said: "You, Johnny, know as well as I do that Eliza Holt was lolo. They called her ihepa and feeble-minded. Don't you think so?" She also told the attorney to go out and get certain persons who had

(Testimony of John D. Holt, Jr.)

just come from England who would make good material witnesses, and she said to me: "Johnny, you know what Eliza's condition was; what the matter with her was. Can't you get witnesses?"

Cross-Examination.

Mr. James L. Holt is my second cousin and I am a nephew of Annie Kentwell.

(By stipulation of counsel, Exhibit F-8 was received in evidence and reads as follows:

RAW SUGAR PRICES 1900 to 1928 INCLUSIVE
AVERAGE MONTHLY PRICE FOR 96°
CENTRIFUGAL SUGAR AS COMPILED
BY WILLETT & GRAY

	Cents per lb.
1900	4.566
1901	4.047
1902	3.542
1903	3.720
1904	3.974
1905	4.278
1906	3.686
1907	3.756
1908	4.073
1909	4.007
1910	4.188
1911	4.453
1912	4.162
1913	3.506
1914	3.814

(Testimony of John D. Holt, Jr.)

	Cents per lb.
1915	4.462
1916	5.786
1917	6.228
1918	6.447
1919	7.724
1920	12.326
1921	4.763
1922	4.632
1923	7.020
1924	5.964
1925	4.334
1926	4.337
1927	4.730
1928	4.229

Counsel for Respondent asked that the record show that service of the Respondent Waialua's Answer had been duly made upon Mr. John R. Desha, the attorney for James Lawrence Holt.

Counsel for Petitioner renewed his motion to reopen Petitioner's case for the purpose of obtaining the deposition of Mr. Bennett, the bank manager in Oxford, stating that he (counsel) had promised to present a written motion but was content to rest on the oral motion heretofore presented. Counsel stated that he had been advised that such deposition had been taken in England and therefore offered such deposition in connection with his motion to reopen without the physical presence of such deposition in Honolulu, notifying Court and counsel that it would be further offered when it arrived. On objection by

(Testimony of John D. Holt, Jr.)

Respondent, the Court, in sustaining the objection to the offer, ruled:

"The Court has already made its rulings in sustaining the objection. If the deposition should arrive prior to the Court finishing the matter up, the Court feels that if any error is being made and if any rulings heretofore made are changed, the Court will indicate that as a changed ruling, and will indicate that it has or has not, and use the deposition as a part of the record. The record may stand now as heretofore with the objections as sustained. If there is any change in them the Court will indicate it clearly in any decision.")

P. H. BURNETTE

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

I was at one time associated with Lawrence Kentwell in the Hawaiian Realty & Maturity Company. I remember a Mr. Medeiros who was there also. I remember that Eliza Christian used to come to the office of the Hawaiian Realty and Maturity Company. Referring to the testimony of Mr. Medeiros that she came there and was there for several days, in an effort to keep her away from her husband, I do not recall that. She could not read. She never held any kind of rational conversation with anyone.

(Testimony of P. H. Burnette:)

Cross-Examination.

I might have said a word or two at a time. I never did see her try to read.

MRS. P. H. BURNETTE

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

I knew Mrs. Kentwell and I was at their home at Waikiki very frequently, every Saturday. So far as I observed, she did not do household work for the Kentwells.

(Counsel for Petitioner offered the proceedings of the appointment of George H. Holt as Guardian of Eliza R. P. Christian, as to which the court stated that no final ruling would be made on the offer but it would be left as one of the issues incidental to the main issues of the case.)

(Petitioner rested.)

By stipulation of the parties, the question of accounting for the undivided 1/3 interest in the Holt lands in possession of the Respondent, Waialua Agricultural Company, since April 10, 1922, was left over to await the determination of the trial court on the issue of the right of cancellation and avoidance of the deed of May 2, 1910, on the plead-

ings then before the court. Following the decision of the trial court on May 11, 1929, the following proceedings took place and the following testimony was taken. Preliminary, however, to the taking of testimony, Respondent Waialua Agricultural Company noted its objections to the accounting on the issues raised in its answer, and further, that there could be no accounting during the time of the lease already in evidence (Exhibit A-8), that is to say, the lease of March 17, 1905, for a period of 25 years from April 1, 1905, and that there likewise could be no accounting without Annie Kentwell being made a party to such proceeding. The court overruled the objection of Respondent and ordered the accounting hearings to proceed. Counsel for Petitioner thereafter stated, referring to Petitioner's Exhibit Ac. B-1 (being document mentioned hereinabove as 29 in the list of stipulated documents):

"We want the record to show definitely at this time that with respect to the lease or a lease to the Hawaiian Pineapple Company from this Respondent (as to the date and terms of which we will make more definite), under the rule of law requiring us to make an election as to whether we will elect to repudiate that lease or affirm that lease and accept the benefits of it, we do elect to affirm the lease and accept the benefits of the lease as we contend we are entitled not only to the rental which has been paid the user at this time but with respect to the users under the lease subsequent to this time. I think that would be clear otherwise, but I don't want there

to be any question on it, inasmuch as one case in Hawaii has said there must be a definite election." Counsel further stated that the principal question to be presented to the court was whether or not the Petitioner was entitled to profits as distinguished from mere rental value on the lands used by Waialua.

The court ruled that the accounting should date from April 10, 1922, (the death of John D. Holt), when the interest of Mrs. Christian would have vested, and that the accounting was based on an ouster by Waialua under a claim of sole ownership which would give Mrs. Christian, as an ousted co-tenant, a proportionate share in all rents received from third parties during the period after April 10, 1922, and also her proportionate share in the reasonable rental value of all the area actually used and occupied by Waialua itself. The court further ruled that if there should be any question of profits entering into the problem at all, it could only get into the case on the Respondent's opening the subject by way of defense in reducing the claim for rental value.

Petitioner's Exhibit Ac. B-1 was received in evidence without objection, being an indenture of lease dated January 10, 1923, between the Waialua Agricultural Company, Limited and the Hawaiian Pineapple Company, covering the lands in controversy as well as other lands, and being the lease hereinabove referred to as 29 in the stipulated documents. After discussion by counsel, the court ordered:

"Let the record show that the Respondents are willing to abide by an equal distribution per acre

basis and if the Petitioners desire any other basis they will have to put the facts on to show it."

Waialua was collecting rentals on pineapple lands prior to the effective date of the Hawaiian Pineapple lease (Ex. Ac-B-1), namely January 1, 1923. There was thereupon received in evidence a document showing the proportion of rentals attributable to pineapple leases on the Holt lands for the period April 10, 1922 to December 31, 1922, of which rentals Petitioner's proportionate share, if so entitled thereto, would be the sum of $12,333.

It was stipulated that the total area of the Holt lands covered by the lease (Ex. Ac. B-1) was 6476.45 acres and that these lands were the subject of this litigation.

Petitioner thereupon offered in evidence certain leases in connection with values on sugar cane lands, counsel for Respondent stipulating to the facts in regard to such leases as follows:

(1) Lease executed August 30, 1923, Oahu Railway & Land Company to Waialua; area 58.74 acres; term 20 years from May 2, 1924; annual rental $3174.80, or $20 per acre;

(2) Lease executed January 1, 1924, Addison Gulick to Waialua; area 91.65 acres; annual rental $1325.35, or an annual rental of approximately $14 per acre;

(3) Lease executed January 1, 1924, Francis Gulick to Waialua; area 105.50 acres; term 30 years; annual rental $1660.80, or an annual rental of approximately $15 per acre;

(4) Lease executed October 1, 1925, Oscar P. Cox to Waialua; area 19.31 acres; term 23 years; annual rental $325, or an annual rental of approximately $17 per acre;

(5) Lease executed January 1, 1923, Estate of Henry Wharton to Waialua; area 25 acres; term 10 years; annual rental $300, or an annual rental of $12 per acre;

(6) Lease executed January 1, 1923, Kekuewa to Waialua; area 25 acres; term 10 years; annual rental $500, or an annual rental of $20 per acre;

(7) Lease dated June 5, 1925, Ii Estate to Oahu Sugar Company; area 1318.23 acres; term 32 years; annual rental $22.50 per acre for the first 10 years, and thereafter $25 per acre;

(8) Lease January 1, 1925, Ii Estate to Oahu Sugar Company; area 9.5 acres; term 9 years; annual rental of $20 per acre;

(9) Lease executed January 1, 1925, Ii Estate to Oahu Sugar Company; area 11.61 acres; term 9 years; annual rental of $20 per acre;

(10) Lease executed April 26, 1923, Bishop Estate to Oahu Sugar Company; area 146.15 acres; term 17½ years; annual rental $2700, or an annual rental of approximately $19 per acre;

(11) Lease executed during the year 1920, Territory of Hawaii to Honolulu Plantation; area 150 acres; rental 5% of sugar produced, less marketing expenses;

(12) Lease executed in 1918, Damon Estate to Honolulu Plantation; area 1804 acres, of which 1545.36 acres were in cane on December 18, 1918; term 10 years; annual rental $30,000;

(13) Lease executed January 27, 1927, Damon Estate to Honolulu Plantation, of land "having a total area of 1451.66 acres, of which 1223.91 acres are or are deemed to be cane lands"; term 15 years; annual rental $28,687;

(14) Lease executed in 1922, Territory of Hawaii to Kekaha Sugar Company, of 5,000 acres of cane lands on the Island of Kauai; term 15 years; rental of 7½% of the sugar produced, less marketing expenses. This lease carried with it the Government water rights for mountain and other water;

(15) Lease, Louise Gulich Whitaker to Waialua; area 268.10 acres; rental $2681 per annum, or an annual rental of $10 per acre. The lease, however, covered both sugar and other lands;

(16) Lease dated October, 1923, Catherine McGrew Cooper to Honolulu Plantation; area 52.627 acres; term 10 years; rental $1200 per annum, or an annual rental of approximately $23 per acre per annum;

(17) Lease executed February 28, 1929, Bishop Estate to Honolulu Plantation; area 42.79 acres; term 11 years 4 months; annual rental $820, or an annual rental of approximately $19 per acre.

(Counsel for Petitioner then offered to prove from the records of the Waialua Company the actual income and profits accruing to it from the date of the vesting of Petitioner's interest in 1922 to date. In refusing such offer the Court stated:

"As the Court has heretofore indicated, the question seems to the Court to be the reasonable rental value of the Petitioner's share of the Holt lands, and not the question of an attempt to segregate or allocate profits of the Waialua Agricultural Company made as indicated by the record which is before us, not only out of the use of land or out of the use of the Holt lands by themselves, but out of the organization of the various lands and organization of its sales force and marketing force, none of which has reference to the tenancy of the land. The Court, for the reason stated and more elaborately indicated heretofore, will refuse the offer."

The offer was also made to introduce evidence showing what reasonable charge should be made in arriving at the profit derived and which was derived from the lands by reason of the lease. Counsel for Waialua objecting to such offer, the Court sustained the same.)

MR. JAMES GIBB

was called as a witness for Petitioner, was sworn, and testified as follows:

Direct Examination.

I was for many years manager of the Honolulu Plantation on the Island of Oahu and I have had occasion to become familiar with the matter of rentals paid for sugar lands on this island and I am familiar with the Holt or Helemano lands concerned in this litigation. As a result of my study, in my opinion a fair, reasonable rental value for those portions of the Holt lands which are designated as sugar cane lands and totaling 1622 acres, from April 10, 1922 down to the present time, would be, if it were a cash rental, not less than $15 per acre per annum, and if a percentage rental, 5%, with a minimum of say $15 per acre. Cash rental would include areas necessary for reservoir sites, railroads, and the like. In connection with the percentage basis, you deduct the marketing expenses, which run about $10 per ton, and pay the lessor on the net received. In fixing these values, I took into consideration existing leases and also new leases that have been entered into in the last ten years or more, chiefly cash rentals, and I likewise considered, in connection with such leases, the differences existing between the types of lands involved as compared with these lands. In connection with cash rentals, it is on the basis that the lessee pays the taxes. In addition to the rental

(Testimony of Mr. James Gibb.)

value. I would expect to have the Plantation incur whatever expense was necessary to bring additional water to the land. My value is based on the fact that the land itself does not have water but with the idea that water was available to it.

Cross Examination.

I understand the Holt sugar lands run from an elevation of 20 feet up to 700. In my opinion the value of the Holt lands on a rental basis from 20 feet up to 250 feet would be approximately $20 per acre; from 250 feet up to 500 feet, say $15 per acre; and from 500 feet to 700 feet about $10 per acre. The cost of putting water on the lands themselves would have a material bearing on the rental value of the lands, and the cost of pumping water to the higher elevations would be material.

I am familiar with the leases offered in evidence by Peittioner. The leases from the Ii Estate to Oahu Sugar Company are all low-lying lands, say up to an elevation of 50 feet, so this is an advantage that Ii Estate lands have. The Ii Estate lands are comparable with the Holt lands but I would not consider that the Holt lands would have such a high rental value. Likewise, the productivity of the respective lands would make a difference. The Holt lands do not have short ratoons. The lands leased by the Bishop Estate to the Oahu Sugar Company would run up to an elevation of about 60 feet and would be more comparable with the Ii

(Testimony of Mr. James Gibb.)

Estate lands, both being able to short ratoon. The land leased by the Damon Estate to Honolulu Plantation would carry pump water up to a maximum elevation of 65 feet. Most of the Damon Estate lands are very flat lying pieces. The production there is usually good. It would compare in rental value more particularly with the Ii Estate lease. I do not know which area produces the most sugar—the Damon Estate or the Holt lands—but I would say, as a plantation man, that the Damon land would produce a little more than the Holt. The other Bishop Estate lands leased to Honolulu Plantation, and the Cooper lease, are all low-lying lands.

In connection with the Kekaha lease, that includes all the government water from the mountain, and since they have the government water they are now going up higher on the ridge. Kekaha is in a part ideal for sugar cane. I do not know the two leases of lands on the Pioneer Plantation, namely, the Wahikuli and Honokawai. In considering the productivity of these various lands, I have assumed good management in any case. I did not have in mind the possibility of renting these Holt lands to outsiders but merely considered such value in relation to Waialua as sugar cane lands. I did not go into the question if a third party had the Holt lands whether such party could get water from the plantation and raise cane. I took into consideration that I was dealing with an undivided interest. Some-

(Testimony of Mr. James Gibb.)

times an undivided interest brings a higher rental than a full fee simple interest; if it is a third of a big piece of land there is far more chance of that being rented than a smaller portion. In this particular case I should say there would not be much difficulty. A 1/3 interest in the whole of the Holt lands would rent to Waialua on the same proportionate basis, but as to outsiders I would rather not be pressed on the point. I feel that on the Holt lands short ratoons could be raised up to 250 feet elevation, but the mere fact they don't short ratoon does not indicate bad management, as Waialua has a large area of low-lying lands which they would be most likely to take in preference to short ratoons.

Re-direct Examination.

The percentage basis is regardless of the productivity of the particular area. It has been my observation that there has been a marked increase in the last ten years or so in cash rentals. In placing my value of $15 per acre cash rental for the Holt lands, I took into consideration that the low-lying lands covered by the Damon lease to Honolulu Plantation, the Ii Estate leases to Oahu Sugar Company, and other low-lying lands, have a greater productivity and greater value as far as the land is concerned. In connection with the Oahu Railway & Land Company lease to Waialua, rental there is $20 per acre per annum, but it is often the case that a plantation will pay a little more for small areas running through another land, as that does, than

(Testimony of Mr. James Gibb.)

they would for a bigger area, though as far as the productivity of the land is concerned, there should be no difference in the rental My testimony of the value of the Holt lands is based on the assumption that water could be procured for such land.

Re-cross Examination.

Even though water might not be procured, the Holt land might have produced cane profitably at the 700-foot elevation, and this would apply on down to the 500-foot elevation. In connection with the Oahu Railway & Land piece leased to Waialua. I did not notice that the Waialua Company was putting a fill across the gulch, or what effect this lease might have on any rights to place tracks in regard to other areas of the plantation.

Re-redirect Examination.

In placing my value on the Holt lands, I have not considered rights of access to other parts of the plantation. To put water on the upper part of the Holt lands would cost 6¢ per million gallons foot lift. In fixing the values of the Holt lands for rental purposes, I had in mind the lower third would be worth $20 per acre, the middle $15, and the upper $10,—$15 being a fair average figure. The cost of pumping up to the 500-foot elevation would be 6¢ per foot per million gallons, or $30 per million gallons raised 500 feet.

(Respondent's Exhibits Ac. 2, Ac. 3, and Ac. 4 were received in evidence, without objection, and read as follows:

(Testimony of Mr. James Gibb.)

EXHIBIT Ae-2

Statement Showing Production of Holt Lands for the Years 1922 to 1928 inclusive

Year	Area in Acres	Tons	Tons Sugar Per Acre
1922	900.17	3781.71	4.172
1923	524.22	2367.35	4.516
1924	770.18	4963.27	6.444
1925	670.80	3931.20	5.860
1926	729.20	5879.96	8.064
1927	808.91	5965.11	7.374
1928	769.15	6861.80	8.921

EXHIBIT Ae-3

Statement Showing Prices Received for Sugars for the Years 1922 to 1928 inclusive

Year	Price Per Ton
1922	$ 91.77
1923	133.25
1924	112.00
1925	83.99
1926	84.46
1927	90.19
1928	85.67

EXHIBIT Ae-4

Statement of Marketing and Containers Expense for the Years 1922 to 1928

Year	Marketing Expense Per Ton	Container Expense Per Ton	Total Per Ton
1922	$9.28	$2.07	$11.35
1923	9.85	2.19	12.04
1924	9.71	2.48	12.19
1925	8.86	2.05	10.91
1926	8.35	2.58	10.93
1927	8.57	2.64	11.21
1928	8.45	2.44	10.89

JAMES BUCHANAN THOMPSON

was called as a witness for Respondent, was sworn and testified as follows:

Direct Examination.

I am at the present time manager of the Waialua Agricultural Company. Prior to that, I was manager of the Oahu Sugar Company. Prior to that, for eighteen years with the Hawaiian Commercial & Sugar Company, being graduated there from one position to another, starting in as a luna and up to assistant manager. I was particularly in charge of the fields and the agricultural department at Hawaiian Commercial on the Island of Maui. I have been on the Pioneer Mill Company fields on the Island of Maui and am familiar with the lands of Wahikuli. I would say they would compare very favorably with the Holt lands and, as far as climate is concerned, they would be better. Pioneer is a place very well adapted to growing sugar cane: a hot place with not so much wind. It is hotter in Wahikuli than on the Holt lands. The soil at Wahikuli is rather stony and I think it is better soil than the Holt lands. The stony part is on the lower part of the lands.

(Respondent's Exhibit Ac. 5 was received in evidence, without objection, and is Government Lease No. 1078, dated May 6, 1919, for the lands of Wahikuli, to the Pioneer Mill Company, of an area of cane lands of 1479.70 acres, in addition to which there is reservoir land, plantation railroads, etc.,— a total of 1972 acres, of which 439 are either waste

(Testimony of James Buchanan Thompson.)

or pastural; rental $11,000 per annum; term 15 years.)

WITNESS RESUMES: I have also been over the lands of Honokawai at the Pioneer Mill Company. Such Honokawai lands are a little better than the Wahikuli lands.

(Respondent's Exhibit Ac. 6 was thereupon received in evidence, without objection, being Government Lease No. 1841, dated May 10, 1927, for cane land of 931.41 acres, with certain taro land and other lands, making a total of 1153.89 acres, at an annual rental of $6,000.)

WITNESS RESUMES: At the present time I should say that perhaps 500,000 gallons, or perhaps 700,000 gallons, of water are required to produce a ton of sugar. In connection with the Oahu Railway lease, there are also 40 acres which we use for our tracks, sidings, and anything else on which we do not pay any rent. The Whitaker, Kekuewa and Cox leases at Waialua are all on low-lying pieces of land at an elevation of not more than 30 or 40 feet.

Cross Examination.

I went over these Pioneer Mill lands in 1916 or 1917, going over the lands just as from one plantation to another on observation trips. I do not know how much sugar was being produced on the lands covered by the Honokawai and Wahikuli leases but I do know that they had very fine cane on those lands at the time—better looking cane than they had on the Holt lands when I went to Waialua in 1924. In my opinion it would cost no more to culti-

(Testimony of James Buchanan Thompson.)

vate the Pioneer lands than the Waialua. At Pioneer they have the Honokawai Ditch that runs up to 800 or 900 foot elevation. There is a mountain stream that takes care of the Honokawai and Wahikuli lands and they also have pumps. I do not know how much they do by pumping and how much by gravity, nor the comparative cost of putting water on those lands, as compared with the Holt's.

The Pioneer lands continue up farther for sugar purposes than the 700-foot elevation. They start at sea level. I don't know how much higher than 700 feet. The upper part of the Pioneer lands are steeper than the Holt.

CHARLES T. BAILEY

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I am Land Commissioner for the Territory of Hawaii. I am familiar with the lands of Wahikuli on the Pioneer Mill Company Plantation. That is all dry land. The same is true of the Honokawai lease.

Cross Examination.

I negotiated these leases. At the time of the negotiation of these leases they were under similar tenure. The present rentals I think are somewhat higher.

(Testimony of Charles T. Bailey.)

Re-direct Examination.

Both of these lands were in sugar cane at the time of the negotiation of the new leases.

MR. CARL BISCHOFF

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I am the Assistant Civil Engineer at Waialua Plantation and have been assistant engineer for the past three years and have prepared exhibits in this case.

(Respondent's Exhibits Ac.-8 and Ac.-9 were received in evidence, without objection, and are in words and figures as follows:

EXHIBIT Ac-8

	Holt Lands in Contour	Below Higher Elevation
0- 50 feet	75.19	
50-100 "	80.27	155.46
100-150 "	75.90	231.36
150-200 "	98.76	330.12
200-250 "	79.25	409.37
250-300 "	74.02	483.39
300-350 "	84.78	568.17
350-400 "	103.79	671.96
400-450 "	132.53	804.49
450-500 "	128.67	933.16
500-550 "	106.41	1039.57
550-600 "	160.87	1200.44
600-650 "	124.85	1325.29
650-700 "	212.48	1537.77
	1537.77	

(Testimony of Mr. Carl Bischoff.)

EXHIBIT Ac-9

Holt Estate Lands

Classification of Cane Lands, Pump and Mountain Water Between 50-ft. Contours—June, 1929

Contours	Areas Between 50 ft. Contours	Areas Under Pumps 7 & 8	Areas Under Pump 10	Areas Dependent on Mountain Water
0- 50	75.19	22.57	23.13	29.49
50-100	80.27	—	80.27	—
100-150	75.90	—	75.90	—
150-200	98.76	—	98.76	—
200-250	79.25	—	79.25	—
250-300	74.02	—	74.02	—
300-350	84.78	—	79.62	5.16
350-400	103.79	—	13.03	90.76
400-450	132.53	—	—	132.53
450-500	128.67	—	—	128.67
500-550	106.41	—	—	106.41
550-600	160.87	—	—	160.87
600-650	124.85	—	—	124.85
650-700 or to Wahiawa Ditch)	212.48	—	—	212.48
Totals	1,537.77	22.57	523.98	991.22

Note. The above areas are net, taken from latest field surveys, and do not include areas of level, straight or supply ditches.)

WITNESS RESUMES: The total number of acres given is 1537.77. This is an apparent discrepancy from prior exhibits showing 1550.95 acres of cane land, the difference being merely the difference between the gross and net area, for since 1924 we leave out the level ditches. The mountain water can be brought all over the plantation, if we have enough. The Poamoho Pump, known as Pump

(Testimony of Mr. Carl Bischoff.)

No. 10, was completed in April, 1928. At Waialua, and more particularly on the Holt lands, between 4,000,000 and 5,000,000 gallons of water per acre per crop is applied.

Cross Examination.

Prior to April 1928, as appears by reference to Exhibit Ac.-9, there were only 22.57 acres in the entire Holt area which was watered in any way by pumps. Such small area was supplied by Pumps 7 and 8—Pump 7 below a small portion of the Holt lands and Pump 8 in the Opaeula section. This small area of 22.57 acres could also be supplied with mountain water, but the mountain water is not generally taken down that low unless there was an abundant supply.

(It was admitted by counsel for Waialua that including the area of camps, reservoirs, and the like, of 72 acres, there was a total of 1622 acres and a fraction of lands used to produce cane.)

WITNESS RESUMES:

Re-Direct Examination.

Pump 10 was designed for about 1200 acres of sugar cane land and is used in connection not only with the Holt lands but other lands. Exhibit Ac.-9 shows that about 523 acres on the Holt land can be reached by Pump 10, the balance of the 1200 acres being other lands.

(At this point, by agreement of counsel, the following documents or statements were received in evidence:.

(1) Lease executed February 10, 1919, Edward S. Holt to Waialua, leasing his 1/27 interest in the Holt lands, and his 1/9 interest in Grant 1092, for the remainder of the term under the lease of March 17, 1905 (Ex. A-8) and for the further term of 19 years from the expiration of said lease, Exhibit A-8, to the 1st day of April, 1949, upon the same terms and conditions as set forth in said lease, but at an annual increased rental of $1200 from said April 1, 1919, in lieu of the $333.33 payable under said lease of March 17, 1905 (Ex. Ac.-10);

(2) Statement showing the tons of sugar produced per acre per crop on the several Ii Estate leases with the Oahu Sugar Company, showing, for the years 1922 to 1925 inclusive, an average of 7.01 tons, and for the years 1926 to 1929 inclusive, 7.82 tons per acre (Ex. Ac.-11);

(3) Statement showing tons of sugar per acre per crop produced on the fields under lease by the Bishop Estate to the Oahu Sugar Company from the years 1923 to 1929 inclusive, showing an average of 10.86 tons sugar per acre (Ex. Ac.-12);

(4) Statement showing production records on the Wahikuli lease and the Honokawai lease, for the years 1922 to 1928 inclusive, at the Pioneer Mill Company (Ex. Ac.-13), the statement showing an average of 7.56 tons sugar per acre per crop for the Wahikuli lease and 7.15 tons for the Honokawai;

(5) Statement showing tons of sugar per acre

per crop produced under lease by the Honolulu Plantation Company from the Bishop Estate (Ex. Ac.-14), showing tons of refined sugar per acre on one field of 2,285 acres at an average of 7.46 tons under the period 1919 to 1927 inclusive, and on another field of 38.49 acres at an average of 6.09 tons over the same period. As Honolulu Plantation produces refined sugar instead of the raw, it is necessary to add 7% to the Honolulu Plantation records to translate the same into terms of raw sugar as in the Oahu or Waialua records;

(6) Statement showing tons of sugar per acre per crop produced on the fields of the Damon Estate under lease to the Honolulu Plantation (add 7% for correction from refined to raw sugar), such production being, in tons of sugar per acre for the respective crops, as follows: 1916—6.025; 1917—7.208; 1918—6.645; 1919—6.843; 1920—3.916; 1921—4.677; 1922—4.432; 1923—4.78; 1924—6.38; 1925—6.017; 1926—9.24; 1927—10.06; 1928—9.04.

Counsel for Petitioner then offered to prove that the amount of water rising on the upper lands and reaching the Holt lands at the intakes was an amount over and above that required for the uses of upper riparian owners that a certain number of billion gallons a year had been used for commercial and agricultural purposes by Waialua over a period of years over which the accounting ran, and that he would further prove the value of such waters in terms of annual rental value. Upon objection being interposed thereto by counsel for Waialua, on the ground that Respondent had a lease from the

Bishop Estate for such waters, the offer was refused.

It was stipulated between counsel that either party could use and refer in their argument to any standard work on mathematical tables, mortality tables, life expectancies, or otherwise, without physically introducing such books or tables into evidence.

It was admitted by counsel for Petitioner that at the time of the accounting hearing James L. Holt was not financially responsible or would not be able to respond to any judgment which might be rendered against him.

Mr. Ulrich, of counsel for Petitioner, filed an appearance for Annie Kentwell personally and as Receiver. Respondent moved to strike the same from the files as being improper in form and substance, collusive with complainant, and filed too late in the cause, and under the pleadings Annie Kentwell is not shown to be a party in interest and does not offer to do equity. The court overruled the motion to strike.

Counsel for Respondent admitted that demand was made upon Waialua on April 5, 1928, the suit herein being instituted on May 8, 1928.)

TRIAL ON REMAND.

Following the decision of the Supreme Court of Hawaii on April 18, 1931 (31 Haw. 817), and in pursuance to the Order of Remand issued thereon, a trial on remand was had.

Respondent, on November 18, 1931, and November 20, 1931, filed and made a motion, supported by affidavits, to take the depositions of Eliza R. P. Christian; Oxford, England; Dr. Cyril Burt, London, England; Dr. Smith Ely Jeliffe, of New York; Martin Alfred Baker of London; A. W. H. Taylor of Oxford; C. Goldsworthy of Oxford; Annie H. Kentwell of Oxford; Dr. Alfred Tregold of London; and Mr. and Mrs. Frank Hudson Jenkins of Oxford, as to matters showing the mental competency of Eliza R. P. Christian, and more particularly showing her mental competency to have executed said lease of March 17, 1905 (Ex. A-8) and the instrument of August 31, 1906 (Ex. 2-G). The evidence sought by Respondent related to opinions and observations of the witnesses named subsequent to 1909 and 1910, except as to the London mental experts named, the request in the case of these experts being for an examination by them of Eliza R. P. Christian; and except as to Dr. Smith Ely Jeliffe, a mental expert of New York, whose testimony would relate to the mental competency of Eliza R. P. Christian based upon his study of her testimony as set forth in the transcript of the Hall trial (Ex. 4), and upon information given him by counsel for Respondent. The Court denied respondent's motions to take said depositions, ruling:

> "* * * I have been re-reading the decision of the Supreme Court in connection with the affidavit,—in connection with the pleadings as they now stand, and in my opinion and I so find from

the record before me that the issue of mental competency has been decided by the Supreme Court as the law of the case; that the Supreme Court has made a finding well within the issues of the proceedings that Eliza Christian was a congenital imbecile; and it is for that reason that they do find her incompetent in 1910; and that the question at issue before this court on the remand or amendments bring in the two additional deeds is the question of determining what shall be done on voidable instruments,—whether or not the instruments should be void under all the equity of the case or whether or not they should be allowed to stand and therefore modify any question of damages that might have arisen but for these instruments from the date of the vesting of the title in Eliza Christian on the cancellation of the deed of May 2nd, 1910. Stated perhaps a little bit more clearly and distinctly, I am brought to the conclusion that the issue of Eliza Christian's incompetency is not before this court."

Thereafter the following proceedings took place:

"Mr. CASTLE: We will of course have a great deal of evidence on the question of mental incompetency. It would seem useless procedure, in view of Your Honor's ruling, to call those witnesses into court and offer their evidence if this is a definite ruling.

The COURT: I am bound at this time to make a definite ruling on that: as finding upon further hearings of the court that the issue of

Eliza Christian's competency or incompetency is not before this court in this stage of the proceedings, the court in that connection because of that ruling would have to deny the examination of any witness bearing upon her alleged competency or incompetency."

The Court ruled that testimony of witnesses as to observations and descriptions of the Petitioner subsequent to 1909 would not be received, but that if Respondent had a type of evidence which came between expert evidence already received and the former type, it should make specific application for the admission thereof.

The Court further ruled that as to the facts and circumstances surrounding the execution of the lease (Ex. A-8) and the instrument of August 31, 1906 (Ex. 2-G) a closed commission might issue to take the testimony of Annie Holt Kentwell but that as to Eliza R. P. Christian the Court stated that it felt that it was being asked to do a futile thing to either require or allow an examination of one who has been adjudicated, as far as this proceeding is concerned, a congenital imbecile, and that the issue of whether or not she was or was not an imbecile was a matter that was before counsel when they were taking the testimony in England at the former trial, that then and there was the place for taking such testimony. The Court further ruled that the only restriction imposed upon a closed commission directed to Annie Kentwell was that her testimony should not have to do with any further questions as

to Eliza Christian's mental competency. Thereupon Respondent declined to ask for a closed commission to Annie Kentwell.

On January 7, 1932, after issue joined, Respondent renewed its motion, supported by affidavits, to take the depositions of the parties mentioned in said motions of November 18 and 20, 1931, together with the additional depositions of Bessie Alice White, Manor Park, England; Kate Nixey, Stamford, England; and Sophia Pacey, Oxford, England, as to matters showing the mental competency of Eliza R. P. Christian, and more particularly showing her mental competency to have executed said lease of March 17, 1905 (Ex. A-8) and the instrument of August 31, 1906 (Ex. 2-G). The Court denied Respondent's motions to take said depositions, and reaffirmed its prior ruling that the issue of competency as of any time had been decided and was no longer before the Court on any of the hearings under the Second Amended Petition.

On February 29, 1932, the hearing on remand commenced in Honolulu before the Circuit Court of the First Judicial Circuit, Territory of Hawaii, Judge Cristy presiding. Petitioner was represented by Barry S. Ulrich and Charles M. Hite, of the firm of Ulrich & Hite, of Honolulu; Respondent Waialua Agricultural Company, Limited, by Herman Phleger, of the firm of Brobeck, Phleger & Harrison, of San Francisco, and Alfred L. Castle, of the firm of Robertson & Castle, of Honolulu. Annie Kentwell having filed her answer and submission to the jurisdiction of the Court, and James

L. Holt being represented by John R. Desha. Both sides announcing that they were ready, the trial proceeded as follows:

Counsel for Petitioner stated that on the questions dependent upon the execution of the lease of March 17, 1905 (Ex. A-8) and the assignment of rentals of 1906 (Ex. 2-G) and which were to be considered in determining the question of their cancellation, the Petitioner rested upon the record and evidence heretofore before the Court; that in reference to the accounting there would be no further evidence as to the twelve thousand odd dollars representing rentals accrued and paid on the pineapple lands prior to the lease of 1923 (Ex. Ae-B1) and no further evidence in so far as the proportionate allowance of the rentals under the latter document, but that further evidence would be adduced with respect to sugar rentals since the original decree entered October 16, 1929.

Counsel for Respondent stated that he wished the record to show that in participating in the present proceedings on remand the Respondent did not waive or withdraw any of the previous pleadings or motions heretofore made or interposed by it, but that each and every one of the same were reaffirmed.

Counsel for Petitioner re-offered all evidence heretofore taken and received by the Court in the prior proceedings but stated that such evidence was before the Court without such offer or reception. Counsel for Respondent Waialua objected to such offer of evidence on the grounds, first, that such evidence had not been introduced in a former trial between the same parties with the same issues:

second, upon the further ground that it had not been shown that the witnesses who previously testified were dead or otherwise unavailable; and, third, upon the further ground that such testimony was hearsay as to the Respondent Waialua and as to Annie Kentwell, the predecessor of Waialua. After argument, the Court ruled: (1) that as to any witnesses heretofore examined on the part of the Petitioner that the Respondent wished to cross-examine, the Court would be prepared to permit such cross-examination; and (2) that the evidence as appearing in the prior records, except for such additional examination as may be desired, was to be considered and be a part of the record and hearings then being had, and that if there were any witnesses in the previous hearings that either party desired examined, such examination would be permitted, if they are witnesses within the Territory.

JAMES GIBB,

a former witness for Petitioner, was called as a witness for Petitioner, was sworn and testified as follows:

Direct Examination.

The fair and reasonable average annual rental value for the Holt sugar lands at the present time would be $15 per acre if a cash rental, or 5% if it was a percentage rental, with a minimum of $15 per acre, lessee paying taxes, and that such would

(Testimony of James Gibb.)

be a fair average rental per acre per year for the time which has intervened since the prior heaings.

Cross Examination

I am testifying on the lands as fully improved lands.

Re-direct Examination.

I have in mind the land as it has been for the last two years as under cultivation in cane. It is for the same cane land as I testified to in prior hearings, with water available, and without considering the cost of bringing water to the land.

Re-cross Examination.

The present price of sugar is 2.85¢ per pound, it was approximately 3.95¢ to 4¢ a pound in August 1929.

Further Re-direct Examination.

I am holding to my same figure of value, despite the lower price of sugar, in part because Waialua has doubled her tonnage of sugar per acre in the last ten years, considerably higher than it was in 1929. This is a condition general to plantations in the Territory. Plantations today produce more sugar per acre than they formerly did. If a renter of the land in question paid $15 per acre per annum he would get the use of that land with whatever happened to be on it at the time of lease.

Petitioner thereupon rested.

Respondent thereupon moved that the petition be dismissed as to the issues involving the lease of

(Testimony of James Gibb.)

March 17, 1905 (Ex. A-8), and the instrument dated August 31, 1906 (Ex. 2-G), raised by the amendment set forth in Petitioner's Second Amended Petition, upon the following grounds:

That the evidence before the court on this proceeding fails to make out a case entitling the Petitioner to the cancellation of the said lease of 1905 or the said assignment of 1906, or to any of the relief prayed for, because (a) there is no evidence to sustain the allegations of the second amended petition bearing upon the said 1905 lease and the said 1906 deed; (b) there is no evidence sufficient to justify a finding that the Petitioner was mentally incompetent at the date of the execution or delivery of either the 1905 lease or 1906 assignment; (c) there is no evidence that at the time of the execution or delivery of either of said instruments Respondents knew, or that Annie Kentwell knew, of the alleged mental incompetency of Petitioner or had knowledge of facts which would put a reasonable person upon inquiry, which inquiry, if honestly pursued, would lead to such knowledge; (d) there is no evidence excusing Petitioner's delay in bringing this suit, but, on the other hand, the suit is barred by the laches of Petitioner, her guardian and her attorney; (e) the evidence does not show there is equity in Petitioner's behalf which would justify either the relief prayed for or any relief.

Counsel for Respondent further stated that the foregoing motion was based in part on the fact that

(Testimony of James Gibb.)

there was no evidence before the court with respect to the issues raised by the amended pleadings other than the testimony of Mr. Gibb who had just left the stand.

The court thereupon, upon the record, overruled the motion to dismiss, stating that all matters contained in the motion had been argued at length before. On further discussion by counsel, the court ruled that the testimony of any witnesses having to do with issues that would affect damages or in connection with any matters that Waialua had done with the lands raising equities in its behalf would be received, and that any evidence bearing upon the circumstances attendant upon the execution of the two instruments, or indicating equities attaching to or failing to attach to said documents might be further gone into, but that the issue of mental competency was not before the court on any of the issues presented in the hearings on remand, on the ground that such evidence had been foreclosed by the decision of the Supreme Court of Hawaii in said case in 31 Haw. 817. Counsel for Respondent thereupon moved that the testimony of all witnesses who had heretofore testified in this trial under the original pleadings, excluding the testimony of Mr. Gibb just adduced, be stricken upon the ground that it was incompetent, irrelevant and immaterial, was not introduced responsive to any issues framed in the case when the evidence was introduced, and was hearsay as to Respondent. Counsel for Petitioner stipulated that without going through the testimony

(Testimony of James Gibb.)

of each witness, Respondent's motion would be considered as a motion to strike the testimony of every witness testifying in this case, witnesses for the Petitioner as well as for the Respondent, excluding the testimony of Mr. Gibb just adduced, and that Respondent has moved to strike separately each question propounded and each answer given of such witness.

The court thereupon denied the motion of Respondent, again holding that the issue of competency was not before the court and was a closed issue. The court further ruled that all the evidence theretofore taken in the case was before the court in the sense it was part of the case, except that the court would not re-examine any of the evidence that had already been considered and ruled upon by the court and the appellate court on the question of competency, and that the only evidence in the issues for re-examination was the evidence as to what equities or damages were involved in the question of the return of the land ordered reconveyed by the former decree.

On the basis of written motions, being the said motions to take the depositions of the parties named in the motions of November 18 and 20, 1931, and January 7, 1932, hereinbefore referred to, and further motion filed this day to take the depositions of Mrs. Phyllis Colley, Droitwich, Birmingham, England, and Charles Richard Fox, Chief Constable, Oxford, England, on behalf of Respondent, showing the mental competency of Eliza R. P. Christian,

(Testimony of James Gibb.)

and more particularly her mental competency to have executed said lease of March 17, 1905 (Ex. A-8) and the instrument of August 31, 1906 (Ex. 2-G), counsel for Respondent moved to take the testimony of the witnesses named in said motions, requesting that they be examined for all purposes, including the mental competency of Petitioner at the time of the execution of said lease (Ex. A-8) in 1905 and the execution of said instrument (Ex. 2-G) of 1906. Counsel for Petitioner called the atention of the Court to the fact that the testimony of the witnesses was being offered on he question of competency alone, to which counsel for Respondent replied that the purpose and object of these motions was to secure a definite ruling during the course of the trial on the question of competency. The court denied Respondent's motion on the ground that the question of competency was not before the Court. The court stated that it had ruled that an examination might be had of Annie Kentwell in connection with the facts transpired upon the execution of the 1905 and 1906 documents; that it had ruled that closed depositions would be permitted as to her, and that advantage had not been taken of such ruling by Waialua. Relative to the matters and things presented for the examination of witnesses Mrs. Phyllis Colley and Mr. Charles Richard Fox, that inasmuch as it affirmatively appeared that the matters and things that these witnesses could testify to occurred in 1931 and were matters wholly dealing with the competency of Eliza Christian that the

(Testimony of James Gibb.)

request to take the testimony of these witnesses would be refused. Counsel for Respondent thereupon announced it was Respondent's purpose to invoke further rulings from the Court on the introduction of oral testimony bearing upon the competency of Petitioner at the time of the execution of the 1905 lease and 1906 deed.

JOHN H. WISE

was called as a witness for Respondent to testify as to the competency of Eliza R. P. Christian in 1905 and 1906, and particularly in connection with witness's recollection, observations and opinion of Eliza Christian around the years 1902 to 1907 inclusive. After argument, the court held again that the question of competency was foreclosed and sustained the objection of counsel for Petitioner to going into the question of competency, either with Mr. Wise or any other witness, bearing upon the period in question and affecting the two documents which are specifically made a matter of investigation in this hearing, namely, the lease of March 17, 1905 (Ex. A-8), and the assignment of 1906 (Ex. 2-G), the court announcing that such ruling was based upon the assumption that the evidence offered was wholly in favor of Respondent, but that until the findings of the Supreme Court upon the previous record that Eliza Christian was shown to be a congenital imbecile were set aside by a superior court and the

(Testimony of John H. Wise.)

cause remanded for re-examination on that issue, it was without jurisdiction to go into the question of competency; that if the Supreme Court's ruling had been wholly confined to Eliza Christian's competency in 1910, an entirely different ruling would be made, but that the decision of the Supreme Court finding that Eliza Christian was, upon the evidence of the former record, a congenital imbecile and finding her at all times incompetent to execute a conveyance, thus making the lower court's original findings more conclusive, precluded the admission of evidence of competency. The court further ruled that its reason for interpreting the Supreme Court's mandate in such fashion was that the original pleadings were based upon the larger fields of congenital imbecility, and that the testimony throughout the former record began with the birth of Eliza Christian and went up to the date of the then hearing, and upon that evidence both courts found that it was not simply a question of the evidence as to her being incompetent in 1910 alone, but the record showed that at all times she had been a congenital imbecile.

In order to foreclose Respondent from producing any further witnesses on the question of the competency of Petitioner, the court thereupon excused Respondent from producing in court any other witness who might be called on the question of competency, stating that the court understood that the witness John H. Wise had been called to raise the issue, the court holding again that the decision

(Testimony of John H. Wise.)

of the Supreme Court of Hawaii (31 Haw. 817) and the Order of Remand made following such decision, precluded the trial court from inquiring into her mental capacity in 1905 or 1906.

Counsel for Petitioner moved to reopen the case in order to introduce in evidence the said lease of March 17, 1905 (Ex. A-8) and the assignment of 1906 (Ex. 2-G), which motion was granted, and by stipulation of counsel the said documents were received and the exhibits took the designation of Petitioner's Exhibits R-1 and R-2 respectively on these proceedings on remand, but in order to avoid confusion the same exhibit numbers, Exhibits A-8 and 2-G, respectively, are used, as in the previous hearings.

Petitioner thereupon rested.

Prior to the testimony of the following witness, counsel for Petitioner stated that he did not object to the reception of any evidence which might bear on the question of notice as to the mental condition of Eliza R. P. Christian. The court thereupon ruled that Petitioner having rested, Petitioner was bound by the evidence heretofore introduced and the ruling of the Supreme Court of Hawaii in said case of Christian vs. Waialua (31 Haw. 817); that actual notice on the part of Waialua of any mental incompetency of Eliza R. P. Christian had not been shown; that the issue of actual notice was not now

before the court but was foreclosed against Petitioner and that Petitioner's rights must depend upon the construction of law as to the rights of a respondent who had no actual notice of incompetency and acted in ignorance of the actual fact. The court further ruled that it was the court's understanding that counsel for Petitioner had not relied on further notice by not producing further evidence but on the ruling of the court that there was no actual notice.

MR. E. D. TENNEY

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live in Honolulu and have lived here since 1880. I am president of the Waialua Agricultural Company, the Respondent in this case. I have been connected with Waialua since its formation and organization. I knew Mr. W. W. Goodale in his lifetime (Mr. Goodale having died since the prior hearings) very intimately. He was the first manager of the company and he remained as such manager for a period of 25 years or more until he retired somewhere along 1924 or 1925. Mr. Goodale had general management and supervision of the active affairs of the company at Waialua in relation to the development and organization of the plantation—not only its development and activities, but acquirement of the lands; in fact, general charge, both of the agricultural operations and also of the

handling and acquiring of land. He was the one we looked to who handled all those affairs.

I am familiar with the Holt lands and first knew them very many years ago, but without any particularly detailed consideration, until the time of the formation of the Waialua Agricultural Company. Prior to the leasing of the Holt lands, Mr. John F. Colburn approached both me and Mr. Goodale to inquire if we would be open to considering a proposition to lease such lands. My recollection is that under certain conditions we would consider the matter and he was referred to Mr. Goodale for further consideration of any proposition he might have to submit. The negotiations then continued between Mr. Goodale and Mr. Colburn.

When the negotiations got to a point that they definitely submitted a proposition, Mr. Goodale asked me to come out and go over the land with him to size up the situation. I went over the major portion of the lands that were considered available and suitable for the uses of the Waialua Agricultural Company at that time. This was, I think, not long before the lease which was consummated. The Holt Estate lands were covered with a very dense growth of lantana and klu and scrub guava, and there were sections of them that were very rocky. You couldn't have very detailed inspection of the surface of the ground because there were only here and there little patches where such was possible. It was one of the heaviest growths of underbrush I had ever noticed anywhere. There was no appearance of the land ever having been under cultivation.

(Testimony of Mr. E. D. Tenney.)

There was no discussion between Mr. Goodale and myself of the possibilities of growing any pineapples on the land. That was before the days of the development of pineapples in that section. In fact, the upper land that we controlled in the neighborhood of the Wahiawa dam—the so-called Galbraith Estate lands—which immediately adjoined the upper Holt lands, were regarded by the then expert pineapple people as not suited to the purpose. We had endeavored to lease some of these lands to pineapple growers but they were rejected as not suited. The leasing of pineapple lands, therefore, did not enter into the picture at all.

The board of directors, in considering various land matters at Waialua and the acquiring of certain lands, had appointed a committee of three, consisting of Mr. Goodale, Mr. W. R. Castle and myself, charged with the duty of considering a lease of these lands and with authority to make such a lease. Mr. Goodale is now dead and Mr. Castle, on account of his health, is not available as a witness.

(Witness was thereupon shown a letter dated March 7, 1905, from Mr. Goodale to him, which he identified, which was received in evidence, over objection, as Respondent's Exhibit S-1, and which is as follows:

(Testimony of Mr. E. D. Tenney.)

WAIALUA AGRICULTURAL
COMPANY, LTD.
Waialua, Oahu

March 7th, 1905.

Official.

Mr. E. D. Tenney,
President Waialua Agricultural Co., Ltd.,
Honolulu.

Dear Sir:

Herewith you will find enclosed a copy of a lease of the Holt Estate lands, prepared by Messrs. Colburn and Ashford, for our approval. I enclose also Mr. Colburn's letter to me.

I have read over this lease carefully, and it seems to me to cover the ground more fully than either of the other leases, and to be much nearer what we need. So far as I can see the signatures to be obtained to this lease will make us perfectly safe in going ahead with the improvements on the property, the digging of ditches and building of siphons.

I would have preferred however to have the lease for a longer term than twenty-five years. The end of the lease will be within the natural lifetime of all of the people whom it is proposed to have sign the lease. For our interest it would be better to have the lease for so long a term that the present holders cannot make plans for their own futures based on the termination of this lease.

(Testimony of Mr. E. D. Tenney.)

The two old men, James and John, have signed a deed conveying all their rights in the land in trust to John F. Colburn. His signature would therefore seem to cover all of their interests during their lifetime, and the signatures of James Lawrence Holt and Mrs. Christian would seem to cover the same rights after the death of the two old men.

I hope that you will be able to do something about this before the sailing of the steamer "CHINA".

From the study I have given the case, and from what has been said to me by Messrs. Castle & Withington and Mr. Colburn, I recommend the execution of the lease in this form if it is impossible to arrange for a longer term.

Very truly yours,

(Sgd) WM. W. GOODALE

Manager Waialua Agricultural Company, Limited.

Dict. WWG.

WITNESS RESUMES: I received this letter on March 8th. Mr. John F. Colburn is dead.

(Witness thereupon identified a letter from Mr. Colburn to Mr. Goodale, referred to in said Exhibit S-1, as having been received by him, which letter was received in evidence, over objection, as Respondent's Exhibit S-2, and reads as follows:

(Testimony of Mr. E. D. Tenney.)

KAPIOLANI ESTATE, LIMITED
Honolulu, T. H.

March 6, 1905.

Mr. W. W. Goodale,
Manager Waialua Agricultural Co., Ltd.,
Waialua, Oahu.

Dear Sir:

Enclosed find draft of the proposed lease by the heirs of the R. W. Holt Estate to your Company. Kindly peruse same at an early date and return as soon as possible with such modifications or amendments as you may see fit or be advised to make.

A meeting of all but one of the O. J. Holt heirs, by their attorneys, have been held at my office to discuss the matter of the lease to you upon the lines indicated in the enclosed document. While they have not yet given a decided and definite answer still I believe they will all be parties to the same. I have this day sent out to each of them a copy of the enclosed draft and anticipate an early reply from them.

Yours very truly,
(sgd) JOHN F. COLBURN.

WITNESS RESUMES: There was also enclosed with the letter a draft of a proposed lease between the Holt heirs and Waialua. This draft was sent to the attorneys of the Waialua Company for their examination and consideration. I do not know

(Testimony of Mr. E. D. Tenney.)

where the draft now is. It was, however, the practice of the Waialua Company to keep all of the documents relating to its lands at the plantation. They were stored in a warehouse, which warehouse was destroyed by fire in 1931, such fire destroying the accumulated archives.

I knew Mr. Ashford. He was an attorney at law and a judge of this court. He is dead. I, myself, gave consideration to the terms of the proposed lease that had been suggested by Mr. Colburn, particularly to the period of the lease and of course to the rental asked and the other terms generally. I likewise gave consideration to the provisions of the lease having to do with improvements which were to revert at the expiration of the lease. I discussed the terms with my committee. Mr. Goodale was in favor of a longer term, if possible, to secure it, but the lease had been prepared and had been executed by the various parties and it was deemed best to accept the term of 25 years and authorize its execution. The committee would not have authorized the execution of the lease for a shorter term than 25 years.

No Cross-Examination.

CARLOS A. LONG

was called as a witness for Respondent, the oath being waived, and testified as follows:

Direct Examination.

I live in Honolulu and have lived here since 1874. I am an attorney at law and have practiced my profession for about twenty-two years. I knew John F. Colburn in his lifetime. He died ten or twelve years ago. He was my stepfather. I likewise knew Clarence Ashford in his lifetime. He died several years ago. He acted as my attorney and we were sometimes associated together in cases. I was appointed administrator of the estate of R. W. Holt, deceased, about December 1904, and I served for about three years. Mr. C. W. Ashford was my attorney as such administrator.

As administrator of the estate, I conducted its affairs, receiving the income, disbursing the same, having charge of the properties, and rendering accounts. I know the Holt Estate lands at Waialua and first became acquainted with them some twenty-five or thirty years ago. I knew W. W. Goodale and knew of the negotiations which commenced about the beginning of 1905, looking toward the leasing of the Holt lands to Waialua Agricultural Company. I initiated these negotiations together with Mr. Ashford and Mr. Colburn. Mr. Ashford represented me as my attorney. I participated in the subsequent negotiations which were had with Mr. Goodale, the manager of Waialua. In connection with such negotiations, I examined the prop-

(Testimony of Carlos A. Long.)

erty together with Mr. Colburn, Mr. Ashford, Mr. Goodale and Mr. James L. Holt. This was during the first part of 1905.

Right after I was appointed administrator of the Holt Estate in December 1904, we entered into negotiations with Waialua for the leasing of those lands. The Holt Estate at that time was not receiving enough rent, and these particular lands were idle lands, pasture lands, not being leased at all by anybody, so I believed it was to the best interest of the Holt Estate to have these lands leased or to get some revenue from them. That is the reason why I instructed Mr. Ashford and the rest of the parties in interest to see whether these lands could be rented. I do not think that the taxes upon the lands had been paid during the preceding few years.

The negotiations were principally had between Mr. Colburn and Mr. Ashford on our side, and with Mr. Goodale for Waialua. I recall that $6,000 a year was to be paid over to me as administrator. Just prior to the execution of the lease I went over the lands with Messrs. Colburn, Ashford, Goodale, and James L. Holt, and they were covered with lantana, brush, and klu. None of the lands at that time were under cultivation and they were not producing any income. The terms of the lease to Waialua as finally executed were satisfactory to me as administrator. I myself, personally, delivered the lease to Mr. Goodale right on the land itself, I think in April of 1905. Mr. Ashford and Mr. Colburn were with me at the time of the delivery of

(Testimony of Carlos A. Long.)

the lease. During the time I was administrator of the Holt Estate I received all of the rentals that were due me under the terms of the lease as such administrator and accounted for those rentals through the court as such administrator.

No Cross-Examination.

GEORGE C. WATT

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I reside at Kohala, Hawaii, at the present time. I was employed by the Waialua Agricultural Company from January 1899 to July 1906. For the first five and a half years I had charge of the Kawailoa division of the company, in charge of agricultural work, including improvements and supplying labor and material for construction. The Kawailoa section lies to the north of the Holt lands. After those first five and a half years I became head overseer at Waialua, doing exactly the same type of work except that it took in the whole plantation.

I became acquainted with the Holt lands in 1899. They were then lying idle, covered with very heavy lantana, with lots of stones in the lower end, together with klu and other brush. On the upper part there was some scrub guavas. The lands did not show any signs of ever having been under

(Testimony of George C. Watt.)

cultivation. In 1905, as compared with their condition in 1899, there was no improvement. There might have been a little further growth of lantana, and in 1905 there was likewise no evidence of the lands ever having been cultivated.

In the early part of 1905 Mr. Goodale met me on the government road, stating that he had the lease to those lands and directing me to get in some men to take possession right away, which I did the same day. We cleared off all the lantana and all the stone, working on it every day until we cleaned the place up. For the first few days we were clearing by hand work, but later we got a machine that was invented for clearing lantana. We got that over and operated it between two steam plow engines. It had a very heavy roller and a heavy set of knives—a tremendous, big thing—but we used it and cleared the land I think very cheaply. This machine was used for the lantana and the other scrub stuff. Some of the stones were blasted out and some hauled out with steam plows. There were probably a hundred to two hundred men working on this job at various times.

I do not know the actual cost of clearing these lands but one day Mr. Goodale said the cost was a good deal, and he asked me my idea of the cost of clearing such land. I replied it would run not over $35 or $37 an acre. Before I left Waialua in July 1906 the stretch was cleared from the government road up to the Wahiawa extension ditch. The lands were not surveyed at that time but it was thought to be about 1400 or 1500 acres of cane land.

(Testimony of George C. Watt.)

When I left in 1906, the Wahiawa extension ditch had been built but there was no water in it. They were just then putting in one of the big siphons. I planted the first cane on the Holt lands in the latter part of 1905. We planted a piece of some 40 or 50 acres down near the lower end which would have been harvested in 1907.

The question of water was very unsatisfactory. We didn't have any regular water supply for that piece but we wanted to get in some cane. We dug a ditch and tried to get some water out of the gulch there, but it was very unsatisfactory. If we had heavy rains we had water, but in dry times no water at all. When I left in July that cane had not received sufficient water. When I left we had some railroad construction on a part of the Holt lands. The railroad work was started after we took possession in 1905. The labor employed in clearing the lands was mostly Japanese and Chinese, though we had some gangs of Portuguese and natives. This was all day labor, though the employees lived on the plantation, the laborers receiving from the plantation, without charge, their house, fuel, water and medical attention. This was an emolument received by them over and above cash payment.

The quality of the soil on the Holt Estate lands was very much the same as the adjoining lands. The lands above the Wahiawa ditch extension were considered useles for anything but a few cattle. There was no cultivation or clearing of the Holt lands above the Wahiawa extension ditch while I was in

(Testimony of George C. Watt.)

Waialua. The vegetation on the Holt lands was very heavy, there being a very heavy crop of lantana, especially on the lower lands. After you went up about half way, the lantana began to peter out a little bit. On the lower end there was nothing but one or two little trails. There were no roads. The lower end was very rocky, with lots of big rocks.

No Cross-Examination.

CARL BISCHOFF

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live at Waialua and am employed as a civil engineer for Waialua Agricultural Company, having been continuously in its employ since 1926. I received a B. S. Degree in Civil Engineering at the University of Maine and practiced it for a number of years prior to and since my graduation in 1926. I do all the company's civil engineering work, as well as the land surveying and anything pertaining to lands and leases. I am familiar generally with the properties and lands of the company. I have been familiar with the so-called Holt properties since early in 1928 and know the improvements located on that property, as well as the improvements and plants generally of the Waialua Com-

(Testimony of Carl Bischoff.)

pany located off the Holt property. I have prepared a map which was done from a map made and compiled by Mr. John Gomes Duarte in 1902 and then revised, and the cane fields and improvements are indicated thereon as of February 1, 1932.

(Respondent's Exhibit S-3, being the map referred to, was received in evidence without objection. This map is an original exhibit, a part of this record by order of the Supreme Court of Hawaii, a reduced reproduction being incorporated herein at the end of this volume.)

WITNESS RESUMES: The Holt lands are designated on the map, Exhibit S-3, by that area within the heavy green borders. The majority of the other lands shown on the map are owned or controlled by the Waialua Company except some few houses along the beaches and other small properties. The pink coloring on the map shows the land now available for pineapple culture. There are some portions of the pink coloring on the map that are not in cultivation in pineapples but would be available for pineapples as of February 1, 1932.

The red circle on the map to the west and south of the westerly tip of the Holt lands indicates the location of the Waialua Mill and is designated with the word "Mill." The directions on the map are indicated by the arrow which shows that the top of the map is approximately north, the left side of the map west, the right side of the map east, and the bottom approximately south.

The total area of land owned or controlled by Waialua, including land shown on the map and

(Testimony of Carl Bischoff.)

others not shown, is 49,063 acres, all contiguous or adjoining. This has been the area since 1928 when we purchased the Waimea Hui of over 5,000 acres, prior to that, for a number of years, the area being approximately 44,000 acres.

The total Holt estate area included within the green lines is 13,950.7 acres. The net area of sugar cane land within the Holt area, indicated in yellow, is 1537.77 acres. Using the gross area for the same, which includes roads, reservoirs and railroads, the total comes to 1622.95 acres.

The total net area of the Waialua Company's cane land is 9904 acres, which includes the Holt sugar cane area and which has been the approximate total area for a number of years last past. The Holt lands form about 15½% of the total cane area of the Waialua Company, or something less than 1/6. Of the pineapple lands owned or controlled by the company, the area in the Holt Estate lands is 6476.45 acres. That includes all the Holt Estate lands available for pineapple cultivation. The total area of the pineapple land now controlled by Waialua is 11,625 acres, so that the Holt Estate pineapple lands are about 55.7% of the company's pineapple lands. There has been no substantial change for the past ten years.

The map shows all physical features except telephone and telegraph lines. The roads are shown by a double black line; the railroads are a heavy black line with cross ties; the ditches are a double black line filled in with blue; siphons are a heavy dash line; reservoirs have their area enclosed in the black.

(Testimony of Carl Bischoff.)

line and they have the watered area colored in blue. The railroads, roadways, telephone and telegraph lines, canals, ditches and other improvements of a continuous nature, cross and re-cross the boundaries of the Holt lands without any regard to the boundaries as an obstacle. That is true, not only of railroads but of roadways, telephone wires, reservoirs, ditches and other physical improvements as shown on the map.

The Holt lands, for all physical and operating purposes, are considered and treated as an integral part of the Waialua Plantation. The sugar produced on the Waialua Plantation is hauled off on the plantation railroad to the mill and there crushed. The same cars and the same engines that are used over the entire plantation are used to haul the sugar on and off the Holt lands. Some of the labor working upon and cultivating the Holt lands live in camps on the Holt lands; others of the laborers come in for special jobs and from the outside, and from other lands outside of the Holt lands. Some of the laborers who live on the Holt lands work for the company off the Holt lands; in other words, the places of the laborers' residences does not control the place of their labor.

On the map, Exhibit S-3, the camps are denoted by small areas enclosed with black lines and the name of the camp printed near that area. On the map the improvements shown are now in existence as of February 1, 1932, and there are no improve-

(Testimony of Carl Bischoff.)

ments which are not in existence as of February 1, 1932.

I have also prepared another map indicating in a larger scale and with a more restricted total area, the so-called Holt Estate lands and the surrounding lands. This second map is likewise compiled and traced from a map made in 1902 by Mr. John Gomes Duarte, but compiled and revised up to date. The scale of the map is 1" to each 1,000 feet, with the exception of a little enlargement in the lower left-hand corner of the map, which is an enlargement of the southwest tip of the Holt Estate lands and small plots around the Helemano stream.

(Respondent's Exhibit S-4, being the map referred to, was received in evidence without objection. This map is an original exhibit, a part of this record by order of the Supreme Court of Hawaii, a reduced reproduction being incorporated herein at the end of this volume.)

WITNESS RESUMES: I have indicated the Holt lands by a heavy green border around the outside of those lands. As in the other map, directions are shown by the arrow, north being at the top, east at the right, south at the bottom, and west on the left. On the extreme left of the map, as you face the map, a red circle with a black building inside it indicates the Waialua Mill.

The principal buildings of the plantation are located near the mill. The office is located near the mill, the skilled camp within a short radius of it, and a large number of laborers' camps are near

(Testimony of Carl Bischoff.)

the mill. Such laborers are skilled mechanics and perform work from time to time upon the Holt area.

The pink colored area shows the lands available for pineapple within the Holt lands. They are substantially devoted to pineapple cultivation, although certain of the areas are not presently in cultivation.

The yellow shaded area in the Holt lands indicates the part used for the cultivation of sugar cane. Cane roads are shown with a double black line; railroads with a heavy black line with cross ties; ditches a double black line filled in with blue; reservoirs, the flood area, filled in with blue; siphons by heavy dash lines; domestic water lines with light dash lines; transmission lines with a line superimposed with dots, camps are in an area enclosed in black, and the buildings within such area indicated in small squares.

I have on this map shown improvements which were not actually in existence on February 1, 1932. These I have marked "Retired", with the date of such retirement in years, so that from the face of the map, Exhibit S-4, all of the improvements in existence on February 1, 1932, can be seen, and the improvements erected and abandoned prior to that date are similarly shown.

The Wahiawa reservoir is the main mountain water supply of the plantation. The dam is located just below the junction of the north and south forks of the Kaukonahua gulch, and the reservoir fills a great area in such north and south forks just below

(Testimony of Carl Bischoff.)

Schofield Barracks. The Wahiawa dam is located at the bottom and center of the map, Exhibit S-4, and the reservoir itself extends to the north-east, and to the south-east far below the bottom of the map. The approximate area of the Wahiawa reservoir is 300 acres and when the dam is filled to capacity there is impounded about 2,500,000,000 gallons at the spillway height. A small area of the flooded area of the reservoir is located on the Holt Estate lands on the north fork of Kaukonahua gulch in Grant 973, which is on the south center of the map.

The waters of the Wahiawa reservoir are carried to the plantation fields by a system of tunnels from the Wahiawa reservoir to Kemoo field, known as the Wahiawa reservoir ditch. That ditch is shown on the map extending from the Wahiawa reservoir dam in a northwesterly direction and is so designated on the map. The Waialua Agricultural Company owns this Wahiawa reservoir ditch. The ditch consists of a few hundred feet of open ditch with some four miles of tunnels.

The Wahiawa extension ditch takes the water from the Wahiawa reservoir ditch and carries it laterally across the plantation in a northeasterly direction at an elevation of about 700 to 750 feet. The approximate length of the Wahiawa extension ditch is about 22,000 feet, about half of it, or 11,000 feet, being located upon the Holt lands. This ditch consists solely of an open ditch with a few flumes and siphons carrying it over gulches.

(Testimony of Carl Bischoff.)

The ditch passes through property owned and controlled by Waialua, first at the outlet of the Wahiawa reservoir ditch known as Kemoo fields, through Kaukonahua gulch, by a 54" siphon, through the fields of Kaheeka, into the lands of the Holt Estate, and beyond into the Kawailoa lands to the north, commonly known as the Bishop Estate lands.

The waters of the Wahiawa reservoir are used to irrigate lands in Kemoo, the ranch section, a number of the Helemano fields not in the Holt lands, and portions of Opaeula fields and Kawailoa fields to the north of the Holt lands; in other words, the Wahiawa water serves lands lying south of the Holt lands, the Holt lands themselves, and lands lying north of the Holt lands. The waters of the Wahiawa reservoir system are used indiscriminately on all of those lands—sometimes on one land and sometimes on another land.

There are a number of sources of the water supply used in the irrigation of the Holt Estate lands. The major one might be called the water from the Wahiawa dam, carried along through the Wahiawa extension ditch as described. Another system of mountain waters affecting the Helemano and Poamoho streams is the water developing in lands on the upper edge of the Holt Estate lands originating on lands belonging to the Territory and lands of the Bishop Estate under lease to Waialua. This is carried through the Helemano and the Poamoho branch ditches into the Helemano ditch, through the Holt Estate pineapple lands. Some of the water is

(Testimony of Carl Bischoff.)

stored in a small reservoir along the line and it ultimately empties into the Wahiawa extension ditch where it intermingles with water from the Wahiawa reservoir, some passing into the land of the Holt Estate and some passing on into the land of the Bishop Estate to the north.

When the mountain water is insufficient from those two sources, namely, the Territory and Bishop Estate lands referred to, and the Wahiawa reservoir, it is supplemented by water from pumps, the major pump being Pump No. 10, known as the Poamoho pump, located on Holt Estate land on a small piece to the west and south of the major portion of the Holt Estate lands. It is located at Grant 235, which is the small green bordered area directly to the south of the extreme westerly end of the larger Holt area as shown on the map, Exhibit S-4. This water is pumped on to the Holt Estate lands and other lands.

The waters required for the irrigation of the Holt lands come from two sources, namely, gravity water, and, as to part of the Holt lands, pump water. The sources of the gravity water may be described generally as the Wahiawa reservoir system and water from the lands above and to the east of the Holt Estate lands but under lease to Waialua. All of these waters are mingled and used indiscriminately either on the Holt lands or upon other lands of the Waialua plantation and such has been the fact for many years.

(Testimony of Carl Bischoff.)

The water originating in the Bishop Estate and the Territorial or school lands to the east of the Holt lands are gathered up by two intakes: one intake in the Helemano stream just west of the east or upper boundary of the Holt Est e lands, and another intake in the Poamoho stream near such east boundary. These waters are carried into the upper Helemano ditch from where they are dropped into the upper Helemano reservoir or carried above the Helemano reservoir down through the pineapple fields where the upper Helemano reservoir ditch and the Helemano ditch join and go into the Wahiawa extension ditch. Some of this water from the Helemano and Poamoho ditches can be put into the Helemano 6 reservoir. This reservoir is open to the Wahiawa extension ditch. It has its outlet below the Wahiawa extension ditch and the water can go into the lands below the extension ditch. The waters from the Wahiawa extension and from the Helemano system thus both find their way into Helemano 6 reservoir and the waters which flow out of Helemano 6 reservoir may have had their origin either in the Wahiawa or in the Helemano system.

About 523 acres of Holt Estate cane area can be irrigated from the waters of the Poamoho pump, being the area below the 380-foot ditch, which is designated on the map as the "High Lift Ditch." Some 500 acres of other lands that lie to the south and southwest of the Holt area can be irrigated by this pump.

(Testimony of Carl Bischoff.)

The Poamoho pump is used when there is an insufficient supply of mountain water to irrigate the lands below the high lift ditch elevation; whenever there is gravity or Wahiawa water available in sufficient quantities, the pump is not used. The water from this pump is pumped from the pump with two lifts: the high lift pump, which pumps through a 30″ diameter, rivetted steel pipeline to an elevation of 380 feet where it is carried laterally in a ditch in a northerly direction, and also through several siphons, into Kaheeka land and through the Holt Estate lands; the low lift ditch water from this pump is carried through a 24″ diameter pipe, through several siphons laterally in a northerly direction into the Holt Estate lands at an elevation of 190 feet.

The high lift waters from the pump may be stored in any of three reservoirs: the Kaheeka reservoir, the Helemano 4-C reservoir (which is near the south boundary of the Holt Estate lands) and the Helemano 9-C reservoir across the Helemano gulch. The Kaheeka reservoir is not located upon the Holt lands. About half of the ditch system mentioned in connection with the Poamoho pump is off the Holt lands. There are lands other than the Holt lands irrigated from the ditches just mentioned, and some of the water which is stored in the Helemano 4-C reservoir located on the Holt land is used on areas off the Holt land. There is no distinction made in the use of the Poamoho water for irrigation purposes upon the Holt lands and any other lands of the Waialua Company.

(Testimony of Carl Bischoff.)

If one went out onto Holt lands to a certain spot it would be difficult to tell from what sources that water originated, and, especially in what quantities it came. It might be mingled water, or from one source or the other. The same is true if you went over to the Bishop Estate cane land north of the Holt lands. It would be difficult to originate the source of water there unless some of the mountain systems were entirely dried up. Water on the Bishop Estate lands might be from the Helemano system, from the Wahiawa system, or from both. In other words, all of this water is used indiscriminately upon all of the lands subject to irrigation from these sources.

During the harvesting season when we are grinding cane, the greater portion of the electricity used in the Poamoho pump comes from that generated in the mill power plant. It is supplemented at times by power from a hydro-electric plant located at Kemoo power plant, indicated on the map and just below the outlet of the Wahiawa reservoir ditch. During the off season the major part of the electricity which supplies the Poamoho pump is purchased from the Hawaiian Electric Company. The Kemoo power plant cannot supply the whole of the Poamoho pump. It could supply one of the pumps but it supplements the power from the mill at times.

The Waialua Company has an extensive system of transmission and distribution lines for electricity, the source of the power coming from the Waialua mill, the Kemoo power plant and the Hawaiian

(Testimony of Carl Bischoff.)

Electric Company, so that a particular kilowatt may have had its origin in any one of these three sources.

There is a small area to the west of the major portion of the Holt lands which is irrigated by Pump No. 7. That pump is located near the junction of the Kaukonahua and Poamoho streams at the site of the old Waialua mill. Pump No. 7 is located off the Holt lands but the water it supplies is in part used for the irrigation of Holt lands and other lands, no distinction being made between the Holt areas and the other areas irrigated by it.

Cross Examination.

The area marked in pink on Exhibit S-3 does not represent all of the lands of the Waialua Company available for pineapples. The figures given are correct, although there are other parts not shown on Exhibit S-3. This exhibit, however, does show the pineapple lands on the Holt Estate lands.

The roadways indicated on the map are all roadways which were made by the Waialua Company. There are numerous other roadways not shown on the map which were made by the Hawaiian Pineapple Company or pineapple lessees. All of the improvements indicated on the small map, Exhibit S-3, are likewise indicated on the larger map, Exhibit S-4, so far as they relate to Holt Estate lands, except that Exhibit S-4 also shows certain improvements which have been abandoned.

As to ditches, where the two black lines are marked with blue in between, that is the ordinary

(Testimony of Carl Bischoff.)

ditch dug in the ground, but where the lines are double dash lones, filled in with blue, it denotes tunnels, and tunnels are a great deal more expensive than open ditch. Some cement structures in the ditch system are not shown in detail.

Where I use the words "Upper Helemano Ditch 1908", on Exhibit S-4, for instance, it indicates the date when that ditch was completed and put in operation. The same is true of dates of railroads and various other dates. Abandoned improvements carry the word "Retired". The railroad labeled "C R. & L. Railroad" is not a Waialua improvement.

The lands north of the Holt lands have small mountain water supplies but they are insufficient to water the area. These northerly or Kawailoa lands also have a ditch system coming from the Bishop Estate lease so they are not entirely dependent on the Wahiawa or Helemano systems. There are no sources of water supply for the lands south of the Holt Estate lands other than those already indicated.

Re-direct Examination.

Approximately 1/3 of the waters impounded in the Wahiawa reservoir are used in the lands north of the Holt area, approximately 1/3 on the Holt area and 1/3 on the lands lying south of the Holt area. While none of the ditches mentioned have substantial portions lined with concrete or cut stone, nevertheless there are such portions which, lined in that manner, are costly.

(Testimony of Carl Bischoff.)

Re-cross Examination.

My basis for the statement that the Wahiawa Water is divided about into thirds is because the areas correspond to about thirds. In exceptional times no Wahiawa reservoir water might be needed on the Holt or Bishop Estate lands, and at that time we cut down our supply from Wahiawa in order to keep the level of the reservoir higher, in order to assure our supply in dry weather. If the two local systems, namely, the Helemano system and the system on the Bishop Estate lands, have no water, then all the water for irrigation on such lands would come from Wahiawa. There are also occasions when neither Wahiawa nor Holt waters are available and you use all pump waters on the area that is below the pump level. We use water from one source or another, either Wahiawa, mountain, or pump, depending on what water is generally available, without making a distinction. There are, however, very few days we do not draw from the Wahiawa reservoir, throughout the whole year. These occasions are generally when we have a great amount of rain locally, and then we do not need even mountain water supplies.

MR. BISCHOFF

being recalled for further examination, testified on

Direct Examination

as follows:

My answer that the pineapple area owned or controlled by Waialua has been substantially the same for a number of years last past, is an error on two

(Testimony of Carl Bischoff.)

points: In January of 1929 we sold 283 acres of pineapple lands to the government, and in April of 1930 the Richardson Estate lease expired, which included an area of 239.87 acres of pineapple lands. There may have been a few minor small changes also. The date of the fire at Waialua, in which plantation records were destroyed, was August 2, 1930.

Cross Examination.

The 283.51 acres sold in January 1929 were pineapple lands not a part of the Holt lands. What I refer to as the Richardson Estate lease expired on April 1, 1930, this being an undivided interest in the Holt area. The lease on the Richardson area has not been renewed at this time by the Waialua Agricultural Company but I think it is renewed to the Hawaiian Pineapple Company, the lessee under the lease of January 10, 1923 (Exhibit Ae. B-1).

L. N. MACKOMISKEY

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

I live in Honolulu and am an accountant, working almost entirely with reference to income taxes. I have done analytical accounting for a number of years and have worked on accounting for the Treasury Department and for my present employers, namely, Castle & Cooke, Limited, and T. H. Davies & Company, for approximately twenty years. I am familiar with the accounts, books and records of the

RESPONDENT'S EXHIBIT S-5.

STATEMENT SHOWING COST OF IMPROVEMENTS MADE

Description	From Apr. 1, 1905 to May 2, 1910	From May 2, 1910 to Apr. 10, 1922	From Apr. 10, 1922 to Apr. 5, 1928	Total
Buildings (including Domestic Water System)	$ 19,775.58	$ 35,928.67	$ 1,873.79	$ 57,578.0
Railroads	32,758.02	50,006.92	382.90	83,147.8
Reservoirs				
Helemano 4 "A" Domestic	243.00	———	———	243.0
Helemano 3	2,299.70	———	———	2,299.7
Helemano 6	5,354.15	———	1,274.95	6,629.1
Helemano 6 "B"	———	2,494.36	———	2,494.3
Helemano 11	———	5,455.07	———	5,455.0
Helemano Upper	47.00	20,007.21	———	20,054.2
Helemano 12	———	3,186.25	790.60	3,976.8
Helemano 4 "A"	———	2,915.30	———	2,915.3
Helemano 9 "C"	———	2,783.10	———	2,783.1
Helemano 15	———	8,080.70	179.00	8,259.7
Helemano Upper	———	16,025.36	———	16,025.3
Siphons				
Helemano 54 inch	16,098.49	239.25	3,247.71	19,585.4
Opaeula 54 inch	4,869.98	235.50	259.12	5,364.6
Helemano 6	———	5,969.22	———	5,969.2
Helemano 6 New	———	———	———	———
Helemano Reservoir 11	———	———	———	———
Ditches				
Wahiawa Extension	5,799.16	———	———	5,799.1
Helemano—Poamoho Branch	8,835.65	———	———	8,835.6
Helemano Upper	22,708.35	7,072.00	3,087.00	32,868.0
Helemano Lower	7,022.70	———	———	7,022.7
Helemano Upper Reservoir Outlet	———	2,465.10	2,230.20	4,695.3
Waterways (including Lining Ditches)	5,306.46	18,233.40	4,059.77	27,599.6
Roads, Bridges and Fences	3,520.85	3,320.65	3,254.04	10,095.5
Flumes	169.60	3,619.10	4,389.82	8,178.5
Camp Sewerage	———	762.50	———	762.5
Drainage Ditches	———	173.00	55.00	228.0
Electric Plant	———	———	4,415.75	4,415.7
Development of Upper Lands	2,121.70	1,130.05	———	3,251.7
Cane Flumes	1,381.20	8,935.65	2,000.00	12,316.8
Telephone Lines	719.60	796.67	———	1,516.2
Clearing Lands	43,493.89	3,678.40	311.60	47,483.8
Pump No. 10 (Poamoho)				
Building	———	———	900.97	900.9
Machinery, etc.	———	———	164,409.62	164,409.6
Wells	———	———	42,860.52	42,860.5
Pump No. 10 "A"—Domestic	———	———	4,700.56	4,700.5
TOTAL	$182,525.07	$203,513.43	$244,683.62	$630,722.1

BIT S-5.

NTS MADE ON HOLT LANDS

Total	From Apr. 5, 1928 to Mar. 31, 1930	Total	From Mar. 31, 1930 to Dec. 31, 1931	Total
$ 57,578.04	.....	$ 57,578.04	$ 400.00	$ 57,978.04
83,147.	$ 496.94	83,644.78	3,235.39	86,880.17
243.00	.....	243.00	.....	243.00
2,299.70	.....	2,299.70	.....	2,299.70
6,629.10	.....	6,629.10	.....	6,629.10
2,494.36	.....	2,494.36	.....	2,494.36
5,455.07	.....	5,455.07	.....	5,455.07
20,054.21	.....	20,054.21	.....	20,054.21
3,976.85	.....	3,976.85	.....	3,976.85
2,915.30	.....	2,915.30	.....	2,915.30
2,783.10	.....	2,783.10	.....	2,783.10
8,259.70	.....	8,258.70	.....	8,259.70
16,025.36	.....	16,025.36	.....	16,025.36
19,585.45	473.61	20,059.06	.....	20,059.06
5,364.60	.....	5,364.60	.....	5,364.60
5,969.22	.....	5,969.22	.....	5,969.22
.....	5,191.21	5,191.21	.....	5,191.21
.....	505.55	505.55	.....	505.55
5,799.16	.....	5,799.16	.....	5,799.16
8,835.65	.....	8,835.65	.....	8,835.65
32,868.05	.....	32,868.05	.....	32,868.05
7,022.70	.....	7,022.70	.....	7,022.70
4,695.30	.....	4,695.30	.....	4,695.30
27,599.62	1,608.11	29,207.73	.....	29,207.73
10,095.54	469.24	10,564.78	.....	10,564.78
8,178.52	.....	8,178.52	3,363.35	11,541.87
762.50	.....	762.50	.....	762.50
228.00	.....	228.00	.....	228.00
4,415.78	.....	4,415.75	307.95	4,723.70
3,251.75	.....	3,251.75	.....	3,251.75
12,316.85	.....	12,316.85	.....	12,316.85
1,516.27	.....	1,516.27	.....	1,516.27
47,483.89	.....	47,483.89	.....	47,483.89
900.97	.....	900.97	.....	900.97
164,409.62	132.00	164,541.62	.....	164,541.62
42,860.52	.....	42,860.52	.....	42,860.52
4,700.56	.....	4,700.56	.....	4,700.56
$630,723.12	$ 8,876.66	$639,598.78	$ 7,306.69	$646,905.47

(Testimony of L. N. Mackomiskey.)

Waialula Agricultural Company, Limited, and have been familiar with them since about 1918. I have, with assistance, prepared at the request of the attorneys for the Waialua Agricultural Company, a statement showing the cost of improvements made by the Company on the Holt lands for the period beginning April 1, 1905, to December 31, 1931, segregated by various periods and according to various descriptions of improvements. This statement is from the original books of record of the company, supplemented by contemporaneous analyses of accounts made by the company.

(Respondent's Exhibit S-5 was received in evidence over objection and reads as follows:

[See adjoining pages 1507-1508.]

WITNESS RESUMES: Exhibit S-5 shows all of the capitalized improvements put upon the Holt lands by the Waialua Agricultural Company. It does not include the cost of repairs, maintenance, etc., which was not capitalized by the company. It is divided into periods: from April 1, 1905, to May 2, 1910; from May 2, 1910, to April 10, 1922; from April 10, 1922, to April 5, 1928, with the total of the three periods to that time; also from April 5, 1928, to March 31, 1931, and the total to that time; and the further period from March 31, 1931, to December 31, 1931; with a grand total covering all periods. It is also subdivided into various larger accounts of the company, namely, Buildings, Railroads, Reservoirs, Siphons, Ditches, Waterways, Roads, Bridges and Fences, Flumes, Cane Sewerage, Drainage Ditches, Electric Plant Development of Upper Land, Cane Flumes, Telephone Lines, Clearing Lands, Pump No. 10, Pump No. 10-A. The

(Testimony of L. N. Mackomiskey.)

various column headings showing the periods between various dates were supplied by counsel.

The accounts include a portion only of "Indirect Costs." They include cost of supervision but not, for instance, interest during construction. I am sure they include engineering. From the methods of accounting of the plantation, they would include any damage done incidentally during construction, like accidental death of workmen, which had to be paid up, and any damage resulting from the work while it was in course of construction. They likewise include a portion of indirect costs of laborers. There are some indirect costs which are not shown as part of the costs of improvements, such as medical attendance to employees, the value of quarters furnished employees, firewood, and some similar items. The statement includes the cost as just explained of all improvements erected upon the Holt lands from April 1, 1905 to December 31, 1931.

I have likewise prepared a statement showing the cost of improvements made on the Holt lands which have been abandoned for the same period, namely, April 1, 1905, to December 31, 1931. The information as to the items of improvements which have been abandoned was made up upon the advice and with the consultation of Mr. Duarte who is familiar with the physical units of improvements. The costs of these units which, on his information, had been abandoned was traced to the original books of record of the company and the contemporary analyses of accounts made up at the same time.

Respondent's Exhibit S-6

was, over the objection of counsel for Petitioner, received in evidence and reads as follows:

COST OF IMPROVEMENTS MADE ON HOLT LANDS WHICH HAVE BEEN ABANDONED TO DECEMBER 31, 1931

Description	Year Constructed	Year Abandoned	Cost	Total
Buildings (including Domestic Water System)				
Helemano 8 Camp	1907	1931	$3,465.80	
Helemano 8 Camp	1908	1931	1,073.40	
Helemano 8 Camp	1909	1931	21.75	
Helemano 8 Camp	1916	1931	92.65	
Helemano 8 Camp	1919	1931	87.00	
Wilson's Helemano Camp	1908	1909	150.00	
Wahiawa Ditch Camp	1911	1923	896.20	
Helemano 14 Camp	1913	1923	1,754.10	
Helemano 14 Camp	1917	1923	3,639.45	
Helemano 13 Camp	1917	1923	115.00	
Helemano 13 "A" Camp	1919	1923	366.90	
Helemano 3 Camp-Store	1908	1927	726.00	
Helemano 4 Camp	1906	1930	780.00	
Domestic Water System	1917	1924	7,880.60	$21,048.85
Railroads				
Helemano 4	1906	1929	8,000.00	
Helemano 4 "B"	1906	1930	1,975.00	
Helemano—12-13-14	1915	1923	5,932.40	
Helemano—14-15-16-17	1917	1923	3,226.60	
Poamoho Spur	1916	1929	1,546.00	20,680.00

Description	Year Constructed	Year Abandoned	Cost	Total
Siphons				
Helemano 6	1918	1925		$5,969.22
Ditches				
Helemano Lower	1906	1915		7,022.70
Waterways				
Helemano 14	1914	1923	42.60	
Helemano 13	1915	1923	64.30	
Helemano 13-13A-14B	1917	1923	189.10	
Helemano 14-14A	1918	1923	26.00	
Helemano 14	1919	1923	83.70	
Helemano 12-13A-13B-14B	1920	1923	408.90	
Helemano 6 Siphon Outlet Kaanoo Ditch Extension	1920	1929	353.50	1,168.10
Flumes				
Helemano 13	1911	1923	83.90	
Helemano 11 Outlet Ditch	1911	1929	726.45	
Helemano	1911	1913	2,852.40	
Helemano	1912	1913	22.00	3,684.75
Cane Flumes				
Helemano—Various Fields	1908	1929	222.75	
Helemano—Various Fields	1909	1929	773.45	
Helemano—Various Fields	1910	1929	1,143.50	

Description	Year Constructed	Year Abandoned	Cost	Total
Helemano—Various Fields	1912	1929	691.50	
Helemano—Various Fields	1913	1929	*1,407.40	
Helemano—Various Fields	1914	1929	1,337.70	
Helemano—Various Fields	1915	1929	452.65	
Helemano—Various Fields	1916	1929	1,215.00	
Helemano—Various Fields	1917	1929	1,304.00	
Helemano—Various Fields	1918	1929	1,384.00	
Helemano—Various Fields	1921	1929	404.90	
Poamoho	1926	1929	2,000.00	12,316.85
Telephone Lines				
Helemano (Lord)	1906	1925	26.65	
Helemano Extension	1908	1925	688.95	
Helemano Extension	1909	1925	4.00	
Helemano Upper Reservoir Extension	1915	1925	769.50	
Helemano Policeman's House	1919	1925	27.17	1,516.27
				73,406.74
Reservoirs				
*Helemano Upper	1914	1917		20,054.21
				$93,460.95

*Failed in 1917 Replaced 1918)

(Testimony of L. N. Mackomiskey.)

WITNESS RESUMES: Exhibit S-6 is made up of units similarly to Exhibit S-5, previously discussed. It shows the year of construction of each unit, each item, the year abandoned and the cost of the item abandoned, so that the total, appearing at the bottom of the Exhibit, namely $93,460.95, represents the original cost of those improvements upon Exhibit S-5 which have been abandoned up to and including December 31, 1931. The total cost of improvements now located on the Holt property may be determined by subtracting from the total shown on Exhibit S-5, namely $646,905.47, the total appearing at the bottom of Exhibit S-6, $93,460.95.

I have also prepared a statement showing the cost of the Wahiawa Water Company outlet and spillway to December 31, 1931. This is prepared directly from the original books of record of the company at the Wahiawa office.

(Respondent's Exhibit S-7 was, over the objection of counsel for Petitioner, received in evidence and reads as follows:

(Testimony of L. N. Mackomiskey.)

COST OF WAHIAWA WATER COMPANY, LIMITED, DAM AND SPILLWAY TO DECEMBER 31, 1931.

Year	Dam	Spillway	Total
1902)			
1903)	$ 24,079.72		$ 24,079.72
1904)			
1905	49,817.48		49,817.48
1906	170,001.14		170,001.14
1907	3,794.48		3,794.48
1916	39.38		39.38
1917	25.00		25.00
1921		$180,000.00	180,000.00
1924		867.23	867.23
1931	19,931.51		19,931.51
	$267,688.71	$180,867.23	$448,555.94

WITNESS RESUMES: The exhibit shows the amounts, year by year expended from 1902 to 1931, on the dam and on the spillway, separately, and the total of the two items, except for the years 1902 to 1904, inclusive, which are combined in one item.

I prepared, also, a statement showing the cost of the Wahiawa Ditch and the Wahiawa Extension Ditch from the outlet valve at the Wahiawa Dam to the boundary of the Holt Estate lands, up to December 31, 1931. This was likewise prepared from the original books.

(Respondent's Exhibit S-8 was, over the objection of counsel for Petitioner, received in evidence and reads as follows:

(Testimony of L. N. Mackomiskey.)

COST OF WAHIAWA DITCH AND WAHIAWA DITCH EXTENSION FROM OUTLET VALVE AT WAHIAWA DAM TO BOUNDARY OF HOLT LANDS TO DECEMBER 31, 1931:

Year	Wahiawa Ditch	Wahiawa Ditch Extension	Total
1904	$13,328.21		$13,328.21
1905	25,415.50	$4,394.68	29,810.18
1906	10,433.88	1,404.49	11,838.37
1907	323.05		323.05
1912	927.20		927.20
1915	318.90		318.90
1916	71.00		71.00
1917	84.30		84.30
1918	767.80		767.80
1919	355.00		355.00
1920	1,068.90		1,068.90
1923	109.00		109.00
1924	4,892.67		4,892.67
1925	13.00		13.00
1926	132.00		132.00
1927	115.90		115.90
1928	925.02		925.02
1930	958.63		958.63
	$60,239.96	$5,799.17	$66,039.13

WITNESS RESUMES: Exhibit S-8 shows the capitalized cost of the Wahiawa Ditch and the Wahiawa Ditch Extension from the outlet valve at the Wahiawa Dam to the boundary of the Holt lands, year by year from 1904 to 1930, showing the expenditures on the two items of improvements separately, and also the total of the two combined, combined, annually and combined as a grand total for the whole period. The statement includes no item that has been charged to expense and only

(Testimony of L. N. Mackomiskey.)

items which have been charged to capital. Each and every one of the items indicates cash expenditures as shown in the books of records of the company. I analyzed these accounts myself and gave attention to the fact whether they were capital accounts, but I did not in any way segregate the Wahiawa Dam Spillway account or Ditch account in connection with any pro rata effect of these two items upon the Holt lands as distinguished from other parts. The only proration shown is the prorations of the cost of the Wahiawa ditch extension as between the portion on the other Waialua land and the portion of the Holt land. On information from Mr. Duarte it was divided equally. The length of the Wahiawa ditch extension is about 50% on the fee lands of Waialua and 50% on the Holt lands. The nature of the land and cost of construction is stated by Mr. Duarte to be just about the same, so the apportionment of the cost from the lower part of the Wahiawa ditch to the end of the Wahiawa ditch extension is shown as 50% expended on fee and 50% on the Holt land, and this portion shown on Exhibit S-8 is 50% of the total amount. This is the only proration we had to make on these.

Cross Examination.

Referring to Exhibit S-5, and to Exhibit S-6, the dates of abandonment were ascertainable in most cases by reason of some definite occurrence; in some cases by an accounting record. This would be par-

(Testimony of L. N. Mackomiskey.)

ticularly true since 1926, for the reason that the company's plant ledger was established at that time. In other instances I gathered my information from the people at the plantation itself and from Mr. Duarte. The various accounts themselves are being carried in the exhibits at capital cost.

Exhibit S-5 does not pretend to show present value, as depreciation is not included. On buildings of these lighter types, the depreciation taken is 4% or 5%. In past accounting history of the company a great deal lower rate of depreciation was taken for the reason that, under the then system of accounting, buildings were repaired very largely through repair and maintenance accounts. Buildings of this type can be maintained almost at 100%. Through repairs and replacements, new roofs are to be put on, new sidings, new painting, etc., and new foundations, so buildings run along almost continuously. At the present time we capitalize a greater percent of improvements.

The cost of maintenance and repair will not equal or exceed the original cost of construction in any one year, but if you take a building—an ordinary laborer's shack as there is on the plantation—put a new roof on one year, a new floor in another year, etc., there might come a time when such costs would amount to the original cost of the building. You cannot talk of a fair rate of depreciation without due consideration for the repair and maintenance policy. A laborer's quarters, on which 5% might

(Testimony of L. N. Mackomiskey.)

be considered a fair rate of depreciation, might conceivably last forty or fifty years, or even longer, depending on the repair and maintenance policy. For practical accounting purposes, some rate has to be taken.

I have made no attempt to determine the physical condition of the improvements, and a survey of the improvements would have to be made to determine to what extent maintenance and repairs had overcome normal wear and tear. This schedule purports to be only a statement of costs, of capitalized improvements that were put on the property, and with no indication of present worth. Likewise, there is no indication as to how far the present physical condition may be the result of outlay in the course of repairs and maintenance as distinguished from initial capital invested. On this particular Exhibit S-5 no depreciation is carried against the improvements.

In certain classes of assets there has been an improvement in the condition of the asset as compared with its original installation, like railroad cuts and fills. They improve in time and there has also been an element of betterment that has entered into these improvements through repairs and maintenance, substituting a stronger or better character than was in the original installment, like railroad rails and ties. The bed of a railroad as a whole is not ordinarily depreciated at all because as ties and rails wear out new ones are put in and the road is main-

(Testimony of L. N. Mackomskey.)

tained in a quite serviceable condition. So, also, with respect to reservoirs in which the reservoir sides have become settled and strengthened. I am merely pointing out that some of the assets have not depreciated at all but are better. I should think that a considerable part of the physical condition of the assets today is a result of the maintenance and upkeep which has been exercised throughout all these years.

Enlargement of buildings would be capitalized. If a one-room building was enlarged into a three- or four-room building the cost would be reflected in the increased capital expenditure, but if there were simply a replacement of something that had previously existed it would not appear in that statement. All my information in regard to the items comes from the accounts of the company. It was customary to have an analysis made of the expenditures month by month and year by year, which analysis is on record at the plantation, which definitely shows the location of these improvements which were put on the property. It would show all fields and all camps and all sections, so that the accounts there definitely and specifically show the location of the improvements that have been put on.

The subsidiary records show, in practically all instances, the difference between capital outlay and operating expense. It would be difficult to take every particular improvement, each particular item, and trace that improvement down to its place in

(Testimony of L. N. Mackomiskey.)

the improvements today. It could not be done with the accuracy with which the schedule, Exhibit S-5, is compiled, for the reason that some of these items have become merged into group items and carried in these accounts as a group instead of a single item. Take the extension of the railroad, for example. We would know what that extension would cost from a fixed point to another fixed point, which was usually noted in the book when the expenditure was made, but after it has become set up in the books it becomes merged with other railroad accounts and it loses its identity to some extent. That would confuse us in picking out items at the present time. Some of these large units, however, like large siphons and reservoirs, do still remain on the books and carry a different account in themselves.

In the item "Clearing Lands," $43,493.89, there would be an item in the ledger account of which that would be a part. In my experience as an accountant, and knowledge generally of bookkeeping methods among sugar plantations in Hawaii, the initial cost of clearing lands is carried as a capital asset indefinitely, and properly so. This represents the cost of the land in its present condition. If someone else had done the clearing and sold the land to you it would be reflected in the added cost you would have to pay for it.

Between the period April 1, 1905, to May 2, 1910, there were some amortization charges on some of the items, and the books would reflect the charges.

(Testimony of L. N. Mackomiskey.)

After May 2, 1910, and for the succeeding years, I could not say positively just what the practice was on the books. There was a period up to which amortization was taken and thereafter discontinued, but I do not know what that date was, as I have made no effort to determine the amount of amortization. Amortization and depreciation are entirely different in their nature. Some improvements do not depreciate, such as reservoirs, railroad road beds, tunnels, and other improvements more or less permanent in their nature. If anything was taken there it would be amortization, but I cannot say that was taken, but from my best recollection and from what I have seen of the books and accounts, there was only one rate of amortization. An amortization charge represents the equity of spreading the cost of improvements over the period for which the lessee would have their use. This is a constant rate, varying only as additional improvements were put on the land.

Exhibit S-5 represents only that portion of the cost of improvements that actually were on the Holt lands and does not include any incidental cost such as connecting the railroad system with one over the Holt lands or other areas. This could be done because in practically all instances the cost of the proportion of improvements on the Holt land was separately shown on the account. In a very few instances it was necessary to apportion the cost of improvement which was partly on Holt land and

(Testimony of L. N. Mackomiskey.)

partly on other lands, but there were only a very few cases of that kind and the percentage was negligible. When such apportionment was made it was done on the advice of Mr. Duarte who was there at the time and had first-hand knowledge of the work that was done, as, for instance, in the case of the Wahiawa ditch extension. Generally, the apportionment was made by the plantation contemporaneously with the construction, in order to set up the items properly in the books.

Since 1910, the improvement accounts in respect to the Holt lands are shown separately, either by books or subsidiary temporary exhibits which were available to me. I believe the accounts can be shown up to the present time as having been put on the Holt lands or other lands, but the larger accounts may merge the expenditures. Exhibit S-5 shows the actual cost of an improvement where physically located without regard to its use and without regard to what part of the company's business it served; for instance, if there is a ditch on the Holt lands, with no purpose except serving the land beyond the Holt land, it would be carried in the exhibit as a Holt improvement.

In regard to Exhibit S-7, relating to the Wahiawa Water Company, I obtained my information from the books of the Wahiawa Water Company, as such figures were not shown on the books of the Waialua Company. I am generally familiar with the stock holding of the Wahiawa Water Company. Waialua

(Testimony of L. N. Mackomiskey.)

at all times held control. I couldn't say, definitely, just what outside holdings there were but they have all practically been sold to the Waialua Company.

Waialua pays the Wahiawa Water Company for the use of water coming from the Wahiawa water system. The accounts of the company are kept separate and distinct. The transactions between the Wahiawa Water Company and Waialua are not quite the same as would be between two independent corporations, because Waialua owns 100% of the stock of the Wahiawa Company. The charge that is made is, I presume, agreed upon between the two corporations. If there were any dividends from the Wahiawa Water Company, of course Waialua would get its proportion. I think the practical working out has been that water is sold at about cost, including the various items of cost which might arise over a period of years.

The Wahiawa Dam is entirely off the Holt property, except a comparatively small area into which a part of the waters at its higher levels might be backed up from the dam. The spillway is that portion of the dam or that portion adjoining the dam which provides for carrying away the surplus waters of the reservoir.

I am not competent to segregate the costs of the books of the Wahiawa Company by its various assets. It is not my understanding, however, that the dam of itself, or the spillway of itself, takes in any more than the classified units as signified by

(Testimony of L. N. Mackomiskey.)

the name. In connection with the Wahiawa Water Company, of course there are a number of features and a long list of improvements and things connected with water development not connected with the Holt lands which are not shown at all on Exhibit S-7, they being, in the main, outlets and ditches used in supplying the homesteaders with domestic and irrigation waters, a minor detail of the company's operations. There would be no depreciation on the Wahiawa Dam. The expenditure for the Wahiawa ditch and the Wahiawa ditch extension, from the outlet valve at the Wahiawa dam to the boundary of the Holt lands as shown in Exhibit S-8, is an expenditure of the Waialua Company and is carried as an asset of the Waialua Company. If the Wahiawa extension ditch goes beyond the north boundary of the Holt lands into the Bishop Estate lands, such extension would be set up on the accounts relating to the Bishop Estate lands.

(In order to clear up a question asked by the court the witness was recalled on

Direct Examination

and testified as follows:)

Exhibit S-5 shows the cost of improvements which are physically located on the Holt lands and none other. Exhibit S-6 shows those improvements physically located on the Holt lands which have been abandoned. Exhibit S-7 includes only the cost of the dam and spillway of the Wahiawa Water

(Testimony of L. N. Mackomiskey.)

Company and none of the other capital expenditures of the Wahiawa Water Company. Exhibit S-8—the cost of the Wahiawa ditch and Wahiawa extension ditch, from the outlet valve of the Wahiawa dam to the boundary of the Holt land—includes the cost of the ditch running from the outlet dam of the Wahiawa reservoir down to where the extension ditch commences, and that there is then included the cost of the extension ditch only from the end of the main ditch to the south boundary of the Holt property. Therefore, the only item requiring allocation that his Honor referred to is the cost of the Wahiawa extension ditch from the end of the main ditch near Kemoo to the north boundary of the Holt property, the aggregate of this being slightly over $11,000. Inasmuch as that constituted but one item on the books, it became necessary to apportion the item in order to show the expenditure on the Holt land as distinguished from the expenditure off the Holt land. This apportionment was made after consultation with Mr. Duarte, and the item was allocated half to the Holt land and half to the land south of the Holt boundary.

In practically every instance, with respect to the items of improvements, there are documents made contemporaneously with the improvements which show the costs. This is true with the Wahiawa ditch extension, the only apportionment being that apportionment which was required for the portion off the Holt land and the portion on the Holt land.

JOHN GOMES DUARTE

was called as a witness for Respondent, was sworn, and testified as follows:

Direct Examination.

At present I am employed by Castle & Cooke, Limited, but from the latter part of 1900 to April 1, 1924 I was employed directly by the Waialua Company, and since April 1, 1924, in a consulting capacity on a retainer basis. I was a resident at the plantation from 1900 to 1924. I was employed as surveyor and engineer.

I first knew of the Holt lands in 1901, becoming more familiar with them, particularly in 1904 and 1905. I knew the condition of the Holt lands at the time of the execution of the lease (Exhibit A-8) to the Waialua Company. I had occasion to go through these lands very often. There were nothing but small cattle trails on the lands. On the lower part of the lands, up to an elevation of 400 to 450 feet, there was a dense growth of lantana and scrub guava, and on the part north of the Helemano gulch the lower portion was thickly covered with rock. Likewise, on the south side of the Helemano gulch there was also a lot of rock. The only improvement on the Holt lands at the time of the execution of the lease, was a little house by the government road, occupied formerly by one Dr. Reed and later by Dr. Brodie. No portion of the property was under cultivation.

(Testimony of John Gomes Duarte.)

My work in connection with the Holt lands shortly after the execution of the lease, was the Wahiawa ditch extension. I surveyed that ditch line from the Kaheeka boundary to the north, or to the south boundary of the Opaeula ditch. Work of construction on that portion of the Wahiawa ditch extension commenced in 1905 after the lease was executed, being complete in 1906, at which time the first water was brought onto the lands and into that ditch. I surveyed for other improvements upon the Holt property, such as reservoir sites, railroads and siphons, determining quantities, capacities and so on. Up to 1924 I did practically all of the surveying and engineering work in connection with the improvements upon the Holt lands. I located and surveyed the route of both the Helemano ditches and likewise that of the Poamoho branch. The same is true of the reservoirs on the Holt property. I likewise located all the railroads shown on Exhibit S-4, with the exception of a piece of railroad to eliminate two switchbacks.

I conferred with Mr. Mackowinskey and designated to him the improvements which are shown on Exhibit S-6. This exhibit (S-6) sets forth accurately all of the improvements constructed upon the Holt property which have been abandoned up to the date shown on the exhibit. I also conferred with him in respect to the ascertainment of the cost of construction of that portion of the Wahiawa extension ditch which is located upon the Holt property.

(Testimony of John Gomes Duarte.)

In regard to this latter, the following method was used:

From the distributing point at Kemoo, or the end, you might say, of the Wahiawa reservoir ditch at the weir, there was a certain amount of money spent up to a certain point on the Holt lands, and later there was another contract for the construction of this ditch to this point on the Holt lands to the north boundary of the Holt lands. These two amounts were added together, and in view of the fact that half of the line there represented was on the Holt lands, we divided the total item by two. The records consulted showed accurately the cost of the ditch from the Kemoo junction to the north boundary of the Holt property. The allocation was on the basis of distance and did not include the cost of siphons.

At the request of counsel for the Waialua Company, I went onto the Holt Estate lands with a photographer and indicated to him the photographing of the improvements. All of these improvements which were then photographed are on the Holt lands, except as indicated by the captions in the photograph book which I have here. The photographs were then put in a book marked "Photographs," containing 56 separate photographs. Such photographs are true representations of the physical items indicated by the caption or title below each respective photograph. I myself prepared the book, together with Mr. Rudin of the Waialua

(Testimony of John Gomes Duarte.)

Company. The captions below each photograph are true. Photograph #1, which is of the Waialua mill, is not on the Holt land. The photograph of the Wahiawa dam and reservoir is likewise not on the Holt land, although the photograph does show a part of the Holt land. The photographs in this book accurately and truly show, as of today, the condition, nature and location of the respective items shown by the captions.

(Over the objection of counsel for Petitioner, the book of photographs was received in evidence as Respondent's Exhibit S-9, with the privilege to counsel for Petitioner at any time, on further examination, to object to any items in connection with or appearing in the captions which are considered objectionable to Petitioner. The original of said Exhibit S-9 is, by order of the Supreme Court of Hawaii, a part of this record and such book of photographs is hereby referred to and incorporated herein.)

WITNESS RESUMES (referring particularly to the improvements marked on the map, Exhibit S-4): Helemano 1 Camp, so indicated on the map, is located about a quarter of a mile east of the main government road near the west corner of the map. (The witness thereupon referred to certain memoranda prepared by him, which were handed to counsel for Petitioner for examination.) This camp consists of two houses—wood frame buildings built in 1911—and will accommodate about five laborers.

(Testimony of John Gomes Duarte.)

Helemano 3 Camp is located about half a mile east of the main government road, as indicated on the map. It consists of five wood frame buildings accommodating about thirty laborers, built in 1906. The physical condition of the buildings is very good; they are kept repaired and maintained and kept up in very good shape. The same is true of the buildings in Helemano 1 Camp just referred to.

Helemano 4 Camp is located about a half mile east from the main government road. This was built in 1912. There are twenty-seven houses and a bath-house in that camp and the same will accommodate sixty-one laborers, more or less. The physical condition of the buildings composing the camp is very good; they have all been repaired and maintained, and such constant repairs have kept them in good order and condition.

Helemano 6 Camp is located about one and a quarter miles east from the west boundary of the Holt lands near the circular reservoir shown on the map. This camp was built in 1919 at the same time the reservoir was built. There are twenty houses and one bath-house in that camp. The camp will accommodate forty-eight laborers. It is in good physical condition, a photograph in Exhibit S-9 illustrating that particular camp.

Opaeula 9 camp is located about a quarter of a mile south from the north boundary of the Holt lands and about one and a quarter miles east from the government road. This consists of thirteen

(Testimony of John Gomes Duarte.)

houses and one bath-house, accommodating thirty laborers. It was built in 1908 or 1909. This camp is in very good physical condition.

Helemano 10 Camp is located near the south bank of the Opaeula gulch, about two and a half or three miles from the government road, a little bit south of the north boundary of the Holt lands. This is also known as Opaeula 10 Camp. It consists of nine houses and one bath-house, accommodating about twenty laborers and being built in 1908 and 1909. The camp is in very good physical shape and condition.

Opaeula 11 Camp is located about three or three and a quarter miles east from the government road, also near the south bank of Opaeula gulch near the reservoir called Helemano 11 reservoir. That was built at about the same time the reservoir was built, in 1912. It is in very good physical shape and condition.

In regard to supplying domestic water to these camps, we first built a little domestic water reservoir about a mile east from the government road adjoining the Kemoo ditch extension, or waterway. It was supplied with mountain water from the Helemano system. These various camps are now supplied with domestic water consisting of a pipe system with the source of water supply from Pump 3, the pump not being on the Holt lands.

The camps I have described are entirely located upon the Holt lands, but the laborers living in those

(Testimony of John Gomes Duarte.)

camps work sometimes on the Holt lands and at other times on other lands of Waialua outside of the Holt lands. The manager controls that feature of it. These laborers may be detailed to any section of the Waialua plantation.

The total distance of railroads originally constructed on the Holt lands is 9.75 miles, of which 2.75 miles have been abandoned. Originally we used the 25-lb. rails, but that has been gradually replaced with 35-lb. rails. There are two trestles: one trestle is across the Poamoho gulch in Grant 238, about 300 feet long; and there is another trestle in the Helemano gulch about 100 feet long. The railroad upon the Holt property is not continuous. The first piece is located in Grant 238 in the Poamoho gulch and the length of it from point to point, indicated by me on the map, is .2 of a mile. That is where the Poamoho bridge or trestle is located.

A second piece runs parallel to the government road on the upper side. After it leaves the government road it goes into the Helemano gulch up to a point where it gets into the Bishop Estate lands. It is located on the westerly edge of the Holt lands. This is a piece about .65 of a mile, and on this piece there is a small trestle crossing the Helemano stream about 100 feet long. The principal purpose of this last section is to reach the lands of the Waialua Company lying north of the Holt lands, as well as to reach the northerly portion of the Holt lands themselves. In respect to the first line of railroad

(Testimony of John Gomes Duarte.)

mentioned, that crossing the lands upon which the Poamoho pump is located is simply to traverse the land upon which the pump is located.

Then there are also three branch lines running into the cane fields above the main lines. The main line, or the line I have just described, namely, that on the western edge of the Holt lands, is the main line of the company's system. There are three branch lines: a small branch line that crosses the Holt land onto Grant 607—a distance of .1 mile on the Holt property; the next branch line starts just at about the point of the intersection of Grant 607 with Royal Patent 4475, at the westerly end, and proceeds through Helemano 4 field. This line continues on for a total distance of 6.8 miles on the Holt lands. A part of that has been abandoned—a total of 1.7 miles—and in another place on this line to improve the railroad system and the rerouting of the same, we elimniated two switch-backs of .95 of a mile. The third branch begins at a point near the Opaeula stream trestle on the main line of Bishop Estate land and comes up through Helemano 3 field into the Holt lands with a switch-back; then it goes in a general northerly direction for a distance of two miles.

The railroads upon the Holt properties, or running through them, are of two general characters: main and branch lines. The main line crosses the property upon which the Poamoho pump is located, proceeding northerly therefrom, across lands not belonging to the Holt Estate, and across the tip end

(Testimony of John Gomes Duarte.)

of the Holt Estate where it crosses into Bishop Estate lands. There are thus three branch lines from this main line: the first branch taking off from the main line at about the Holt property on which the Poamoho pump is located, proceeding northerly and easterly into other lands not classified as Holt Estate lands; the second branch takes off from the main line at about the intersection of the main line with the southerly boundary of the Holt Estate, and proceeds thence in an easterly direction along the property lying south of the Helemano stream; the third branch takes off from the main line at about its intersection with the Bishop Estate lands and proceeds in an easterly direction along the property lying to the north of the Helemano stream. The Holt Estate lands are separated into two major portions by the Helemano stream, which has necessitated the construction of the separate branch lines so that one may reach the land lying south of the stream and the other the land lying north of the stream.

In response to a question by the court, I stated that a section of the railroad lying south of the Helemano stream was abandoned. The first part of such abandonment was in 1923. The occasion for this was the leasing of those lands—the lands lying easterly from the Wahiawa extension ditch, or the upper lands—to the Hawaiian Pineapple Company. That abandonment was occasioned by the making of the Hawaiian Pineapple Company lease. With re-

(Testimony of John Gomes Duarte.)

spect to the land of the Holt Estate lying north of the Helemano stream, it is not possible, economically, to cross that stream with wagons or railroads, with the exception of the extreme lower end where it is crossed by a plantation railroad. The other parts are economically impossible.

All of the pineapple lands lying to the north of the Helemano stream are supplied or harvested by trucks coming down the main arteries; that is, ordinary roads, plantation roads, or pineapple roads, to where the terminus is of the Helemano 9 Railroad, or of the branch line designated as the Third Branch Line. From there the pineapples are taken on the plantation line to the Waialua railroad station, which station belongs to the Oahu Railway & Land Company.

The physical condition of the plantation railroads located upon the Holt property is as follows: the roadbed is far better than when made; you have a settled track and a settled roadbed. As to rails and ties, they have either been replaced or are gradually being replaced, so that the railroad as a whole is in A-1 condition. The main line was all 35-lb. rails. The branch lines originally had 25-lb. rails but since 1905 these have been replaced with 35-lb. rails, so there is very little left of the original 25-lb. rails.

Helemano 3 dam and reservoir is on the extreme westerly boundary of the Holt Estate property. It was built in 1906. It is more or less of a circular dam with a total distance around the dam of 577

(Testimony of John Gomes Duarte.)

feet. The height of the dam is 12½ feet, with a crest of 12 feet. The slopes, both inside and outside, are 1½ to 1. The capacity of the reservoir is 2,000,000 gallons. The purpose of this reservoir was originally to store tail race water. In other words, after the irrigation, in the evening when the irrigation is over, a lot of that water is still running; then the gates are closed from the fields and the water is run down and stored in that reservoir. It also stores a little night water. The reservoir is located entirely upon Holt lands. The waters impounded in the reservoir serve the Holt lands and other lands outside of the Holt Estate owned by Waialua. The physical condition of this reservoir is good. The reservoir or dam is practically a compact unit now; it won't settle any more and its holding qualities are perhaps better today than the day it was built. I am sure of that—of any reservoir that is built that way.

The Helemano 6 reservoir is located about 500 feet northeasterly from the junction of the Helemano ditch and the Wahiawa extension ditch. It was built in 1908. This reservoir is at an elevation of about 700 feet. It is really a dam put across a gulch 410 feet long. The height over all, in the center of the dam, is 48 feet. The width of the crest is 16 feet. The inside slope is 2 to 1, and the outside 1½ to 1. The cubic content of the dam itself—not of the reservoir—is 23,140 yards. It holds a depth of water of 35 feet. The area flooded is 6.6 acres. The spillway is a concrete spillway 10 feet wide, located on the north side of the dam. The purpose of the reser-

(Testimony of John Gomes Duarte.)

voir is to store night water from the Wahiawa reservoir ditch and also water from the Helemano ditch system. Water in Helemano 6 reservoir cannot find its way into the Wahiawa extension ditch but water from the extension ditch can find its way into the reservoir. The reason is that water stored in that reservoir is used on the cane lands immediately below, through an outlet ditch from the dam where it is taken to the area below in straight ditches or on laterals, irrigating cane lands lying to the west, some of which are Holt lands and some of which are other cane lands belonging to Waialua.

Helemano 6-B reservoir is a little circular reservoir, about two miles easterly from the main government road. It was built in 1912, at an elevation of 460 feet. It is a circular dam having a circumference of 850 feet. The height of the dam at its highest point is 12.4 feet; the width of the crest is 12 feet; the slopes, both inside and outside, 1½ to 1; and the cubic content of the dam 4754 cubic yards. It will impound 2,500,000 gallons. It is used in a similar area as in the preceding Helemano 6 reservoir. It irrigates Holt lands and other lands controlled by Waialua. The present physical condition of that reservoir is good, or better, than when built. Any of those earthen dams, after they have been used a certain number of years, hold better, and the dam itself becomes very compact and hard. The same statement is true as to Helemano 6 reservoir.

Helemano 11 reservoir, both the dam and reservoir, is situated a little east of the Wahiawa ex-

(Testimony of John Gomes Duarte.)

tension ditch before the ditch enters the Opaeula 54" siphon near the north boundary of the Holt Estate lands. This was constructed in 1912 at an elevation of 680 feet. It is a dam which is located in a small dry gulch. The length of the dam across is 343 feet; the height at the center in the deepest place is 37 feet; the width at the crest 14 feet; the slope inside 2 to 1, and the outside slope 1½ to 1. The reservoir has a capacity of 23,000,000 gallons, with a flooded area of 7.3 acres. The cubic content of the dam is 16,810 yards. The water impounded in this reservoir is taken through a small outlet ditch, traveling about a half mile westerly until it reaches what we call the Helemano 11 road. From there it travels down that road, or westerly, irrigating Holt lands and also other lands outside of the Holt lands. The physical condition of this dam and reservoir is the same as Helemano 6 dam and reservoir.

The Upper Helemano Reservoir is located in the pineapple area somewhat near the center of the area that lies south of the Helemano stream, but lying closer to the Poamoho stream. It was built in 1918. There had been an earlier reservoir there, built in 1914, but it failed in 1917. A new reservoir was built there to replace that, at an elevation of 980 feet. The length across the dam is 210 feet; height at the center 40 feet; width at the crest 16 feet; inside slope 2½ to 1, and the same on the outside slope. The cubic content of the dam is 20,000 cubic yards. Its capacity is 50,000,000 gallons and its area 12.8 acres. Water stored here is primarily surplus water

(Testimony of John Gomes Duarte.)

from the Helemano ditch system. The water is taken from an outlet ditch for about two miles; then it connects with the Helemano ditch and travels down this ditch where it is used on the lower lands. It is also taken through a lateral ditch across the Holt lands onto the Waialua lands and to another reservoir, namely, the Helemano 15 reservoir. From that latter reservoir the water is taken onto other Waialua lands so that the water from the upper Helemano reservoir is used on the Holt cane lands and other cane lands of Waialua. From Helemano 15 the waters come down onto Kaheeka land—part of the Waialua plantation. The rebuilt reservoir was constructed in 1918, and its present condition is as good as the day it was built.

Helemano 12 reservoir is located in a dry gulch surrounded by the pineapple area. It was built in 1915, serving two purposes: as a dam and a railroad fill. It is at an elevation of 820 feet and the length of the dam is 250 feet; height 34 feet; width of crest 14 feet; slope inside 2 to 1; outside 1½ to 1. The cubic content of the dam is 8,015 cubic yards and the capacity of the reservoir 7,000,000 gallons. The waters impounded are taken through an outlet ditch into the Helemano ditch or dropped into a gulch, and from thence into Helemano 6 reservoir. If it finds its way into the Wahiawa ditch extension it is carried through that ditch onto the Holt lands or other lands controlled by Waialua. If it finds its way into the Helemano 6 reservoir the water from there is taken through an outlet ditch which goes

(Testimony of John Gomes Duarte.)

down below the Wahiawa extension ditch, serving the Holt lands and other lands outside of the Holt lands. This reservoir (Helemano 12) receives its water from the Helemano ditch system. The reservoir is in as good physical condition as when built.

Helemano 4A reservoir is located about 1½ miles easterly of the main government road near the south boundary of the Holt lands in Royal Patent 4475. It was built in 1916. It is a three-sided dam with a length of 759 feet; height 14 feet; and crest 8 feet wide. The slopes inside are 2 to 1, and outside 1½ to 1, with the content of the dam 7,296 cubic yards. The reservoir has a capacity of 3,000,000 gallons. It secures its supply of water either from Pump 10 High Lift or from the Wahiawa extension ditch, or from any of those sources above the dam. The waters impounded in that reservoir are taken by two small outlet ditches branching north and south. The branch taking the water north travels down the road in a straight ditch or lateral, serving the Holt lands and other lands outside of the Holt lands; the south branch serves only lands outside of the Holt lands. The physical condition of the reservoir today is perhaps better than when it was built.

Helemano 9-C reservoir is located about a quarter mile southerly from the north boundary of the main Holt lands and perhaps 1½ miles easterly from the western side of the Holt lands. It is located about the center of the cane area north of the Helemano stream. It was built in 1917. Its elevation is 325 feet. It is a three-sided dam of 782 feet length containing

(Testimony of John Gomes Duarte.)

6143 cubic yards of material. The height is 12 feet; the crest is 10 feet wide; and the slope inside is 2½ to 1, and outside it is 1½ to 1. The reservoir has a capacity of 3,000,000 gallons. It secures its water from the High Lift of the Poamoho pump which is located on Grant 235. It may also secure its water from the Wahiawa extension ditch or it may impound waters from the Helemano ditch development. The water is used on Holt lands and other lands outside. The reservoir and dam are in good condition—perhaps better than when they were built.

Helemano 15 reservoir is a little west from the center of Grant 431 but it floods a portion of Grant 431 which is Holt land. It was built in 1919. The dam is at an elevation of 800 feet; its length is 286 feet; the width at the crest is 14 feet; slope inside 3 to 1 and outside 1½ to 1. The cubic content of the dam is 11,300 cubic yards, and its capacity 23,000,000 gallons. It is surrounded by the so-called pineapple area and gets its water supply from the upper Helemano ditch system. The waters impounded are taken through an outlet ditch and dropped into the Wahiawa reservoir ditch and from there carried onto the Kaheeka lands and other lands outside of the Holt lands, though some of it may find its way onto the Holt lands through the Wahiawa extension ditch. The dam itself is not on Holt lands. The physical condition of the dam is better than when built. All of the waters from the Wahiawa reservoir are used on Waialua lands, in-

(Testimony of John Gomes Duarte.)

cluding the Holt lands. None of the water is used on lands not owned or controlled by Waialua.

Helemano 54" siphon is located about the center of the Holt lands in the Helemano gulch. It carries the Wahiawa extension ditch waters across the gulch. The siphon was built in the latter part of 1906, of 54" steel rivetted pipe. The length of the pipe is 1400 feet and the thickness of the siphon ranges between 3/8" on the bottom to 1/4" on the top sections. The total head of water in the siphon is 260 feet. The siphon has corroded somewhat since it was installed and is not in as good physical condition as the time we put it in, but it should last between five and six years more.

The Opaeula 54" siphon is located on the Wahiawa ditch extension, about the center of the Holt lands and the north boundary of the Holt lands. It was built in 1906 and its length is 900 feet. It was built of 54" steel rivetted pipe ranging from 5/16" thick on the bottom to 1/4" on the upper section. It is located on the Opaeula gulch, partly on Holt lands and partly on Bishop Estate land, and the cost of the siphon has been allocated to the two lands. The siphon is used to transport the Wahiawa water onto the Bishop Estate lands to the north. This siphon is also corroded but should last five to ten years more before being replaced.

The No. 6 Helemano siphon is located in the Helemano gulch on the high lift ditch of Pump 10, and carries the water from the south side of the Helemano gulch to the north side to Helemano 9-C

(Testimony of John Gomes Duarte.)

reservoir. Its location is about 1½ miles easterly from the west boundary of the Holt land. The siphon was built in connection with the high lift of the Poamoho pump. I believe it was built a year later, in 1929. The purpose of the siphon is to carry the Poamoho water across the Poamoho gulch to Helemano 9-C reservoir. The siphon is 1300 feet long, built of 12" cast iron pipe. It has a total head of 250 feet. The water is used on the Holt lands and other lands outside of the Holt lands. The siphon is practically new, and, being of cast iron pipe, I suppose it will have a life of fifty years.

Helemano No. 11 siphon is a little below the Helemano 11 reservoir. It replaced an old flume which gave way. It takes water in connection with the outlet ditch of Helemano 11 reservoir. It was built in 1929, of 24" concrete pipe. Its physical condition is good, as concrete does not deteriorate very fast. It has a small head of 15 feet.

The Wahiawa reservoir ditch, leading from the outlet of the Wahiawa reservoir down to Kemoo, was started in 1905 and completed in 1906. It traverses the north side of the Kaukonahua gulch for a distance of four miles. There is a series of 21 tunnels and a piece of open ditch about 800 to 1,000 feet long. The size of the ditch is 6'x6', mostly through rock tunnels. The aggregate distance of the tunnels is 19,400 feet. The open ditch is 5 feet deep and 7½ feet wide. The purpose of the ditch is to transport water from the Wahiawa reservoir to the Waialua lands, including the Holt lands.

(Testimony of John Gomes Duarte.)

The Wahiawa extension ditch is in good condition. There are two sections that eroded some, but those sections have been replaced with concrete sides. The Helemano upper ditch is about 30,000 feet long. It travels in a southwesterly direction for two miles, then in a westerly direction to the junction of the Wahiawa ditch extension at a point about 1,000 feet north from the south boundary of the Holt lands. It is located entirely on the area of lands leased to the Hawaiian Pineapple Company. The ditch was built in 1908. The intake is at an elevation of 1,075 feet. It travels through a series of fifteen tunnels 6'x6' for a distance of 10,450 feet, and then an open ditch, about 4½' deep by 7½' wide, for a distance of about two miles, and then it travels a distance of about two miles, in a regular-sized ditch. The ditch is in good condition, and has not depreciated. The waters travel down to feed the cane lands below the Wahiawa reservoir ditch, and surplus waters drop into the upper Helemano reservoir and are stored there to use as we need them. Part of the waters find their way into the Wahiawa extension ditch for there is a branch of the Helemano inlet ditch that takes water into the Helemano reservoir dam, and from there it can find its way northerly to the Holt lands and other lands to the north.

The Poamoho branch is at an elevation of 1075 feet at the east boundary of the Holt land and has a total length from the intake to where it joins

(Testimony of John Gomes Duarte.)

beyond the Helemano ditch intake, of 6,130 feet. It runs through part of the pineapple area and traverses the north side of the Poamoho gulch. There are nine tunnels in the ditch of an aggregate length of 5,420 feet. The tunnels are 4½ feet deep by 5 feet wide. The physical condition of the ditch is as good as when built.

The Helemano upper reservoir outlet runs in an approximately northwesterly direction for about two miles, where it joins with the upper Helemano ditch. It is all open ditch with a small flume in a dry gulch. The ditch is 3 feet deep by 5½ feet wide, the upper portion of the ditch being lined, both on the sides and at the bottom, with concrete and masonry. It is in good condition, without erosion.

The lower Helemano ditch is not on the map, Exhibit S-4. It was built in 1905, with an intake in the Helemano gulch, tapping the Helemano stream at an elevation of about 100 feet. It was divided into two branches and I believe was abandoned in 1908. It was abandoned because the flow was unsatisfactory. After the upper Helemano ditch was built the lower Helemano ditch was not necessary.

The total length of waterways on the Holt lands is ten miles. They comprise what we call straight ditches, following down the roads which are permanent in nature, and also following the outlet ditches, as those in connection with Helemano lower reservoir, Helemano 6 reservoir, Helemano 6-D reservoir, Helemano 4-A reservoir, Helemano 3

(Testimony of John Gomes Duarte.)

reservoir, pump 10 high lift ditch, and the extension of the Kemoo power plant ditch. These waterways are permanent ditches. Some of the sections used to be eroded but these sections have all been replaced with either concrete parts or masonry sides and concrete bottom. There have been at least a mile and a half of such replacements. The outlet ditches—most of them—are in as good condition as when built.

The roads are generally lateral roads branching from the government roads through the fields, roads across the Helemano guleh, roads crossing gulches connecting one field with another, and of that nature, a road overlooking and connecting Helemano and Helemano 6, bridges in connection with these roads, and then fence lines along the government road which the plantation has maintained. The roads are continuous; they go through the cane fields, through the pineapple areas and back to Waialua on other routes. The roads are in as good condition as when built and are now better maintained than formerly. The fences are all in good condition as we have to keep them in good repair to prevent stock from going into the fields. There are about twenty miles of these roads.

The total length of the flumes on the Holt lands is 1,250 feet. In the southerly portion of the Helemano ditch there is one flume 190 feet long, of Armco iron; another flume built principally of concrete with wooden box panel and trestle, and on the Wahiawa ditch extension there are some flumes

(Testimony of John Gomes Duarte.)

and trestles. There is also a flume in connection with Helemano 6 outlet and one in connection with Helemano outlet 11 ditch. All the flumes are in A-1 condition.

There are four and a half miles of transmission system in the Holt lands, built in 1922, 1923 and 1927. The transmission consists of poles, accessories and meters. While the transmission lines referred to are located entirely on the Holt lands, they are really a part of the entire transmission system of the Waialua plantation. The physical condition of the electric transmission system is A-1.

The Poamoho pump is located on Grant 235, which is a part of the Holt land. It was completed in 1928. The building is of tongue and groove; it consists of machinery shop, chamber, pipe lines, etc. There are four centrifugal electric pumps of 4,000,000 gallons daily capacity—two of such pumps for the 190-foot height and two for the 380-foot height—connected in series, and parallel, enabling four, eight, and twelve million gallons to be pumped to the 380-foot height through a 30" rivetted pipe line, where the water is supplied directly to the fields or stored in the Kaheeka reservoir. Also, four and eight million gallons may be pumped in another direction to an elevation of 380 feet. The pumps are located in reinforced concrete chambers, about 50 feet below the surface. The wells are also situated on Grant 235, a little distance from the pump chamber and around it.

(Testimony of John Gomes Duarte.)

In the same pump chamber there is also a No. 10-A domestic pump that pumps 150 gallons per minute and supplies domestic water to the various plantation camps through a pipe line, partly on the Holt land, but mostly on the Waialua lands outside the Holt lands. Work of construction on the Poamoho, or pump 10, was started in 1926.

I was present at the time all of these improvements were constructed and generally supervised them, with the exception of the high lift and low lift of pump 10 and the rerouting of Helemano 4 railroad. I am personally familiar with all the improvements testified to except as indicated. All of the improvements except those which have been abandoned are presently in use and all are used as integral parts in the activities of the Waialua Agricultural Company in the conduct of its business.

Cross Examination.

About 35% of the sugar cane area of Waialua plantation is in the Kawailoa lands, which lands have a greater area than the Holt lands. The Kawailoa lands get water from pumps and also some water from the mountains by a ditch system entirely outside the Holt lands. If the Helemano waters were cut off at any particular time, it would not seriously impede the cultivation of the various lands. In the Holt lands there are about 550 acres north of the Helemano gulch and about 975 acres south of the Helemano gulch. I am speaking of net areas. The items of expenditure on Exhibit S-5 are for improvements entirely on the Holt lands, except

(Testimony of John Gomes Duarte.)

that the Helemano high lift pump is part on and part off the Holt lands, and figures are now being prepared to make this correction and allocate such expenses.

Poamoho Pump No. 10 and Poamoho 10-A domestic pump, carried on Exhibit S-5 as having cost some $213,000, represent improvements physically entirely upon a separated section of the Holt land indicated as Grant No. 235, except that part of the high lift and low lift pipelines running continuously from pump 10 onto lands outside the Holt lands, and that part of 10-A domestic water system outside the Holt lands. This parcel of Holt lands, containing an approximate area of 50 acres, is entirely surrounded by lands other than Holt lands, is separated from the main Holt area, and the entire improvement, except as indicated in Exhibit S-11, could be included in a portion of the parcel by taking a point 500 feet westerly of the easterly boundary of the parcel and cutting off the land at that point by a line running parallel with the easterly boundary line of the parcel.

Helemano 15 reservoir is partly off and partly on the Holt property but it has been impossible to make any segregation of that, the map showing its location.

Sugar was grown on the Kawailoa lands before the clearing of the Holt lands. In the early years we had more pumps and were pumping up to a high elevation but many of those pumps have now been taken down.

(Testimony of John Gomes Duarte.)

In regard to railroads, the construction is all with 35-lb. rails, whether main or branch lines, except that at the higher elevations there are still some 25-lb. rails. The ties on all lines are redwood ties. On all of the lines we use the same sized spikes, fish plates and bolts.

Grant 235 is about 3,000 feet long. North of the Holt area there are about 250 acres owned in fee by Waialua but there are other lands not owned or controlled by Waialua or leased to Waialua. The remainder is Bishop Estate land leased to Waialua. The Holt lands in cane comprise about 15% of the net cane area owned and controlled by Waialua.

Redirect Examination.

The areas south of the Holt lands are irrigated from the Helemano system when there is an abundance of water from this system and more than enough to irrigate the area of the Holt lands. We then distribute that waste water which is carried into the Helemano 15 reservoir and used on the lands below. While it is true that if the Helemano waters were not put onto lands south of the Holt lands it would not seriously impair their use for cane, it would mean that other water would have to be used to replace that amount of Helemano water which would have to come from the Wahiawa reservoir. We use water in the Helemano 15 reservoir at times when we have more water coming through the system than we can use. The Helemano waters are waters originating in the lands owned by the Bishop Estate and under lease to Waialua and also

(Testimony of John Gomes Duarte.)

the school lands of the Territory leased to Waialua. The inlets of the Helemano system are located on the Holt lands near the upper boundary of such lands: The Helemano waters are in reality waters falling upon lands lying to the east of the Holt area and merely caught near the upper boundary of the Holt area in ditches.

Helemano reservoir 15 has a connection with the Wahiawa extension ditch through an outlet ditch. The water from that reservoir could be put into the Wahiawa extension ditch. If the Helemano waters were not taken off the Holt land and used on the land lying south, or were carried into the Wahiawa extension ditch and used on other lands, the whole ditch system, including the reservoir, would be absolutely useless. The system is used as a supplement to the Wahiawa system.

I have prepared a statement showing the assessment of the Holt lands situated at Waialua and Wahiawa for the years 1900 to 1931 inclusive, taken from the assessment books in the Honolulu and Waialua tax offices. It has been certified to by the Deputy Assessor in Honolulu and the Deputy Assessor in Waialua.

(The document referred to was received in evidence as Respondent's Exhibit S-10 and shows that the assessment for the 18/27 interest in the Holt lands (being the interest herein acquired by W. R. Castle, trustee, in 1910) was against the R. W. Holt Estate on a value of $48,000 for such 18/27 from the year 1900 to 1912 inclusive, then against W. R.

(Testimony of John Gomes Duarte.)

Castle, trustee, on a value of $120,000 to 1920 inclusive, then against the Helemano Real Estate Trust for 1921 in the same amount, and thereafter included in the general Waialua Agricultural Company assessment as an enterprise for profit. The exhibit likewise shows that taxes were delinquent as to the R. W. Holt 2/3 interest for the period 1900 to 1904, inclusive, for each of said years, in the sum of $480 for each year.)

WITNESS RESUMES: There is an area of land north of the Holt lands, comprising some 5,600 acres, which are owned by Waialua, but none of it is under cultivation for sugar. There was a house located at the extreme westerly end of the Holt property in April 1905, but it was not occupied and had been abandoned.

MR. BISCHOFF,

again being recalled, testified on

Further Direct Examination

as follows:

I located the site of the Poamoho dam and also designed the construction of the pump building for the Poamoho pump. I fixed the location of the pump in November of 1926. We were instructed to locate the pump on fee simple lands in Poamoho gulch at an elevation of 50 to 60 feet above the sea level, and it was pursuant to those instructions that I located the pump on the Holt lands.

(Testimony of Mr. Bischoff.)

The purpose of building this pump was on account of the fact that there was insufficient water to irrigate the plantation lands; that more water was needed; and the only way to get that water was through pumping. The fact that other areas were already supplied by pumps made it logical to locate this pump (Poamoho pump) where we did.

The location of this pump was dictated by a consideration of the plantation as a whole, and not particularly with the idea of the Holt lands. I laid out the ditches, siphons and pipelines connected with the Poamoho pump, and in laying out the same did not pay any particular attention as to what lands they traversed; that is to say, as to the title to those lands. They were laid out solely with the viewpoint of economical irrigation to the lands that might lie below them in elevation.

The main outlet pipes of the Poamoho pump lie in part on Holt property and in part off the Holt property, but are not divided or cut or separated in any place at the boundaries of the Holt property. They consist of single units from the pump to their ultimate destination.

The high lift pipeline consists of a 30" diameter, rivetted steel pipe running from the outlet of the pumps located in Poamoho gulch, running through a section of the Holt lands in an easterly direction, across Poamoho stream, running up on the south of the so-called Kaheeka fields, with its outlet at an elevation of 380 feet where it may empty into the

(Testimony of Mr. Bischoff.)

Kaheeka reservoir or flow along in an outlet ditch at that elevation. The length of the pipe is 3085 feet, there being approximately 600 feet within the Holt Estate area, and 2485 feet outside.

The total cost of this high lift pipe was $35,754.30. I have, however, allocated the cost with reference to the length lying on the Holt estate and the length lying off of it, but that is merely a mathematical computation based on the proportion of length of pipes lying on the Holt land, as compared with that off the Holt land. The low lift pipeline from the Poamoho pump is a 24" rivetted steel pipe running from the chamber of the Poamoho pump, crossing northerly to a portion of the Holt lands, and discharging at an elevation of 190 feet. The total cost of that pipe is $9,293, and its length is 1,022.5 feet. I have made a similar segregation of the cost of this pipe, based on the footage on and off the Holt property, and also a similar computation with reference to the outlet pipe of the 10-A water system. The net result of the last, namely, the 10-A domestic water system, is that out of a total cost of $4,700.56, the amount of cost allocated to the portion on the Holt Estate land is $2,245.31.

Respondent's Exhibit S-11

was received in evidence, without objection, being a statement showing the allocation of cost of delivery pipe from Poamoho pump (#10) as between the Holt and other lands, prepared by the witness, being in words and figures as follows:

Item	Location: Holt Estate	Location: Outside Holt Est.	Total Cost	Allocation of Cost: Holt Estate	Allocation of Cost: Outside Holt Est.
High Lift Pipe Line, 30" Diam. 3085 ft. long	600 ft.	2485 ft	$35,754.30	$ 6,955.70	$28,798.60
Low Lift Pipe Line, 24" Diam. 1022.5 ft. long	400 "	622.5 "	9,293.50	3,636.20	5,657.30
TOTALS	1000 ft	3107.5 ft	$45,047.80	$10,591.90	$34,455.90
10-A Domestic Water System			$ 4,760.56		
150 G. P. M. Pump	All			200.80	
10 Horsepower Motor	All			100.00	
6" Diam. C. I. Pipe	430 ft.			1,560.31	
Incidental Construction Charges	Portion			384.20	
				$ 2,245.31	
8,000 Gal. Tank	—	All			161.00
20 G. P. M. Pump	—	All			93.00
Pump Building 8'x7'	—	All			265.00
1890 ft. 4" pipe	—	All			1,484.00
5 Horsepower Motor	—	All			68.00
Overhead Construction Charges	—	All			384.25
					$ 2,455.25

(Testimony of Mr. Bischoff.)

WITNESS RESUMES: Referring to Exhibit S-11, the item which includes the allocation of the cost of the high lift and the low lift pipe line is included under Pump #10 Poamoho, under the segregation "Machinery", which has a total cost of $64,541.62. My allocation would take out the sum of $34,455.90 as not being on the Holt lands.

In regard to the next item on Exhibit S-5 (a total of Pump 10-A domestic water system, the last item on the schedule) from the total of $4,700.56, there should be taken out $2,455.25.

In response to a prior question of the court asking for information with respect to the quantity of the Helemano system water that is used on the lands lying north of the Holt property, I have studied the proposition but find it impossible to state the amount of Helemano water used on the so-called Kawailoa land. This is because the Helemano water is intermingled with the Wahiawa water which goes on to that land, and it is an uncertain quantity. It varies between different seasons, different days and different parts of days; for instance, a cloudburst in the mountains would bring down a large supply for a few hours, and then it would dwindle down again. When we have the Helemano waters we use them wherever we can. The quantity varies considerably, and definite quantities are not available most of the time.

The general practice is for each section luna being the man in charge of a certain area of cane

(Testimony of Mr. Bischoff.)

land) to estimate the needs of his water for the next day to see what he has on hand of his own supply. To take a specific example: the man at Kawailoa section would probably call up the man at Opaeula and say, "I need so much water," in terms of the unit of one-man water; then the man at Opaeula would estimate his needs and his own supply, and add onto it the supply he has to deliver to Kawailoa below. The Opaeula man would call up the man in the Helemano section, where the section luna there will go through the same process and then will get in touch with the man in the Kemoo section. The Kemoo man, having water from only one source (the Wahiawa reservoir) then estimates his own needs and adds on the supply called for from the last section, and, consulting with the assistant manager, puts in the order for the supply of water to be turned on the next morning.

When the Wahiawa reservoir is at a certain level—approximately about half full—there is a limit on the amount of water that can be drawn, and if there is more needed, we go without that water. Then the pumps are started. Every night there is an inventory of all the water on hand made under the supervision of the plantation officials. On that inventory, based upon whether water is available at certain places, the use and amount of water to be used the next day is determined. There is then no discrimination or distinction as between sources of water as to where it is used; all is mingled.

(Testimony of Mr. Bischoff.)

Referring to the terms "local water," as compared with "Wahiawa reservoir water," if they have the local water they use it when they have it, in preference to the Wahiawa water. This is because Wahiawa is a reservoir that we depend on. Consequently we want to keep it at as high an elevation as possible. Our reservoirs wouldn't hold the local waters when we have them in abundance, so we naturally use it in our fields instead of throwing it away. Under those circumstances, if not immediately used, the local water goes to waste.

When I use the term "Helemano waters," or "Helemano system waters," I refer to the waters which are derived from the Helemano and the Poamoho streams by intakes located near the eastern boundary of the Holt Estate lands. Those waters originate from the Bishop Estate lands to the east, and also the Territory and school lands to the east. As to waters which are precipitated directly upon the Holt lands, this is water that finds its way through storm ditches into the Helemano ditch, and if it is a reasonable quantity then it can be used. In most cases, however, when it runs on that area there is a lot of silt and trash from pineapples carried into the ditch and we have to spill it into the gulch. These sporadic deluges cause considerable damage. Such rainfall as falls on the land above the Holt areas is not sufficient in and of itself for the economical or proper irrigation of the cane lands. The reason for this is that such sources are not reliable in definite quantities of water.

(Testimony of Mr. Bischoff.)

Cross-Examination.

The Wahiawa reservoir always has formed the main supply. The local water supplies, which you might call "kokua" supply (meaning "helping" supply), come at different periods and are sufficient at only a very few times during the year. We rely upon the Wahiawa ditch just as much as on the water from the systems nearer by. This is true, even in spite of the distance of the Wahiawa water. The lands at the foot of the Wahiawa reservoir ditch use Wahiawa water entirely. There is nothing else they could use. This area, however, is a comparatively small area of the whole plantation. There are ditches on the Kawailoa lands (north of the Holt Estate lands) coming from other water sources, as heretofore testified to. There are some pumps at the lower elevations of the Kawailoa lands.

(It was here stipulated by counsel that whenever a railroad, ditch, or other improvement crossed the Holt property line, cost was taken on those parts physically on the Holt property, and that so far as Exhibit S-11 is concerned, same indicated an apportionment of the total cost of the improvements by length as between the portion on the land and the portion off the land.)

As to the transmission lines, those lines are merely lines for the purpose of carrying electric current to the camps and to supply power and light to the land of the Bishop Estate. The greater length of the main transmission line running along the northerly portion of the Holt lands, lies off the Holt lands

(Testimony of Mr. Bischoff.)

with feeders into the camps. The only line of railroad running onto the Holt lands for the purpose of serving territory beyond the Holt lands is the comparatively small length of railroad running through the westerly end or tip of the Holt area.

The Helemano intake is there for the purpose of and collects the waters which reach that point in the natural flow of the stream.

Redirect Examination.

In connection with counsel's question regarding the main line of the railroad reaching areas north of the Holt Estate, I was only referring to that portion that counsel pointed to on the map. The main line also crosses the Holt lands on what is known as Grant 238.

With respect to the use of power through the transmission line, that power also goes to the Poamoho pump, so that the sources of supply of electricity for the Poamoho pump, both the large pump and domestic pump, is from the transmission system of the company. There is a system of transmission lines in the Holt Estate sufficient to connect up all the camps with the main transmission system. All of the transmission lines affecting the Holt Estate are actually shown as marked on the map, Exhibit S-4.

Counsel for petitioner, in questioning me, had followed only the line on the west end. Briefly, to review the transmission system, the main electric transmission line passes up through the Helemano

(Testimony of Mr. Bischoff.)

fields on lands other than the Holt lands. It enters the Holt lands near Helemano 4 Camp and the southern boundary of the Holt land, and passes through the Helemano 4 Camp, serving the Helemano overseer's house and Helemano 1. Camp, and then passes through the west end of Holt lands into the lands of Opaeula. There is a branch line running parallel with the southern boundary of the Holt lands, serving the domestic water pump, Helemano 3 Camp and Helemano 6 Camp. There is also another branch line from Pump 3, as shown on the map, Exhibit S-4, to the north of the Holt lands coming into the Holt lands and serving Opaeula 9 Camp. There are also other similar lines coming from the transmission line which serve other camps as indicated on the map.

A. A. WILSON

was called as a witness for Petitioner on rebuttal, was sworn, and testified as follows:

Direct Examination.

I am manager of the Wahiawa Water Company but not a director. This Company was organized December 5, 1902, and I have been manager since 1915. On January 16, 1921, we had a very severe storm and lost our original spillway and we had to build a new spillway at an expense of $210,000. This was actual cash going to replace or restore the spillway. The stock holdings of Waialua in the Wahiawa

(Testimony of A. A. Wilson.)

Water Company are not represented by rights of any kind, easements or otherwise, over the Holt lands, which the Waialua Company might have transferred to the Wahiawa Water Company.

The water company delivers water to Waialua at the outlet pipe of the dam, for which Waialua pays 1/3 of 1¢ per miner's inch. A miner's inch in this case is 9 gallons per minute, and that would figure out $6.17 plus per million gallons. Our profits have been very small for the last ten or twelve years. We have paid no dividends.

Since December 21, 1923, all of the stock in the Wahiawa Water Company has been held by the Waialua Company, with the exception of the necessary shares to qualify directors. These directors have generally been officers or directors of the Waialua Company. All of the assets listed as belonging to the Wahiawa Company do belong to the water company. The Wahiawa ditch and all other ditches are owned entirely by the Waialua Company, the water company merely owning the reservoir, dam and spillway. Other developments are the property of the Waialua Company. The water company makes a delivery for domestic use for homesteaders but that is from an independent source back from a higher elevation. The income from that is independent from the income from Waialua.

Cross-Examination.

No water that is impounded by the Wahiawa dam is delivered to anyone other than Waialua. The

(Testimony of A. A. Wilson.)

water being delivered to the homesteaders arise from an entirely different system—a separate and independent ditch, having nothing to do with the reservoir. With the rate which we get from Waialua for water, it would be very difficult to maintain the property in proper shape and expect ever to show very much return.

(By stipulation of counsel extracts from the minutes of the meeting of the board of directors of the Waialua Agricultural Company, held February 23, 1905 and March 9, 1905, were received in evidence as Respondent's Exhibit S-12, and read as follows:

I, T. H. PETRIE, do hereby certify that I am Vice-President and Secretary of the WAIALUA AGRICULTURAL COMPANY, LIMITED, and custodian of the records of all Directors' meetings of said Company;

I further certify that the following is a true copy of an extract from the minutes of a meeting of the Board of Directors held February 23, 1905, as shown in said records:

"The question of entering into a lease for the Holt lands at Waialua being brought up for consideration, through a formal proposition which had been submitted by Mr. Carlos A. Long, Administrator of the Holt Estate, and Mr. John F. Colburn, Agent of several of the owners, after some discussion it was moved by C. M. Cooke, seconded by F. J. Lowrey, that a committee of three, consisting of the President, Mr. E. D. Tenney, the Manager, Mr. W. W.

(Testimony of A. A. Wilson.)

Goodale, and Mr. W. R. Castle, Attorney, be appointed to investigate the proposition and if satisfactory arrangements could be made, with power to close the lease, and the proper officers of the Company are hereby authorized to execute the same."

I further certify that the following is a true copy of an extract from the minutes of a meeting of the Board of Directors held March 9, 1905, as shown in said records:

"Mr. Tenney, on account of intended absence from the Islands, tendered, verbally, his resignation as President and Director of the Waialua Agricultural Co., Ltd., to take effect on March 10th, 1905.

"It was moved by C. H. Atherton, and seconded by W. A. Bowen, that the same be accepted.

"Carried unanimously.

"It was further moved by W. A. Bowen, and seconded by F. J. Lowery, that Mr. G. P. Castle be appointed a Director and President of the Waialua Agricultural Co., Ltd., to fill the vacancy caused by the resignation of Mr. E. D. Tenney.

"Carried unanimously.

"Mr. Tenney also tendered his resignation as a member of the special committee appointed to negotiate for and consummate the proposed lease of the Holt lands in Waialua.

(Testimony of A. A. Wilson.)

"It was moved by C. H. Atherton and seconded by F. J. Lowrey, that the same be accepted, and that Mr. W. A. Bowen be appointed a member of said committee to fill the vacancy caused by the resignation of Mr. E. D. Tenney.

"Carried unanimously."

(Signed) T. H. PETRIE

Subscribed and sworn to before me this 29th day of February, 1932.

[Seal] (Signed) JOHN F. STONE
Notary Public, First Judicial Circuit, Territory of Hawaii.)

HENRY A. WHITE

was called as a witness for Petitioner, on rebuttal, was sworn, and testified as follows:

Direct Examination.

I am the assistant treasurer of the Waialua Agricultural Company. Mr. Atherton Richards, the treasurer, is away at this time. I have prepared, at counsel for Petitioner's request, figures from the books of the company corresponding to the items marked on Exhibit S-5. For instance, in the case of the Helemano 54" siphon, the cost of which is listed on Exhibit S-5 at some $20,000, that same siphon is now carried as a listed asset on the books of the Waialua Company at $2,693.26. There may be some depreciation on that figure but most of it is amortization. Assets which you put on leased land

(Testimony of Henry A. White.)

carry amortization; that is to say, you are allowed to spread the cost of such assets over the period of the lease, whereas if the same asset were on fee simple land you would not be allowed to charge anything to amortization. This item was carried as an item on leased land up to 1922, and amortization was written on it up to 1922. Since 1922, depreciation has been charged.

(Counsel for Respondent objected to any further testimony being taken on the question of present value of the items or assets listed in Exhibit S-5, on the ground that matters as to amortization or depreciation are not relevant, competent or material in the case, and secondly, that such questions are not proper rebuttal. The court overruled the objection of Respondent, allowing the objection to run to all lines of such examination without renewing the objection on each question. The tabulation referred to by witness, showing the values of the items set forth in Exhibit S-5 as they were presently carried on the books of the Waialua Company, was, over objection of counsel for Respondent, received in evidence and marked Petitioner's Exhibit R-8.

(Testimony of Henry A. White.)

(EXHIBIT R-8 is as follows:)

Property	Total Cost As Per Exhibit S-5	Amounts at Which Items Are Carried on Books
Buildings (including Domestic System)	$ 57,978.04	Unascertainable
Railroads	86,880.17	Unascertainable
Reservoirs:		
Helemano 4 "A" Domestic	243.00	$ 243.0
Helemano 3	2,299.70	699.8
Helemano 6	6,629.10	4,131.0
Helemano 6 "B"	2,494.36	1,025.3
Helemano 11	5,455.07	2,159.0
Helemano Upper	20,054.21	Unascertainable
Helemano 12	3,976.85	2,386.7
Helemano 4 "A"	2,915.30	1,569.7
Helemano 9 "C"	2,783.10	1,623.4
Helemano 15	8,259.70	6,463.7
Helemano Upper	16,025.36	9,930.3
Siphons:		
Helemano 54 Inch	20,059.06	2,693.2
Opaeula 54 Inch	5,364.60	872.6
Helemano 6	5,969.22	Unascertainable
Helemano 6 New	5,191.21	4,775.9
Helemano Reservoir 11	505.55	454.9
Ditches:		
Wahiawa Extension	5,799.16	Unascertainable
Helemano—Poamoho Branch	8,835.65	8,835.6
Helemano Upper	32,868.05	13,444.3
Helemano Lower	7,022.70	Unascertainable
Helemano Upper Reservoir Outlet	4,695.30	3,203.3
Waterways (including Lining Ditches	29,207.73	Unascertainable

(Testimony of Henry A. White.)

Property	Total Cost As Per Exhibit S-5	Amounts at Which Items Are Carried on Books
Roads, Bridges and Fences	10,564.78	Unascertainable
Flumes	11,541.87	Unascertainable
Camp Sewerage	762.50	Unascertainable
Drainage Ditches	228.00	Unascertainable
Electric Plant	4,723.70	Unascertainable
Development of Upper Lands	3,251.75	Unascertainable
Cane Flumes	12,316.85	Unascertainable
Clearing Lands	47,483.89	Unascertainable
Telephone Lines	1,516.27	Unascertainable
Pump No. 10 (Poamoho):		
Building	900.97	755.78
Machinery, etc.	164,541.62	138,342.67
Wells	42,860.52	38,964.26
Pump No. 10 "A"—Domestic	4,700.56	4,092.49

WITNESS RESUMES: The items appearing on the list in Exhibit R-8 and marked "Unascertainable" is due to the circumstance that the various items are mingled and mixed with other items in such large totals that it is impossible to segregate the particular item on Exhibit S-5.

Cross Examination.

The differences between the columns on Exhibit S-5 and Exhibit R-8 would be accounted for both by depreciation and amortization. I think in all cases where items were constructed prior to 1922. amortization would be included. The biggest item would probably be amortization because the assets were installed in the early years and they would be

(Testimony of Henry A. White.)

amortized up to 1922. The Company carried amortization on its books for improvements installed on the Holt property prior to 1922 as a reserve. The basis of that amortization charge was to charge off over the unexpired term of the lease, the assets as installed. This practice was discontinued in 1922 so the lowering in value as shown by the Company books for the entire period up to the end of 1922 represents amortization in so far as such figures relate to assets on the Holt land. Depreciation is deducted as an expense, the same being allowable under the income tax law, and we use rates in depreciation which are currently in use for similar property elsewhere. The rate charged for depreciation has no reference whatsoever to the actual physical condition of the property. It is the practice of the Company to maintain its property in first class condition by the making of repairs. Those repairs are charged to expense. It is therefore possible to have an item of property shown on the books as having a very small value when in fact it is worth its original cost.

As to track and roadbeds, no depreciation is charged and replacements are taken care of by maintenance. This, as I understand, is the practice generally in railroad accounting. There is also no depreciation taken on ditches, fields and reservoirs.

The following then transpired:

"Mr. ULRICH: If there is no contention to be made that these properties are so large or

(Testimony of Henry A. White.)

necessary as to indicate an irreparable injury if deprived of them * * * I offer to show that under date of December 31, 1931 there was set up on the books of the Waialua Agricultural Company as a part of the comparative balance sheet * * *.

Mr. PHLEGER: I am going to object now and I know I will have to object later to the practice of counsel reading into the record figures and data which have been excluded by the Court, obviously for the purpose of [illegible] that material in this or other courts. I think it is highly prejudicial and I think it is highly improper conduct. This petitioner can get a ruling on the offering. To drag into this case a lot of figures which counsel must know are incompetent, and possibly using them later in briefs or argument, I think it is improper. Any point counsel may have preserved by making an offer to show what the total book value of the Company actually is.

Mr. ULRICH: I think I have a right as a matter of proper trial conduct to make an offer of evidence and to have made a part of the record documents for any use that may be properly made of it. There can be no question that these figures come from the books of the Waialua Agricultural Company. I submit I have a right to have them form a part of the record in this case and to have it made a record in the

(Testimony of Henry A. White.)

case just as the fact exists, and it is not only proper but the Court cannot refuse to allow me to complete the record in this way, short of a showing of bad faith or offering to prove something which cannot be proved.

Mr. PHLEGER: I will make this prediction now. That counsel will in this Court or in another Court use that figure in his proofs. If counsel does not intend to use the figure or question of the objection as made upon the nature of the figure and not the amount, and I predict there will be offered shortly a mass of figures showing the profits of the company with no conception they will be admitted, but to get them in the record for future use in that way. I don't think any trial judge should permit in the record or questions which are obviously known to be irrelevant.

The COURT: The Court can consider the proposition very easily. I understand counsel has in his hands a document marked for identification which contains the figures counsel is attempting to refer to, and the Court can see no useful purpose to add to the transcript records figures that can't be identified for exhibits. The Court has excluded the fact itself as being immaterial to the issues, and the detail of the fact that counsel is now referring to is contained in documents marked for identification. So, if the Court is in error in excluding that material, it is all contained in identifiable documents. So

(Testimony of Henry A. White.)

as to identify the particular part counsel is referring to, as far as the record is concerned, the Court will permit counsel to identify the page of the record you are referring to and the exhibits for identification number, so the data itself, if the Court has made an error, can be identified by an Appellate Court.

Mr. ULRICH: I am referring to the matter appearing on page 18 of Petitioner's exhibit R-3 for identification. I take it the Court will refuse to allow me to examine the witness on any of these items further.

The COURT: I don't see there is any relevant bearing on the properties and the further amplification of the ruling is referred to your identification as to rulings made in the former hearing along the same line.

Mr. ULRICH: I want to ask one question and take Your Honor's ruling. I think I have already read this figure.

Q. I will ask the witness if the figure, buildings, machinery, equipment, etc. of something over seven million dollars, does it or does it not represent the total original cost of that equipment, machinery, improvements, etc.?

A. I would say it did.

Q. Does the item appearing "Less reserve for depreciation of" something over three million dollars. Please answer.

(Testimony of Henry A. White.)

Mr. PHLEGER: I thought the figures were not to be read in evidence.

e COURT: The question may be stricken.

Q. Does the item underneath opposite the caption "Less reserve for depreciation" represent depreciation which has been carried on the books of the Company as against those buildings, machinery, equipment, improvements, etc.?

Mr. PHLEGER: The objection as I previously made, runs to this whole line, and I need not renew it?

The COURT: You do not need to renew it, but the Court has the idea the objection applies to this specific question. The Court is not particularly interested in it. The objection will be sustained as to the question."

Counsel for Petitioner then offered in evidence a list of figures representing statements of the net profits of Waialua from sugar and molasses for the period from 1908 to 1931 inclusive, objection to which by Waialua being sustained, Petitioner then offered to prove the fact of such profits, which being objected to by Waialua, the Court sustained said objection upon the ground, among others, that the Waialua Company had made no defense in the case that the use of these lands for sugar purposes was unprofitable. The Court refused to permit Petitioner to read the figures referred to into the record, but permitted Petitioner to introduce for identifica-

(Testimony of Henry A. White.)

sion two typewritten sheets setting forth, first, the net profits realized by Waialua for the period referred to before deducting income taxes and special charges and losses, and, second, a sheet showing those same net profits corrected by the deduction of such taxes and special charges and losses. These sheets were by order of the Court enclosed in an envelope marked "Sheets 1 and 2" the envelope being sealed and marked "Petitioner's Exhibit R-9" for identification. It was then ruled by the Court that the envelope contained information which Petitioner offered to identify and prove in connection with her offer to introduce the said profits of the Company in evidence.

The Court further ruled that said envelope should not be opened save by order of the Court. The original envelope, Exhibit R-9 for identification, together with its contents, is by order of the Supreme Court made a part hereof and is hereby referred to and incorporated herein.

Petitioner thereupon rested.

"Mr. PHLEGER: We rest with one exception. We would like to call upon counsel for Petitioner to produce in writing the document purporting to be a transfer by John Dominis Holt to Ann Kentwell of any interest in John D. Holt's stipend, so-called, arising out of his agreement with James L. Holt or John L. Holt.

Mr. ULRICH: I can respond to that by saying we have no such document and are unable to produce it.

(Testimony of Henry A. White.)

Mr. PHLEGER: And know of no such document?

Mr. ULRICH: I know of no such document."

Respondent thereupon rested.

ORDER

The foregoing Condensed Statement of Evidence having been duly lodged in the office of the clerk of this court by both appellants herein, and respective counsel having been heard in the premises and the Court having made its rulings thereon, the same is in all respects hereby approved and settled as a true and complete statement of the evidence adduced on the trial of the above entitled action to be included in the record on appeal in the above entitled cause, and a verbatim reproduction of portions of the evidence included in the foregoing statement being necessary to a proper determination of said cause on appeal, IT IS FURTHER ORDERED that the testimony hereinabove set forth verbatim shall be so reproduced in making up said record on appeal, all as provided by paragraph "b" of Equity Rule 75.

It further appearing to the Court that it is proper and necessary that certain original exhibits, hereinafter listed, and referred to in said Condensed Statement of Evidence, and incorporated therein by reference, should be inspected by the United States

Circuit Court of Appeals for the Ninth Circuit in their original form, IT IS HEREBY FURTHER ORDERED that said exhibits be transmitted by the clerk to said Court in original form in connection with and as a part of said Condensed Statement of Evidence and Transcript, and that a photostat copy of the signatures appearing on Exhibit A-21, and reduced reproductions of maps Exhibits C, S-3 and S-4 likewise be included in the printed Condensed Statement of Evidence, such exhibits being as follows:

Petitioner's Exhibit C, being map;

Petitioner's Exhibits D-10, D-11, D-13, D-15, D-16, D-19, D-21, D-22, D-25, D-28, D-29, D-30, D-32, and D-37;

Petitioner's Exhibit A-21;

Petitioner's Exhibits 1 and 2 in connection with the deposition of Dr. Thomas Saxty Good;

Petitioner's Exhibit, being book or pamphlet entitled: "Scale of Tests," accompanying deposition of Dr. Thomas Saxty Good;

Two undated slips on paper of Canadian Bank of Commerce, London, in connection with Exhibit D-35;

Respondent's Exhibits 15-A and 15-B, being powers of attorney;

Respondent's Exhibit 6-A;

Respondent's Exhibits 2, 3, 4, 5 and 6, for identification, attached to deposition of Dr. Masson, and contained in sealed envelope;

Respondent's Exhibit S-3, being map;

Respondent's Exhibit S-4, being map;

Petitioner's Exhibit R-9, for identification, being sealed envelope;

Respondent's Exhibit S-9, being book of photographs.

Dated: Honolulu, T. H., July 24, 1936.

JAS. J. BANKS
Associate Justice

E. C. PETERS
Associate Justice

C M H
A L C

D. E. METZGER
Associate Justice

Supreme Court of the Territory of Hawaii.

the Grantee his heirs and assigns to his and their use and be-

The said Grantors for themselves their heirs executors and administrators covenant with the said Grantee his heirs executors administrators and assigns that they have good title in and to the described premises that they have good right to convey the same that the same are free from incumbrances except as aforesaid and that they will warrant and defend the same against the claims and demands of all persons except as aforesaid and that they and their heirs executors and administrators will on demand of said Grantee his heirs executors administrators or assigns execute to him or them such instruments or instrument as may be necessary or by him or them deemed advisable at any time to perfect the title in the Grantee his heirs executors administrators and assigns in and to that portion of the estate of R. W. Holt devised by his Will to John Dominus Holt and at his death to his heirs and assigns.

IN WITNESS whereof the Grantors have set their hands and seals this second day of May One thousand nine hundred and ten, the said Albert Christian Husband of said Eliza R.P. Christian joining in consent hereto by a separate instrument executed within said Territory of Hawaii.

Witness
W. D. [illegible]

John D. Holt

Supreme Court of the Territory of Hawaii.

claims and demands of all persons except as aforesaid and that they and their heirs executors and administrators will on demand of said Grantee his heirs executors administrators or assigns execute to him or them such instruments or instrument as may be necessary or by him or them deemed advisable at any time to perfect the title in the Grantee his heirs executors administrators and assigns in and to that portion of the estate of R. W. Holt devised by his Will to John Dominus Holt and at his death to his heirs and assigns.

IN WITNESS whereof the Grantors have set their hands and seals this second day of May One thousand nine hundred and ten, the said Albert Christian Husband of said Eliza R.P. Christian joining in consent hereto by a separate instrument executed within said Territory of Hawaii.

Witness
David L. Withington

John D. A. Holt

Eliza R. P. Christian

Annie Bert Restarick

Albert Christian

Lawrence K. Restarick

Witness to signature of
Albert Christian
W. H. Chillingworth
Albert L. Atherton

(3)

[Endorsed]: No. 8329. United States Circuit Court of Appeals for the Ninth Circuit. Eliza R. P. Christian, an incompetent person, by Herman V. Von Holt, her guardian, Appellant, vs. Waialua Agricultural Company, Limited an Hawaiian corporation, James L. Holt, and Annie Holt Kentwell, Appellees. Waialua Agricultural Company, Limited a Hawaiian corporation, Cross-Appellant, vs. Eliza R. P. Christian, an Incompetent person, by Herman V. Von Holt, her guardian, James L. Holt and Annie Holt Kentwell, Cross-Appellees. Transcript of Record, in three volumes. Upon Appeal and Cross-Appeal from the Supreme Court of the Territory of Hawaii.

Filed: September 11, 1936.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

CLERK'S COPY.

Vol. IV

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 15

WAIALUA AGRICULTURAL COMPANY, LIMITED, PETITIONER,

vs.

ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON, BY HERMAN V. VON HOLT, HER GUARDIAN, ET AL.

No. 17

ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON, BY HERMAN V. VON HOLT, HER GUARDIAN, PETITIONER,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FOR CERTIORARI FILED {MARCH 30, 1938. MARCH 31, 1938.

CERTIORARI GRANTED MAY 2, 1938.

No. 8329

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ELIZA R. P. CHRISTIAN, an incompetent person by HERMAN V. VON HOLT, her guardian,

Appellant,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation, JAMES L. HOLT, and ANNIE HOLT KENTWELL,

Appellees.

WAIAKUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation,

Cross-Appellant,

vs.

ELIZA R. P. CHRISTIAN, an Incompetent person, by HERMAN V. VON HOLT, her guardian, JAMES L. HOLT and ANNIE HOLT KENTWELL,

Cross-Appellees.

Upon Appeal and Cross-Appeal From the Supreme Court of the Territory of Hawaii.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Parker Printing Company, 543 Sansome Street, San Francisco

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, April 12, 1937.

Before: Wilbur, Garrecht and Haney, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION.

Ordered appeal and cross-appeal in above cause argued by Mr. M. C. Sloss, counsel for appellant and cross-appellee Eliza R. P. Christian, etc., and by Messrs. Alfred Castle and Herman Phleger, counsel for appellee and cross-appellant Waialua Agricultural Company, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Thursday, December 9, 1938.

Before: Garrecht, Mathews and Haney, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF DECREE.

By direction of the Court, Ordered that the opinion of Garrecht and Haney, Circuit Judges, and

opinion of Wilbur, Circuit Judge, concurring in part and dissenting in part, be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal and Cross-Appeal from the Supreme Court of the Territory of Hawaii.

Before: Wilbur, Garrecht and Haney, Circuit Judges.

Haney, Circuit Judge.

OPINION.

A guardian of Eliza R. P. Christian, hereinafter referred to as the ward, filed a petition in a court in the Territory of Hawaii, against Waialua Agricultural Company, Ltd., hereinafter referred to as the company, James L. Holt and Annie Holt Kentwell. The petition prayed that a lease, an agreement, and a deed, all covering an interest in real property in the Territory, and all alleged to have been made by the ward when incompetent, be set aside, that the company be compelled to reconvey the property and to account for the reasonable rental value thereof. The Supreme Court of the Territory granted part of the relief asked, and denied the rest. Both parties have appealed.

R. W. Holt, who married a native Hawaiian, died in 1862 leaving a will by the terms of which some

14,000 acres of land in Hawaii were left in trust; one-third of the income was to be paid to each of his three sons for life; and at the death of each son, one-third of such lands was to vest in fee in the heirs at law of the son who died. All three of the sons survived the testator and were named James R. Holt, John Dominis Holt and Owen J. Holt.

James R. Holt was the father of two sons, one of whom is named James Lawrence Holt. John Dominis Holt, who married a native Hawaiian, was the father of two children, one of whom died in infancy, and the other of whom is appellant's ward, Eliza Holt Christian. The other son, Owen J. Holt, was the father of nine children, one of whom is Annie Holt Kentwell.

On June 10, 1891, Owen J. Holt died, and as a result of his death an undivided one-twenty-seventh interest in fee simple in the lands, vested in each of his nine children.

In 1893, James Lawrence Holt acquired the sole title to the expectancy of the one-third interest in the event that he survived his father. He also acquired prior to July, 1902, control of the life interest of his father, and of John Dominis Holt, his uncle, and the father of appellant's ward. Such control was held in the name of a trustee.

On March 17, 1905 a lease of the lands was made for a term of 25 years from April 1, 1905 to the company, by the administrator of the testator's estate, the owners of the vested interests, and by the owner of the life interest in two-thirds of the

estate. The ward was named as a party of the third part, and covenanted that the company "shall peaceably and quietly hold and enjoy the use and possession of said demised premises, free from let or hindrance from any other person or persons having lawful claim or title to the same, or to any thereof." This document was signed and acknowledged by the ward.

On August 31, 1906, the ward and Annie Holt Kentwell entered into a contract wherein it was recited that the latter had supported the ward for many years last past; that the ward would be entitled to receive a part of the rents of the above mentioned lease upon the death of the ward's father, R. W. Dominis Holt); and that the parties had agreed that Annie Holt Kentwell would support the ward for the rest of her life. By that contract, the ward

> "* * * does hereby give, sell, assign, release, transfer and set over unto the said Annie Holt Kentwell * * * all her title and interest in and to any and all rents, issues and profits to which she may hereafter be entitled or which may be due and payable to her by, through or under the lease to the Waialua Agricultural Company, Limited * * * or by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to demand, receive, collect, and receipt for all such rents, issues and profits from whomsoever

due during the term of the natural life of her [the ward] * * *".

There was also a provision whereby Annie Holt Kentwell agreed to support the ward for the rest of the ward's life, and that the heirs of Annie Holt Kentwell should be entitled to perform the contract if the ward survived Annie Holt Kentwell. This contract was recorded on June 17, 1907 in Honolulu.

On May 2, 1910 a deed was made to James Lawrence Holt of an undivided one-third interest in the lands, subject to a deed of trust made by James Lawrence Holt to a trustee and subject to the lease hereinabove described. The deed was signed by a number of people, including the ward, her father (John Dominis Holt), and Annie Holt Kentwell.

On May 28, 1910, James Lawrence Holt and his trustee conveyed to one Castle, as trustee, an undivided two-thirds interest in the lands, which included the one-third which was conveyed by the above-mentioned deed. This conveyance was recorded on May 31, 1910. The deed signed by the ward, above-mentioned, was recorded on June 23, 1910.

Castle, as trustee, on May 17, 1920, conveyed the undivided two-thirds interest to trustees of a real estate trust, the conveyance being recorded the following day. The trustees, on July 20, 1921, then conveyed the undivided two-thirds interest to the company, which conveyance was recorded on the same day.

The ward's father died on April 10, 1922, leaving the ward as his heir at law. In June, 1926, the ward was declared incompetent and Annie Holt Kentwell was appointed her guardian in England, where both parties were then residing. On February 1, 1927, a brother of the English guardian (George H. Holt, being, like his sister, one of the nine children of Owen J. Holt), was appointed guardian of the estate of the ward in Honolulu. He will hereafter be referred to as the guardian.

The guardian on May 9, 1928, filed a petition in the Circuit Court of the territory, alleging that the company's attorneys, one of whom was Castle hereinabove mentioned, induced James Lawrence Holt, who was in the confidence of Annie Holt Kentwell, who in turn completely influenced and controlled the ward, to endeavor to induce Annie Holt Kentwell to procure the ward's signature to the deed hereinabove mentioned. It was alleged that an agreement was entered into between James Lawrence Holt and Castle, as trustee for the company to that effect. Other allegations are that the negotiations were carried out; that the ward had always been, and was on the date the deed was executed by her, wholly incompetent mentally to execute a conveyance; that the conveyance purported to be for a consideration of $30,000 to the ward, but that in fact it was never received by the ward, and that the amount was "grossly, utterly, and wholly inadequate as consideration". The lease and contract, hereinabove mentioned, were not mentioned in the petition. The guardian prayed that the deed exe-

cuted by the ward be cancelled, and that the company be required to account for the rental value of the undivided one-third interest, purported to have been conveyed, from April 10, 1922, the date of the death of the ward's father (John Dominis Holt).

James L. Holt appeared and admitted the petition.

Thereafter, and on March 5, 1929, the guardian filed an amended petition which contained substantially the same allegations as the petition but included an allegation of the existence of the lease hereinabove mentioned; that it was executed at a time when the ward was "as at all other times herein mentioned, wholly and utterly incompetent to bind herself by executing said document", and that neither the ward nor anyone on her behalf received any consideration for the execution of the lease. There was also an allegation that notwithstanding the facts as alleged "relief in equity against said lease need not be and cannot be herein prayed for, respondent's sole claim of right to the said lands being now based upon the said deed of May 2, 1910." In accordance therewith there was no specific prayer for relief against the lease, but there was a general prayer that the court "grant such other and further relief as to the Court may seem just and equitable, to the end that complete justice and equity may be done in the premises * * *".

Appellant replaced the guardian by stipulation dated March 12, 1929.

After trial of the cause, and on May 11, 1920, the trial court wrote an exhaustive opinion, in which it was held that the deed of a mentally incompetent person was not void, but voidable and would be set aside only when the equities so required. The court found (1) that the ward "has never been competent mentally to execute a conveyance of property"; and that "she was not competent mentally to execute the conveyance of May 2, 1910"; (2) that such incompetency was known to Annie Holt Kentwell, her husband and James Lawrence Holt; (3) that "the evidence does not clearly show that the (company) knew of such mental incompetency". The court held that the equities required cancellation of the deed. It entered a decree cancelling the deed executed by the ward, upon return to the company of $30,000 and interest, and entered judgment in favor of the guardian for rentals less $30,000 and interest in the sum of $540.-806.07.

The company appealed from the decree to the Supreme Court of the territory. That court exhaustively considered the case and held that a deed of a mentally incompetent was voidable, if the incompetency had not been judicially declared prior to the execution of the deed, and if the parties dealing with the incompetent did not have actual notice of the incompetency. 31 Haw. 817. After exhaustive consideration of the evidence, the Supreme Court found:

"The overwhelming weight of the evidence requires us to find, and we do find, that on

> May 2, 1910, (the ward) was and at all times has been mentally incompetent to execute a deed or to understand its purpose or effect or to engage in any business transaction of consequence * * * In short, we find that at the date of the deed she was a congenital imbecile."

It did not expressly find whether or not the company had notice of the incompetence, but after indicating it did not, assumed that it did not. It held that the equities required cancellation of the deed upon payment of $30,000 and interest, but held that since the lease and contract were not in issue they were presumed to be valid, and therefore if valid the ward would not be entitled to any rent because she had assigned it away. It reversed that part of the decree granting judgment for rent, ordering that appellant be entitled to amend to bring the validity of the lease and contract into issue.

The company thereupon appealed to this court which dismissed the appeal on the ground that the decision of the Supreme Court "contemplated further proceedings in the lower court" and therefore the decision was not final. 52 F.(2d) 847.

The petition was thereupon amended in the trial court. The second amended petition included allegations that "said lease from its inception was and at all times has been wholly and utterly inoperative, ineffective and of no binding force or effect, with respect to the rights or interests of this petitioner." There was also an allegation that the contract above mentioned was executed by the ward at a time when

she "was wholly and utterly incompetent mentally to bind herself, as was then well known by said Annie Holt Kentwell"; that the contract was executed without consideration and that its provisions were "in no sense beneficial as to" the ward; that the contract "was at all times wholly and completely void and of no effect, or binding force whatever"; and that Annie Holt Kentwell "has at no time claimed and now claims no rights by virtue of said" contract. The prayer asked cancellation of the deed, the lease and the contract, and for an accounting for the rental value of the one-third interest in the land from April 10, 1922 with interest.

Both James L. Holt and Annie Holt Kentwell answered, admitting the petition.

Upon the trial, the trial court refused to permit the introduction of further evidence on the issue of incompetency of the ward because it construed the opinion and order of remand of the Supreme Court to specifically prevent the taking of such evidence. It entered a decree as prayed for, the judgment for rent being $606,785.75.

The company thereupon appealed again to the Supreme Court of the territory. Two members of that court, one being the Chief Justice, held that it (the Supreme Court) had erred in directing the trial court not to permit further evidence on the issue of incompetency, but that the error was harmless, because the ward received "valuable consideration, both for the lease and for the assignment, in

the form of support and maintenance from Annie Kentwell"; and that both the lease and contract were for the ward's best interest and that they should not be cancelled notwithstanding the ward's incompetency. One justice dissented.

The Supreme Court held that the ward had assigned the rents, issues and profits by contract to Annie Holt Kentwell for life, and that the latter had conveyed that interest by deed to the company. A decree was entered by the territorial Supreme Court cancelling the deed of the incompetent only. Appellant appeals from that portion of the decree adjudging the lease and contract to be valid, and denying appellant rents, and the company appeals from that portion of the decree cancelling the deed.

With reference to the facts found "when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous." Baker v. Schofield, 243 U. S. 114, 118 and cases cited; Geddes v. Anaconda Mining Co., 254 U. S. 590, 600; Texas & N. O. R. Co. v. Ry. Clerks, 281 U. S. 548, 558 and cases cited.

If the questions of law before us are questions of general law, then we may exercise our own independent judgment in the decision thereof. Swift v. Tyson, 41 U. S. (16 Pet.) 1, 17. On the other hand if the questions presented are questions of local law, we are required, ordinarily, to sustain it by the great deference due the local tribunals, un-

less there is a sense of clear error committed: Matos v. Hermanos, 300 U. S. 429, and cases cited; Santa Fe Ry. Co. v. Friday, 232 U. S. 694, 700; Ker v. Conden, 223 U. S. 268, 279; Kinney v. Oahu Sugar Co. (C. C. A. 9), 255 Fed. 732, 736, and cases cited; and see Ewa Plantation Co. v. Wilder (C. C. A. 9), 289 Fed. 664, 670.

It is indicated in Edwards v. Davenport (C. C. Ia.), 20 Fed. 756, 762, that the questions presented are questions of general law. On the other hand, it is indicated in two cases that the questions presented are questions of local law. Safe Deposit & Trust Co. of Baltimore v. Tait (D. C. Md.), 54 F.(2d) 383, 385; Kevan v. John Hancock Mut. Life Ins. Co. (D. C. Mo.), 3 Fed. Supp. 288, 290. We believe it is unnecessary to decide this question. The law declared by the Supreme Court in the second appeal is in conflict with that declared in the first appeal. If the questions presented are local, then we believe we must exercise our own independent judgment in our decision thereof, in view of the conflict, because the rule, by analogy applicable here, is that "where state decisions are in conflict or do not clearly establish what the local law is, the federal court may exercise an independent judgment and determine the law of the case." Edward Hines Trustees v. Martin, 268 U. S. 458, 463, and cases cited.

Appellant seems to contend that a deed or contract of an incompetent is void, and that proof of incompetency alone entitles the incompetent to re-

lief against such deed or contract. He relies on Dexter v. Hall, 82 U. S. (15 Wall.) 9; Kendall v. Ewart, 259 U. S. 139, 148; Plaster v. Rigney (C. C. A. 8), 97 Fed. 12, 16; Sothern v. United States (D. C. Ark.), 12 F(2d) 936, 937; Edwards v. Davenport (C. C. Ia.), 20 Fed. 756; Farmers Bank & Trust Co. v. Public Service Co. (D. C. Ky.), 13 Fed. Supp. 548; Anglo-California Bank v. Ames (C. C. Neb.), 27 Fed. 726; Parkhurst v. Hosford (C. C. Ore.), 21 Fed. 827, 832; German Savings & Loan Soc. v. De Lashmutt (C. C. Ore.), 67 Fed. 399; Clark Car. Co. v. Clark (D. C. Pa.), 11 F(2d) 814; 2 Federal Law of Contracts 27, Sec. 336.

On the other hand the company contends that a deed or contract made by an incompetent is voidable only, and relies on Luhrs v. Hancock, 181 U. S. 567, 574, and Beale v. Gibauld (D. C. N. Y.), 15 Fed. Supp. 1020, 1027. See also: Safe Deposit & Trust Co. v. Tait (D. C. Md.), 54 F(2d) 383, 385 and Kevan v. John Hancock Mut. Life Ins. Co. (D. C. Mo.), 3 Fed. Supp. 288, 290, where local law is applied. In Levine v. Whitney (D. C. R. I.), 9 Fed. Supp. 161, the question was mentioned but left undecided.

We hold that contracts made by an incompetent are void because an incompetent is incapable of giving the required assent thereto. Dexter v. Hall, supra, 20; Gardner, "When And Under What Circumstances May An Insane Person Be Held Upon His Contracts?" (1894), 38 Cent. L. J. 224; Cook, "Mental Deficiency And The English Law Of Contract" (1921), 21 Col. L. R. 424. Relief against

such a contract should not be granted, however, on proof of incompetency only. Equity does not always grant relief against a void contract. For instance a gambling contract is void (6 R. C. L. 775, §180), but the loser is granted no relief when he asks rescission and restitution of the property lost. 12 R. C. L. 761, §64. The court in such instance, looks not at the fact that the contract is void, but at the status of the parties involved and refuses relief, because the loser is in pari delicto with the winner. So, in the case of a contract made by an incompetent, after proof of the incompetency, relief will be granted against the contract, or refused, depending upon the situation of the parties at the time relief is asked; in other words, the situation of the parties is the controlling factor.

This, we believe, is the true reasoning to be applied, and is illustrated by the following quotation from the discussion by Gardner cited above:

> "* * * The very essence of a contract is the meeting of the minds of two contracting parties. In theory then, one absolutely insane, having no mind, cannot contract because of the impossibility of the meeting of the minds. * * *
>
> "* * * If a person in good faith enters into a contract with one apparently sane, and whose actions would in no way tend to put a reasonably prudent man on his guard, and a valuable consideration has been paid, there being no undue advantage taken and no unfairness in the bargain, and the consideration cannot be re-

stored by the insane person so as to place the other party in statu quo, then, whether the party be sane or insane, the contract will be good * * *

"Again assuming good faith, fairness and absence of fraud, the courts still hold that if the person contracting with the insane party can be placed in statu quo the contract will not stand. What does this mean? If a contract is valid, what does the accidental fact that a party can be placed in statu quo, have to do with it? If I buy a horse and the bargain is fair, the mere fact that I can return the horse does not give me the right to do so and rescind the sale. It would seem that there is something wrong with this executed contract, or the fact that one party can place the other in statu quo would not in any way alter its binding effect. The contract is not valid. It is not, then, because the executed contract is valid or binding, that it will not be set aside, but because an innocent party without fault or negligence would be prejudiced thereby. As between these two innocent parties, the law will not interpose to effect a wrong on either, but will suffer the misfortune to stand where nature put it. It is true, the courts have not always made this distinction, but have reached the same result on the inaccurate theory of the validity of executed contracts * * *"

Situations are presented where an incompetent asks a court of equity to give him relief as against some act he has done, but would not have done had he been competent. Even though the bargain may seem fair, the incompetent usually has special reasons in asking for relief. The courts should not be concerned with his reason, but, after proof of incompetency, with the status of the parties, as shown hereinafter by the various factual situations. This, as will appear, does not mean that the court should balance all equities of the parties, as was done by the trial court.

Before considering the factual situations, we say, in regard to the company's contention, that a different rule should apply to the case of a deed made by an incompetent than to a contract made by him, that the principle is the same, and there is no distinction. 1 Williston on Contracts (Rev. Ed.) 738, Sec. 249.

One situation presented is where the incompetent makes a contract with one who either has knowledge of the incompetency, or who does not have such knowledge but is guilty of bad faith or overreaching. In such case, relief must be afforded, the consideration received by the incompetent need not be restored, and a third person dealing with the one who contracted with the incompetent is not protected. Kendall v. Ewert, supra.

In Kendall v. Ewert, supra, the incompetent was "over-reached" by one who had knowledge of the incompetency (p. 147). The lower court heretofore was, and the trial court is in accord with this rule. Kailikea v. Hapa, 13 Haw. 459.

The other situation is where the one dealing with the incompetent has no knowledge of the incompetency, and is not guilty of bad faith or overreaching. Brown in "Can The Insane Contract?" (1933), 11 Can. Bar Rev. 600, aptly describes the situation as follows:

"* * * Here, for the first time, arises a real conflict of equities. One of two innocent parties must be saddled with liability. Which shall it be? On the one hand it is argued that 'if of two innocent parties one must suffer, surely the courts ought to favour that one who is least capable of guarding his own interests.' On the other hand, 'it is not to be presumed that ordinary business men are experts on insanity. In these days of commercial war, when the nervous tension is at the highest and sane men are driving mad bargains, it must be confessed that it is a harsh law that would hold the business world to know whether a man be sane or insane. Supposing now, that the man drives a good bargain and acts rationally, is the commercial world bound to know that he is insane, while at the same time men acknowledged to be sane are making hazardous, if not insane bargains? This doctrine would be plainly disastrous to all the commercial world, and the Courts by mingling common sense with legal theory have warded off the evil results that must otherwise have followed * * * * * * * * *"

In this situation, no legal hardship results to anyone in granting relief against executory contracts. Accordingly, relief should always be granted. 32 C. J. 733, Sec. 509.

With respect to executed contracts we find divergent views. A few cases do not regard the restoration of the status quo to the individual dealing with the incompetent, as of any moment, some on the theory that the contract is void, and some on the theory that the option to avoid the contract is exclusively the incompetent's. Neither of these views considers an innocent person in any different position than one who has knowledge or who is guilty of bad faith. Obviously equity should treat the parties differently. For this reason, we believe both of these views to be unsound. The innocent party dealing with the incompetent should receive more consideration than a guilty one. The cases supporting this conclusion may be found in 46 A. L. R. 416, annotation, supplemented in 95 A. L. R. 1442. Another view is, that restoration to status quo is not material. If the party dealing with the incompetent dealt in good faith, without overreaching and without notice, then relief is refused even though the status quo may be restored. This is the view in England (Brown, supra, 11 Can. Bar Rev. 600), and in a few states. 32 Col. L. R. 504, 506; 2 Black on Rescission and Cancellation (2d Ed.) 724, Sec. 256. This view goes to the other extreme and protects one innocent party without enough consideration for the other, the incompetent. Even though the bargain might be fair, there may be special reasons for

granting relief. It should be granted unless some sound reason forbids. This is the view taken by the court below on the second appeal with respect to the contract and lease.

The great majority of the courts, however, take the view in the case of the innocent party without knowledge, that relief will not be granted unless the parties can be placed in statu quo. 1 Williston on Contracts (Rev. Ed.) 746, Sec. 254; 3 Thompson on Real Property, 1006, Sec. 2847; 2 Black on Rescission and Cancellation (2d Ed.), Sec. 257; 46 A. L. R. 416, 95 A. L. R. 1442; 32 Col. L. R. 504, 506. That is an equitable rule, based on the reasoning that "as between these two innocent parties, the law will not interpose to effect a wrong on either, but will suffer the misfortune to stand where nature put it." The court below took this view on the first appeal in regard to the deed. We believe that the law thus declared in its first decision is correct.

The rule as stated means that if the parties can be placed in statu quo, the relief will be granted. 1 Williston on Contracts (Rev. Ed.) 746, Sec. 254; Gardner, supra, 38 Cent. L. J. 224, 226. It is no legal hardship on the party dealing with the incompetent if he receives back what he gave in the bargain.

The one exception to the rule is that relief will be granted if the incompetent received no benefit from the consideration regardless of his ability to restore the status quo. 46 A. L. R. 416, 95 A. L. R. 1442.

With respect to innocent grantees who take property received by an innocent person from an incom-

petent, the cases again split, some holding that relief should not be granted against the grantee, and others holding that the relief should be granted. 3 Thompson on Real Property, 1008, Sec. 2848; 2 Black on Rescission and Cancellation (2d Ed.), 729, Sec. 258; 32 Col. L. R. 504, 511. Since the party dealing with the incompetent, and his grantee, are equally innocent, it is difficult to see why any different rule should be applied as against the grantee, than is applied against the innocent person dealing with the incompetent. We recognize that the court below took this view by the effect of its holding on the first appeal[1] in regard to the deed, but the contrary view on the second appeal.[2] We believe its first decision was correct.

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(1) The deed was not made directly to the company, but to Holt, who conveyed to Castle, who conveyed to trustees, who conveyed to the company. The court below also quoted from 3 Thompson on Real Property, 1007-1009, §2848, wherein it is stated: "The deed of an insane person not under guardianship may be avoided not only as against the grantee, but as against subsequent bona fide purchasers from the latter."

(2) The court below on the second appeal did not find whether or not Annie Holt Kentwell had knowledge of the ward's incompetency. It apparently declared the rule which would be applicable in either event, for it first held that "property passes to the innocent third person freed from the taint which it received by reason of the guilty knowledge of the first grantee or assignee." It also stated:

> "In view of the rule which we have already adopted in this case that, when the deed of an incompetent is to a person not having knowledge of the incompetency, requires that an

We apply these rules to the facts.

1. Relief Against the Deed.

With respect to the deed appellant contends that the ward was incompetent, and that the company had notice of such incompetency. The company denies these contentions, and in addition contends that it cannot be placed in statu quo, and that appellant is guilty of laches.

Both courts found that appellant was incompetent to execute the deed; that the company had no notice of the incompetency; that the company could be placed in statu quo; and that appellant was not guilty of laches. These conclusions were reached after careful consideration of the evidence. Exhaustive opinions were written considering the evidence. We accept them because we can not say

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innocent third person in the position above described should not be placed in a worse position than he would have been in if he had been an innocent, direct taker from the hands of the incompetent. When the W. A. Co. received the deed of Annie Kentwell, of May 2, 1910, it did so, as we have already held, without knowledge of the incompetency of Eliza. In our opinion the deed from Annie Kentwell, a competent person, to the W. A. Co., did operate transfer to the company the right which Annie had secured from Eliza by the assignment of 1906."

Although, by this paragraph, it stated the correct rule, it in fact placed the company in a more favorable position, inasmuch as it did not consider the position of Annie Holt Kentwell, and protected the company.

there was clear error, since the evidence at most was only conflicting.

In accordance with the rules above stated, and considering the company as an innocent party without notice, relief was properly given, we believe, because the status quo of the company may be and was restored by the decree by setting off the $30,000.00 purchase price, which the company paid, together with interest, against the accrued rentals to which the ward was entitled.

2. Relief Against the Lease.

As has hereinbefore been stated, on the first appeal the court below said that if the lease dated March 17, 1905 was valid, then the ward had assigned the rentals reserved by the contract of August 31, 1906, and therefore could not recover such rentals. It thereupon reversed the judgment of the trial court, and directed that the pleadings be amended so as to place in issue the validity of both instruments. Such action was proper. Crockett v. Lee, 20 U. S. (7 Wheat.) 522; Combs v. Hodge, 62 U. S. (21 How.) 397; Robertson v. Cease, 97 U. S. (7 Otto) 646.

Appellant amended the petition alleging that the lease was void because: (1) made by an incompetent to a lessee which had notice of the incompetency; (2) of a want of consideration. James L. Holt and Annie Holt Kentwell answered, admitting the ward's incompetence. The company answered, denying the incompetence and the want of consideration. It alleged that the lease was supported by consideration as follows: (1) the covenants and prom-

ises of the company in the lease; (2) the joinder in the execution thereof by other parties, thus assuring unified possession and control of the premises; (3) the company's promise to pay rent and taxes; and (4) the improvement of the premises inuring to the ward's benefit.

The trial court found among other things: (1) the ward "was not an original party-lessor; she was merely a party assenting to continued possession by the Waialua Company for such balance of the term of the lease as might remain * * * if and when her interest * * * should vest"; (2) the company "has never paid (the ward) any consideration under said lease, or attempted to indicate what improvements were divisible at the termination of the lease, if the same were to stand"; (3) that its findings on the first trial included a finding that the ward "was at all times a congenital imbecile, incompetent to enter into a contract of such a character"; (4) that its findings on the first trial included a finding that the company "in 1905, is not shown to have any knowledge of this incompetency". The trial court concluded that equities required the granting of relief to appellant, and that "Substantial adjustment of the status quo is possible under the facts."

With respect to the issue of consideration, the court below said that the ward "did, however, receive valuable consideration, both for the lease and for the assignment, in the form of support and maintenance from Annie Kentwell and is entitled, under the assignment of 1906, to continue to receive that support and maintenance during the remainder of her life".

With respect to granting of the relief, the court below did not find, but assumed for the purpose of the decision, that the ward was incompetent at the time of the execution of the lease. It found that the company had no knowledge of the incompetency; that the consideration for the lease was adequate; that the bargain was fair and reasonable; that "there was no fraud, actual or constructive". It concluded: "Irrespective of the subject of status quo the lease of March, 1905, and the instrument of August 31, 1906, should be sustained".

With respect to the issue of want of consideration, we believe the court below was right in result, for a reason other than the one assigned by it. Neither the support nor the promise thereof came from the company, and was not the consideration for the ward's promise in the lease.

On the first appeal, the court below said: "* * * when the owner of a contingent remainder in land joins in a lease made by the life tenant and the lease contains a guaranty of possession during its term it is not terminated by the death of the life tenant nor does his death affect the obligation of the lessee to remain in possession of the premises during the remainder of the term". Inasmuch as that rule is one of property, and we cannot say it is clearly erroneous, we adopt it as the rule in the territory. See: Lake Erie Gas, Coal & Coke Co. v. Patterson, 184 Pa. St. 364, 39 Atl. 68; Armstrong v. Rodemacher, 199 Ia. 928, 203 N. W. 23; Potomac Dredging Co. v. Smoot, 108 Md. 54, 69 Atl. 507; Matlack v. Kline (Mo. App.), 190 S. W. 406, on appeal, 216 S. W. 323.

The effect of the rule quoted and the authorities cited, is that the remainderman is in the position of a lessor, because the remainderman's estate is being occupied by the lessee, inasmuch as the life estate terminated on the death of the life tenant. Therefore, here, the promises of the company to the lessors would also be to the ward, considering her as a lessor under the above rule. The promises of the company were the consideration for the award's promise.

It must first be determined whether or not the ward was incompetent at the time the lease was executed by the ward. The trial court, on the second trial, said that a finding that the ward was a congenital imbecile meant that the ward was incompetent in 1905 when the lease was made. However, the findings heretofore made, were made with respect to the issue as to whether the ward was competent on May 2, 1910. A new determination should be made with respect to the issue as to whether the ward was competent on March 17, 1905, the date the lease was made.

3. Relief Against the Contract.

Appellant, after the case was remanded alleged that the contract made by the ward and Annie Holt Kentwell was made when the ward was incompetent, and that Annie Holt Kentwell knew she was incompetent. The latter in her answer admitted the allegation. The trial court found that the finding on the first trial included a finding that the ward was incompetent at the time the contract was made and

that "Annie Kentwell knew the facts as to her imbecility". The court below did not pass upon that issue.

With reference to the suggestion that the contract must be upheld as a contract for necessaries, we say that such a contract is never upheld on such ground. The ward is required to pay for the necessaries on the basis of a promise implied by the law —a quasi contract. The promise of the incompetent is not upheld, but she is liable on a quasi contract. 1 Williston on Contracts (Rev. Ed.) 751, Sec. 255; 2 Black on Rescission and Cancellation (2d Ed.) 724, Sec. 256; Gardner, supra, 38 Cent. L. J. 224, 225; Cook, supra, 21 Col. L. R. 424, 436. However, such rule has no bearing in this case because Annie Holt Kentwell claims no benefit under the written contract, and has not asked for payment under the quasi contract, nor did she assign her right thereunder.

It must first be determined whether or not the ward was incompetent at the time the contract was made. The trial court on the second trial held that the finding that the ward was a congenital imbecile on the first appeal was a finding that the ward was incompetent in 1906. For reasons explained in regard to the lease, there must be a new finding from the evidence with respect to the ward's incompetency in 1906.

In the event that the trial court finds that the ward was competent at the time the contract was executed, it becomes necessary to determine what was assigned by the ward in the contract. That

determination, being merely an interpretation of the contract, is one of general law on which we may exercise our independent judgment.

Appellant contends that the ward transferred: (1) either the rents under the lease of 1905 only, or (2) all rents, issues and profits which would arise from the land. The company contends that the ward assigned both the rents under the lease of 1905, and the rents which might be due under any future lease. The court below held in accordance with the company's contention.

In considering the language used, we may divide it into three clauses: the ward (1) "does hereby * * * transfer * * * all her title and interest in and to any and all rents, issues and profits to which she may hereafter be entitled or which may be due and payable to her by, through or under the lease to the Waialua Agricultural Company, Limited, dated the 17th day of March, 1905, and recorded in said Liber ___ Folio ..... or (2) by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, (3) together with all and every her right to demand, receive, collect and receipt for all such rents, issues and profits from whomsoever due during the term of the natural life of her, the said (ward)."

With respect to the first clause, it is clear that the ward assigned the rents to which she might be entitled under the lease to the company, and those which were due and payable to her by that lease.

The second clause indicates that the ward assigned either (1) rents due under the lease to the

company to which she might be entitled by virtue of being the only child of John Dominis Holt, and devisee under the will of R. W. Holt, deceased, or (2) rents to which she might be entitled by virtue of being the only child of John Dominis Holt, and devisee under the will of R. W. Holt, deceased, which would mean that the ward assigned all rents including those to which she might be entitled under the lease to the company and any other lease.

It is a familiar rule of construction that the contract must be construed as a whole, and the intention of the parties determined from the entire document. 13 C. J. 525, §486. We therefore refer to other language used in the instrument. In the recital, we find a statement that the ward "is entitled to a certain undivided interest or moiety in certain lands" because of the provision in the will of R. W. Holt, deceased, which lands are "now leased to the" company. This provision is followed by the following:

> "Whereas—by virtue of being such * * * devisee under the will of R. W. Holt, deceased, aforesaid, she * * * [the ward] shall upon the death of * * * John Dominis Holt * * * be entitled to her share of the rents reserved in said lease aforesaid * * *"

No other rents are referred to anywhere in the recitals.

In Keelikolani v. Crown Land Commissioners, 6 Haw. 446, 447, the following quotation from 2 Parsons on Contracts 7, was approved: "Where there are recitals of particular claims or considera-

tions, followed by general words of release, the general words shall be restrained by the particular recital". In that case there was a conveyance of particularly described "Crown Lands" followed by general words conveying all "Crown Lands" to which the grantor might be entitled. The court there held the general words to be restricted by the specific words.

In the instant case, the apparent intention of the ward was to convey the rents due and payable to her by the specific terms of the lease, but recognizing that the lease did not mention her as one of the lessors, she describes how she might be entitled to rents under that lease, by saying that she was transferring such rents to which she might be entitled under the lease "by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased". However, if we consider that the clause is ambiguous, then under the rule of construction above quoted, we must restrict the second clause, thus arriving at the same construction.

The third clause contains the language: "together with all and every her right to demand, receive, collect and receipt for all such rents, issues and profits from whomsoever due during the term of the natural life of her [the ward]". The company contends that this language means that the ward was making a second assignment of all rents which might become due under future leases. We believe this contention to be erroneous. It should be noted that the ward does not transfer her title, interest or

possession to such rents, but only "her right to demand, receive, collect and receipt for all such rents". Likewise, it should be noted that the word "rents" is qualified by the word "such". The words "such rents" refer to the rents previously mentioned, i. e. the rents under the lease to the company. If the ward had intended to include other rents, she would not have used the word "such". Apparently, then, the ward was transferring the rents to which she might be entitled under the lease to the company "together with all and every her right to demand, receive, collect and receipt for all such rents". The words "from whomsoever due" merely include the contingency that the company might assign the lease. The words "during the term of the natural life of" the ward, simply include the contingency that the ward might die before the lease expired.

If we assume for the purposes of argument, that the third clause refers to rents other than those mentioned in the lease to the company, it seems clear that she did not assign her title and interest to such rents. The words "her title and interest", used in the first clause are omitted in the third clause, making a sharp contrast between the respective clauses. The third clause is broad enough to make Annie Holt Kentwell a collection agent for the ward only, the latter reserving her title and interest thereto.

We believe the contract assigns to Annie Holt Kentwell only the rentals under the lease to the company to which the ward might be entitled. Un-

der such construction it is unnecessary to pass on the appellant's contention that the contract was void if it conveyed a life estate in the rents, issues and profits of the land, under a statute providing that "no sale * * * of her [the wife's] real estate shall be valid without the written consent of her husband".

If the trial court should find that the ward was incompetent when she executed both the lease and contract, then relief against both the lease and the contract must be granted. Since the company paid no rent to the ward, there is nothing to be restored by the ward. Under such findings the ward would be entitled to reasonable rentals from April 10, 1922.

If the trial court should find that the ward was incompetent at the time when she executed the lease, and competent when she executed the contract, then relief should not be granted against either the lease or the contract, because execution of the contract would amount to ratification of the lease by the ward, while competent. Under such findings, the ward would be entitled to reasonable rentals from the date of expiration of the lease.

If the trial court should find that the ward was competent at the time the lease was executed and competent at the time the contract was executed, then relief against both the lease and contract should be denied and the ward is entitled to no rents until the date of expiration of the lease.

Finally, if the trial court should find that the ward was competent at the time the lease was exe-

cuted, and incompetent at the time the contract was executed, then relief against the lease, should be denied, and relief against the contract should be granted, inasmuch as the status quo of the company has been restored by the decision with respect to the deed. Under such findings the ward would be entitled to the rent specified in the lease from April 10, 1922, to the date of expiration of the lease, and a reasonable rental thereafter.

4. Improvements.

Since April 1, 1905 to April 5, 1928, the time of the demand by the guardian on the company, the latter has expended $630,722.12 for improvements on the lands in question, of which, improvements in the sum of $93,460.95 have since been abandoned.

At the first trial, the trial court said nothing about improvements. On the first appeal, the court below said that under the broad powers vested in the courts in partition proceedings any rights of the company could be equitably settled if, as and when a suit for partition was brought. On the second trial, the trial court decreed to the company the right to continue in the exclusive use and occupation of improvements such as ditches, reservoirs, pipe lines, railroads, power and transmission lines and camp sites. On the second appeal, the court below decreed that the ward convey certain lands upon which improvements existed, to the company absolutely, and permanent rights of way over other lands upon which existed other improvements; and that the company assure certain rights of way to the ward.

We believe neither the court below nor the trial court was correct.

The rule is that "Where the vendor takes advantage of some disability, such as coverture, insanity or infancy to rescind the sale, the purchaser is entitled to an allowance for improvements made in good faith * * *" 66 C. J. 796, §413. See also: 32 C. J. 724, §486. In 31 C. J. 319, §27, it is said:

> "As a general rule in order that one may recover compensation for improvements made on another's land, even in a court of equity, it is necessary that he shall have made such improvements in good faith while in bona fide adverse possession of the land under color of title. There must be three concurrent essentials: (1) The occupant must have made the improvements in good faith; (2) he must have been in possession adversely to the title of the true owner; and (3) his possession must have been held under color or claim of title. * * *
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> "* * * It is also necessary that the improvements be permanent and beneficial to the owner of the land; and that they be retained by him."

If relief is not granted against the lease in the trial court, then the company is entitled to no allowance for improvements because by the terms of the lease, the improvements were to become the property of the lessors at the end of the term.

On the other hand, if relief against the lease is granted, then the company is entitled to an allowance for the improvements placed on the property after May 2, 1910. The allowance, however, is not

based on the cost of the improvements, but on the enhanced value of the land caused solely by the improvements (66 C. J. 797, §419; 31 C. J. 334, §51), not exceeding the cost thereof. 31 C. J. 336, §53; 66 C. J. 797, §419.

Here, if the company is entitled to an allowance for improvements at all, it is entitled to an allowance of one-third of the enhanced value of the land, due solely to the addition of improvements since May 2, 1910. That amount may be made a lien against the land, or may be set-off against the rentals, if any, which are found due to the ward.

5. The Evidence On Remand.

At the first trial, one issue presented was the competency of the ward in 1910. On the second appeal the court below said: "At the original trial about 116 witnesses testified, pro and con, on this issue." There was evidence specifically directed to the ward's competency in 1905 and 1906. The court below discussed the evidence in relation to that period. At the conclusion of that evidence, the trial court found "That Eliza R. P. Christian * * * has never been competent mentally to execute a conveyance of property." On appeal the court below said:

> "The overwhelming weight of the evidence requires us to find, and we do find, that on May 2, 1910, Eliza Christian was and at all times has been mentally incompetent to execute a deed or to understand its purpose or effect or to engage in any business transaction of consequence * * * In short, we find that at the date of the deed she was a congenital imbecile."

The court below then remanded the case, directing the trial court not to admit further evidence against the ward's competency in 1905 and 1906. The trial court complied with the mandate, but on the second appeal the court below decided that it had erred in so restricting the evidence.

The company contends that it should be permitted to introduce further evidence. Ordinarily when a new issue is presented, such contention is correct. 4 C. J. 1242, §3304. However, here we already have evidence, both pro and con on the issues. Any additional evidence would be merely cumulative. It is within the discretion of the trial court to admit or reject cumulative evidence. Sommer v. Carbon Hill Coal Co. (C. C. A. 9), 107 Fed. 230, 232; International Paper Co. v. General Fire Assur. Co. (C. C. A. 2), 263 Fed. 363, 365; Royal Exch. Assur. v. Graham Morton Transp. Co. (C. C. A. 7), 166 Fed. 32, 39; 64 C. J. 140, §163.

Inasmuch as the case must ultimately be remanded to the trial court for decision upon the issue of incompetency of the ward in 1905 and 1906, the parties are entitled to present additional evidence upon those issues subject to the right of the trial court to limit the number of witnesses in the exercise of its discretion with respect to the admission of cumulative evidence. It must determine the issues with relation to the incompetency of the ward in 1905 and 1906 without regard to the previous finding on that subject by the trial court and by the court below.

Evidence regarding the increased value of the land due solely to the improvements placed on the land will, of necessity, be admitted.

The decree of the court below is reversed, and the cause is remanded to the Supreme Court of Hawaii with directions to remand the cause to the trial court with instructions to grant relief against the deed of May 2, 1910, as prayed for in the second amended petition, upon the payment to the company of $30,000.00 with interest at 6% from May 2, 1910, or by impressing a lien therefor upon the ward's interest in the land in question, and to take further proceedings in accordance with this opinion; and with further directions that if upon such further proceedings, in conformity with this opinion, any rentals are found to be due to the ward from the company, such $30,000.00 and interest aforesaid shall be set-off against the amount of such rentals.

DISSENTING OPINION

Wilbur, Circuit Judge, concurring in part, and dissenting in part:

I concur in that part of the opinion and order which requires the company to reconvey the property acquired by it through mesne conveyances from Eliza Christian upon the condition that the company be reimbursed for the sum of $30,000 paid for the property in the manner specified in the opinion. I concur in the reversal of the decree insofar as it affects the lease of March 17, 1905, and the agreement of August 31, 1906, upon the grounds

stated in the opinion, except as hereinafter indicated.

I am not in entire accord with the order of the majority for reasons which I will presently state.

In my opinion the agreement of August 31, 1906 from Eliza Christian to Annie Kentwell, in consideration of her support and maintenance during the balance of her life, purported to convey not only all the rents accruing to Eliza Christian under the lease of 1905 after the contingent remainder of Eliza Christian became vested in 1922 upon the death of her father, as held by the majority opinion, but also all the rents, issues and profits after the expiration of the lease and until her death.[1]

The lower court held that this agreement of August 31, 1906 transferred Eliza's right to the rents, issues and profits of the land during her lifetime, but held that it should not be construed to con-

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(1) The granting part of this instrument, which is set out in the majority opinion in full, omitting certain tautological expressions, is as follows:

"Elizabeth R. P. Christian, in consideration of the premises and of one dollar * * * and for other and valuable consideration * * * does hereby * * * sell, assign, release * * * *all rents, issues and profits to which she may hereinafter be entitled* * * * through or under the lease to the Waialua Agricultural Company * * * or by virtue of being * * * a devisee under the will of R. W. Holt, deceased, together with * * * her right to * * * receive * * * such rents * * * *from whomsoever due during the term of the natural life of the said Eliza R. P. Christian.*" (Italics are by the Court.)

vey an interest in the real estate because if so construed the agreement would be invalid under the law of Hawaii which requires a husband to consent in writing to a sale of real estate by the wife.[2] The main contention of the guardian is that the contract of 1906 purported to convey all the rents, issues and profits of the property during the ward's life, and therefore it was in legal effect a conveyance of land and void under the statute because of a failure of the husband to consent in writing thereto.[3] The suggestion in the guardian's brief that the agreement of 1906 might be limited so as to cover the rents due under the lease of 1905 only is, I think, a mere makeweight added because of his misconstruction of the first opinion in this case by the lower court. The company contends that the agreement of 1906 conveyed the right to receive all the rents and profits of the property during the life of the ward. To meet the limitation of §2993 of the Revised Laws of Hawaii (note 2) it argues that the agreement shows that it was not the intention to transfer a life estate in real estate. The difficulty

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(2) "Sec. 2993. * * * provided, however, that no sale or mortgage of her real estate shall be valid without the written consent of her husband." (Revised Laws of Hawaii 1925)

(3) In the guardian's brief he asserts: "The instrument of 1906 was void for want of written consent thereto of Eliza's husband", and asserts after argument on that point that "it is clear, we submit, that Eliza conveyed to Annie a life estate in the lands in question."

with this argument is that it is a fundamental principle of general application that the conveyance of income and profits of property operates to transfer the property itself. Green v. Biddle, 8 Wheat. (21 U. S.) 1, 76; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 580; Wickizer v. Wickizer, 262 P. 589; 124 Kans. 818; Thompson on Real Property, Vol. 1, §715; Vol. 3, p. 704, §2569; 18 C. J. §284, p. 306. Under this rule the effect of the conveyance of 1906 was to transfer an interest in real estate. The law requiring the husband to consent to such conveyance was intended to protect the wife and perhaps the husband also. There is no room for an interpretation of the instrument which would limit it to something less than an interest in real estate amounting in this case to a life estate. As the Supreme Court said in Pollock v. Farmers' Loan & Trust Co., supra, quoting from Coke's Littleton (p. 45), "For what is land but the profits thereof?" Therefore, the conveyance was invalid under the statutes of Hawaii (§2993 Rev. Laws, 1925, supra). In view of the fact that my associates hold that the agreement of 1906 conveys the rents under the lease of 1905 only, I think it is unnecessary for me to point out the different results which would follow from the conclusion that the agreement is void.

With reference to the question of improvements I agree with the disposition of that question by the majority of the court with these exceptions: I think that after the company acquired title to the contingent remainder of the ward, all improvements

made upon the property thereafter should be deemed to be made by reason of the possession and bona fide claim of right thereto arising from the deed and also from its rights as co-tenant in possession arising from its ownership of an undivided interest in the property derived from the other devisees of the original owner and should not be attributed solely to the right of possession given it by the lease, if valid, which by operation of law merged in the title conveyed by the voidable deed of 1910. In this connection it should be remembered that the right of the ward to the improvements made by the company as tenant while holding under the lease of 1905 arose because the improvements became a part of the land as soon as affixed thereto and that she immediately acquired a contingent interest therein which she conveyed in 1910 and which vested in 1922 in her grantee. The right of the company to the improvements it placed on the land resulted from the deed of 1910. The provision in the lease that the landlord should own the improvements placed on the land by the tenant, was merely a recital of the legal effect of so doing, except perhaps as to what might be called trade betterments. Also, assuming that the lease of 1905 is invalid the following disposition of the case should be made in regard to improvements placed on the property between 1905 and 1910: The improvements placed on the property between 1905 and 1910 were to belong to the landlord in 1930—the date of the expiration of the lease. Such improvements in effect operated as

increased rental. By setting aside the lease the ward receives the benefit of the rental value after 1922 when her right became vested. Any rent paid the landlord between 1922 and 1930 would, of course, be deducted from the value of the use of the premises allowed the ward. While no rent was actually paid the ward for that period, the improvements placed on the property before 1910 on the faith of the lease operated as compensation in part to the ward for the use of the leased property, and to that extent acted as rental for the period from 1922 to 1930. A decree cancelling both the deed and lease should allow as a deduction from the value of the use and occupation of the property awarded the ward for her one-third interest in the property between 1922 and 1930 the pro rata value, that is eight twenty-fifths (eight years out of twenty-five) of the increased value of the property due to these improvements. The value of the use and occupation of the property should be determined without reference to the value of the improvements.

The next point to which I direct attention does not affect the result and is mentioned because I prefer to place my concurrence in that result upon the ground now to be stated. I have no doubt that the question of the results flowing from the incompetency of the ward are questions of general law. There is no statute of Hawaii upon the subject other than that adopting the common law (Sec. 1 Rev. Stat. of Hawaii, 1935) and no rule of property on that subject. The lower court treated the question as one of general law, citing the decisions

of a number of the state courts,[4] and both parties treat the matter as a question of general law in their briefs, the only difference between them being

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(4) The lower court in its first opinion, citing numerous decisions of the federal and state courts, quoted and adopted the rule stated in text books on general law: 32 C. J. 742, §528; in Devlin on Deeds, §73, and in 9 Am. & Eng. Enc. L. (2 ed.) p. 119, and in Story's Equity Jurisprudence, §§317, 318. It rejected the rule stated in 3 Thompson on Real Property, 1007-1009, §2848, and in 2 Black on Rescission and Cancellation 718-720, §254. The lower court stated:

> "After much reading and careful thought, we believe the rule that the deed of a grantor who was mentally incompetent to execute it, but whose condition prior to its execution had not been judicially declared and which in contemplation of law was not otherwise known to those dealing with such incompetent, is voidable only is more strongly supported by reason and justice than the harsher rule that such deed is absolutely and unconditionally void. We also believe that it is in accordance with sound principles of equity and the highest standards of justice to say that such deed, when judicially attacked, should not be canceled upon the sole ground that the grantor was mentally incompetent but that in determining whether it should be canceled the nature of the transaction in all its aspects and the good or bad faith of those dealing with the grantor in respect to such transaction should be carefully considered. * * *
>
> "When the grantee can be restored to the position it occupied immediately prior to the conveyance, the deed of the incompetent should be canceled even though it was taken in ignorance of the incompetency and even though the consideration paid was adequate."

that the guardian contends that there is a federal rule defining the general law upon the subject which should be followed as an authoritative interpretation of the general law.[5] There is no doubt that a decision of the Supreme Court of the United States upon the question of the rule of English common law on that subject as modified by American common law would control our decision thereon, but I believe that the correct rule of the English law so modified is stated in the main opinion approving the holding of the lower court as to the deed in which I concur and that there is no federal rule in conflict therewith.

With reference to the question of whether or not there was a consideration for the ward's joining in the lease of 1905, I think it is clear that the agreement to pay rental to the owners of the life estate was a sufficient consideration for the covenant for quiet possession by the owner of the contingent remainder. Ashburn v. Watson, 8 Ga. App. 566, 20 S. E. 19.

---

(5) The guardian states in his brief:

"The questions involved in this appeal are, in substance, as follows:

1. As between two rules of general jurisprudence, one prevailing in the courts of last resort of a majority of the states, and the other prevailing in the United States Supreme Court and a majority of the subordinate federal courts, which rule should be followed by the Supreme Court of Hawaii and the United States Circuit Court of Appeals for the Ninth Circuit in the determination of the issues presented in the instant case?"

I concur in the order of reversal and order for a new trial, but dissent from those directions with relation to the decree to be entered upon such new trial in the respects indicated.

[Endorsed]: Opinion and Dissenting Opinion. Filed Dec. 9, 1937. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 8329.

ELIZA R. P. CHRISTIAN, etc.,

Appellant

vs.

WAIALUA AGRICULTURAL, et al.,

Appellees.

WAIALUA AGRICULTURAL CO., etc.,

Cross-Appellant

vs.

ELIZA R. P. CHRISTIAN, etc., et al.,

Cross-Appellees.

DECREE

Appeals from the Supreme Court of Territory of Hawaii.

This Cause came on to be heard on the Transcript of the Record from the Supreme Court of Territory of Hawaii, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said Supreme Court of the Territory of Hawaii, in this cause be, and hereby is reversed, with costs in favor of the appellant and cross-appellee Eliza R. P. Christian, and against appellees and cross-appellant, and that this cause be, and hereby is remanded to the said Supreme Court of Hawaii with directions to remand the cause to the trial court with instructions to grant relief against the deed of May 2, 1910, as prayed for in the second amended petition, upon the payment to Waialua Agricultural Company, Ltd., of $30,000.00 with interest at six percent (6%) from May 2, 1910, or by impressing a lien therefor upon the ward's interest in the land in question, and to take further proceedings in accordance with the opinion of this court, and with further directions that if upon such further proceedings, in conformity with the opinion of this court, any rentals are found to be due to the ward from the said company, such $30,000.00 and interest aforesaid shall be set-off against the amount of such rentals.

It is further ordered, adjudged and decreed by this court, that the appellant and cross-appellee Eliza R. P. Christian, recover against the appellees and cross-appellant for her costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Dec. 9, 1937. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION FOR THE ASSESSMENT OF COSTS

It Is Hereby Stipulated by and between the parties hereto that the costs to be allowed and taxed herein in favor of Eliza R. P. Christian, an incompetent person, by Herman Von Holt, her guardian, and against Waialua Agricultural Company, Limited, an Hawaiian corporation, shall be $1,951.61, provided, however, that in the event the judgment for costs herein against the said Waialua Agricultural Company, Limited, shall hereafter be reversed and costs herein be allowed and taxed against the said Eliza R. P. Christian, an incompetent person, then none of the foregoing costs of $1,951.61 shall be taxed against the said Waialua Agricultural Company, Limited, and there shall be deducted from the costs which may be so assessed, and taxed against the said Eliza R. P. Christian the sum of $1,750.00.

Dated: January 6, 1938.

ALFRED L. CASTLE
HERMAN PHLEGER
MAURICE E. HARRISON
Attorneys for Waialua Agricultural Company, Limited

M. C. SLOSS
CHARLES M. HITE
E. D. TURNER, JR.
CHARLES E. FINNEY
Attorneys for Eliza R. P. Christian.

[Endorsed]: Filed Jan. 7, 1938. Paul P. O'Brien, Clerk.

In the Supreme Court of the Territory of Hawaii.
No. 2078.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. Von HOLT, Her Guardian,

Petitioner-Appellee,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation, JAMES L. HOLT, and ANNIE HOLT KENTWELL,

Respondents-Appellants.

Appeal from Decree of Circuit Court, First Judicial Circuit.

At Chambers in Equity.

Hon. A. M. Cristy, Second Judge, Presiding.

CLERK'S CERTIFICATE.

Territory of Hawaii
City and County of Honolulu—ss:

I, Robert Parker, Clerk of the Supreme Court of the Territory of Hawaii, Do Hereby Certify that on September 4, 1936, the sum of $12.36 was paid by Mr. Charles M. Hite, for postage and registry fees on three parcels containing the certified record on appeal in the above entitled cause, mailed to Honorable Paul P. O'Brien, Clerk, United States Circuit Court of Appeals for the Ninth Circuit, Box 547, San Francisco, California, as shown on the receipt of the Honolulu Post Office on file in the Office of the Clerk of the said Supreme Court.

In Testimony Whereof I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 28th day of December, A. D. 1937.

[Seal] ROBERT PARKER
Clerk Supreme Court,
Territory of Hawaii.

[Endorsed]: Filed Jan 7, 1938. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, February 1, 1938.

Before: Garrecht, Mathews and Haney, Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING, ETC.

Upon consideration of the petition of Waialua Agricultural Company, filed January 8, 1938, and within time allowed therefor by rule of court, for a rehearing of above cause, and of the reply of Eliza R. P. Christian, etc., thereto, filed January 18, 1938, and by direction of the court,

It Is Ordered that the opinion on rehearing be forthwith filed by the clerk, and, pursuant thereto,

It Is Ordered that said petition for a rehearing be, and hereby is denied.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 8329, Feb. 1, 1938

ELIZA R. P. CHRISTIAN, an incompetent person by HERMAN V. VON HOLT, her guardian,

Appellant,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation, JAMES L. HOLT, and ANNIE HOLT KENTWELL,

Appellees.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation,

Cross-Appellant,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, JAMES L. HOLT and ANNIE HOLT KENTWELL,

Cross-Appellees.

OPINION ON PETITION FOR REHEARING.

Before: Wilbur, Garrecht and Haney, Circuit Judges.

Haney, Circuit Judge.

A vigorous petition for rehearing has been filed. We deem it advisable to discuss only a few of the points presented therein.

First. We held that "contracts made by an incompetent are void because an incompetent is incapable of giving the required assent thereto." We further held that simply because such a contract was void, did not authorize a grant of relief against it, and that "the situation of the parties is the controlling factor" in determining whether relief should or should not be granted. Heretofore, the majority of the courts have reached the same result on the ground that an incompetent person's contract is voidable. We were, and are, unwilling to accept that reasoning because, we believe, an incompetent person "is incapable of giving the required assent". Under such circumstances it is inconsistent to say that an incompetent at one time could give or manifest the required assent, and later at his request say that he could not. Such inconsistency does not appear, when we consider such a contract as invalid, and determine whether relief will be granted by the position of the parties as explained in the opinion.

In this connection, we neither said nor implied that we reached that conclusion on the theory that "a contract is a meeting of the minds", in a strict sense, as the company seems to suggest. A manifestation of mutual assent is required (1 Williston On Contracts (Rev. Ed. 25, §18; 1 Restatement Of The Law Of Contracts 24, §19), as we originally stated. If the assent is manifested by acts, those acts "must be done with the intent to do those acts." 1 Restatement, supra, 25, §20. An intention is a de-

termination of the mind. One without a mind cannot have an intention.

The company says great harm will result from the rule as announced by us. There are, however, two fallacies in its reasoning. In the first place, it fails to recognize what the rule is. It assumes that relief will be granted upon a showing of incompetency. Such is not the case. The record of land titles can be disturbed only upon proof of incompetency and of a position of parties which authorizes relief. Both are required. We stated in the original opinion the various situations when relief would or would not be granted. The company leaps to its conclusion upon consideration of part of the rule only.

In the second place, the rule has not the injurious results attributed to it. We have reached the same result or results reached by a great majority of the courts. It is true that we have reached that result on different reasoning, but the result is the same. It has already been pointed out why we did not adopt the reasoning of the majority of the courts.

Second. The company makes considerable argument regarding restitution. We used the term "status quo" in the sense that it meant restoration of what was received under the contract. 3 Black on Rescission And Cancellation (2d ed.) 1485, §617. We believe that such meaning is correct, because the transaction against which relief is granted consists of two things, that is, each party has delivered money or property to the other. The relief returns

to each party what he delivered in the transaction. In case one of the parties has by the addition of improvements increased the value of the thing which he must return, then the court may under certain circumstances, grant an allowance to such party for the increase. In a broad sense, the status quo includes both the consideration received and allowance for improvements. The principle is explained in Neblett v. Macfarland, 102 U. S. 101, 103, as follows: "The court proceeds on the principle that, as the transaction ought never to have taken place, the parties are to be placed so far as possible in the situation in which they stood if there had never been any such transaction". However, we treated status quo as restoration of the consideration, and the allowance for improvements as a separate condition. The result is the same whether they be viewed singly or together.

Third. We said that "if relief against the lease is granted, then the company is entitled to an allowance for the improvements placed on the property after May 2, 1910". With respect to that date, the company says: "This date is obviously an error. It should be March 17, 1905." The company erroneously concludes that the date "May 2, 1910" was a clerical error. It would be inequitable to require the ward to pay for improvements made under a promise by the company that such improvements were to become the property of her father without compensation. The company placed the improvements made prior to May 2, 1910, in reliance upon the lease, for the deed had not then been

made. Under that lease the promise to the ward's father to leave the improvements, would inure to the person succeeding the father. Relief against the lease may be granted to the ward, but in no event to the father.

Fourth. Appellant has filed a reply to the petition stating he is contented with the decision as made, but that if a rehearing is granted, his contention that the company had notice of the ward's incompetency should be first considered. Our opinion was reached on the assumption that the company did not have such notice. We treated it in that manner because both the court below and the trial court required restoration of the amount paid. This could not have been done under any theory of the law other than that the company did not have notice. Thus, both have made an implied finding that the company did not have notice. We cannot say that "it is clear that their conclusion was erroneous".

Petition denied.

(Endorsed): Opinion on Petition for Rehearing. Filed Feb. 1, 1938. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR STAY OF ISSUANCE OF MANDATE

To the Honorable Curtis D. Wilbur, Presiding Judge, and Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Waialua Agricultural Company, Limited, Appellee and Cross-Appellant in the above entitled cause, respectfully makes application for and moves this Court that it make and issue its order staying the issuance of its mandate in this cause until after the Supreme Court of the United States shall have passed upon its petition for a writ of certiorari, on the condition, however, that said petition be filed with the Clerk of the Supreme Court within sixty days from the date of said order, and in that behalf avers:

1. On December 9, 1937, this Court filed its opinion and entered its decree in the above entitled cause.

2. Within thirty days thereafter this Petitioner filed a petition for rehearing of said cause.

3. In the event said petition for rehearing is denied, it is the intention of Petitioner to apply to the Supreme Court of the United States for a writ of certiorari directing that said cause be certified to it for determination by it.

Wherefore, application is hereby made that in the event this Court shall deny said petition for rehearing, it shall issue its order staying the issuance

of its mandate in this cause until after the Supreme Court shall have passed upon said petition for writ of certiorari and have disposed of the same, on the condition, however, that said petition for said writ be filed with the Clerk of the Supreme Court within sixty days from the date of said order.

San Francisco, January 8, 1938.

Respectfully submitted,

ALFRED L. CASTLE
HERMAN PHLEGER
MAURICE E. HARRISON
Solicitors for Waialua
Agricultural Company, Limited.

ROBERTSON, CASTLE & ANTHONY,
BROBECK, PHLEGER & HARRISON,
Of Counsel.

[Endorsed]: Filed Feb. 1, 1938. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Messrs. Brobeck, Phleger & Harrison, counsel for the Appellee and Cross-Appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 1, 1938; and in the event the petition for a writ of certiorari to be made by the Appellee & Cross-Appellant herein be docketed in the Clerk's office of the Su-

preme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
Senior United States Circuit Judge.

Dated: San Francisco, California,
February 1, 1938.

[Endorsed]: Filed Feb. 1, 1938. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF MOTION TO VACATE ORDER STAYING MANDATE

To Waialua Agricultural Company, Ltd., and its solicitors Alfred L. Castle, Herman Phleger and Maurice E. Harrison:

You, and each of you, will please take notice, and you are hereby notified, that on Monday, February 14, 1938, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel may be heard, at the court room of the above entitled court, Room 326, United States Courthouse and Postoffice Building, Seventh and Mission Streets, San Francisco, California, Eliza R. P. Christian, an incompetent person, the appellant herein, by and through her solicitors, will move the above entitled court to vacate the order made by it on the 1st day of February, 1938, staying the issuance of the man-

date of said court to the Supreme Court of Hawaii in the above entitled cause.

The motion will be based upon the records and files of the above entitled cause. A copy of the motion, including a brief statement of the facts and objects of the motion and a copy of the supporting points and authorities are attached hereto and marked "Exhibit A" and made a part hereof as if herein fully set forth.

Dated: February 8, 1938.

CHAS. M. HITE
M. C. SLOSS
E. D. TURNER, JR.
G. E. FINNEY

Solicitors for Eliza R. P. Christian, an incompetent person, by Herman V. Von Holt, her guardian.

Service of a copy of the foregoing Notice of Motion to Vacate Order Staying Mandate is hereby admitted this 7 day of February, 1938.

ALFRED L. CASTLE
HERMAN PHLEGER
MAURICE E. HARRISON

[Title of Circuit Court of Appeals and Cause.]

MOTION TO VACATE ORDER STAYING MANDATE

Now Comes Eliza R. P. Christian, an incompetent person, the appellant herein, by and through her solicitors herein, and based upon the record

herein, five days' notice of this motion having been given to Waialua Agricultural Company, Limited, and its solicitors, hereby moves the above entitled court that its order made February 1st, 1938, staying the issuance of the mandate herein in accordance with the decree made herein on the 9th day of December, 1937, be vacated and set aside for the following reasons:

FACTS AND OBJECTS OF THE MOTION

This case has been pending since May, 1928. It has been before the trial court twice, the Supreme Court of Hawaii twice, and is now before this court for the second time. Under the opinion and decision of this court rendered December 9, 1937, and the supplemental opinion rendered February 1, 1938, further proceedings must now be taken in both the Supreme Court of Hawaii and the trial court of Hawaii before a final judgment can be entered herein. All of the decisions have been in favor of the incompetent, the moving party herein, the extent varying in the several instances. If the motion is not granted, the proceedings directed to be taken by the decree cannot be begun and at least upwards of three and one-half months will be lost in the progress of the litigation. Under the decision of this court an essential fact remains to be determined in the case, in so far as the validity of two of the three challenged documents are concerned.

The object of this motion is to expedite the final determination of the cause by permitting the incompetent to go forward with the proofs, and

thereby to sooner permit the enjoyment by the incompetent of the recovery granted to her in 1929, but still withheld.

(Clerk's Note: Points and Authorities in support of motion are not set forth.).

Respectfully submitted,

CHARLES M. HITE
M. C. SLOSS
E. D. TURNER, JR.
C. E. FINNEY

Solicitors for Eliza R. P. Christian, an Incompetent Person, by Herman V. Von Holt, Her Guardian.

[Endorsed]: Filed Feb. 8, 1938. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, February 14, 1938.

Before: Wilbur, Garrecht and Mathews, Circuit Judges.

[Title of Cause.]

ORDER DENYING MOTION TO VACATE ORDER STAYING ISSUANCE OF MANDATE.

Ordered motion of appellant and cross-appellee Eliza R. P. Christian, filed February 8, 1938, to vacate order staying issuance of mandate herein, argued by Mr. M. C. Sloss, counsel for appellant and cross-appellee Eliza R. P. Christian, in support of said motion, and by Mr. Herman Phleger, counsel for appellee and cross-appellant Waialua Agricultural Company, in opposition to said motion, and submitted for consideration and decision.

Upon consideration thereof, Ordered said motion denied.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing four volumes, consisting of sixteen hundred and forty-four (1644) pages, numbered from and including 1 to and including 1644, to be a full, true and correct copy of the entire record, excluding original exhibits of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee and cross-appellant Waialua Agricultural Company, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 18th day of February, A. D. 1938.

[Seal]

PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 15

ORDER ALLOWING CERTIORARI—Filed May 2, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 17

ORDER ALLOWING CERTIORARI—Filed May 2, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 30 1938
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. [redacted] 15

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation,
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, JAMES L. HOLT and ANNIE HOLT KENTWELL,
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Supporting Brief.

HERMAN PHLEGER,
MAURICE E. HARRISON,
J. GARNER ANTHONY,
Counsel for Petitioner.

ROBERTSON, CASTLE & ANTHONY,
Honolulu, Hawaii,

BROBECK, PHLEGER & HARRISON,
Crocker Building,
San Francisco, California,

EVAN HAYNES,
Of Counsel.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No.....

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation,
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, JAMES L. HOLT and ANNIE HOLT KENTWELL,
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable, the Supreme Court of the United States:

Waialua Agricultural Company, Limited,[1] prays that a Writ of Certiorari issue to review the decree

(1) Referred to herein as "Waialua."

(R. 1628) of the United States Circuit Court of Appeals for the Ninth Circuit made in the above-entitled cause on December 9, 1937, which reverses the decree of the Supreme Court of Hawaii entered March 25, 1935 (R. 631).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit is for the cancellation of a deed and lease of land in the Hawaiian Islands upon the ground of the mental incompetence of the grantor and lessor. The facts are fully set forth in the opinions of the courts below and may be summarized as follows:

The lease was executed in 1905 for a 25-year term. The deed (which covered a contingent interest in the same property) was executed in 1910. Suit to cancel the deed was filed in 1928, and by later amendment in 1932 (two years after the lease had expired), the lease was sought to be cancelled. (R. 874, 953)

The lessor and grantor, Eliza R. P. Christian, was born in the Hawaiian Islands and lived there until 1906, when she went to Oxford, England, where she has since resided. She was first placed under guardianship in 1926, in England, at the age of 41 years. Suit was filed two years later; more than 18 years after the deed was made. (R. 844, 847)

Mrs. Christian has never appeared in court in any of these proceedings. Although found to be a congenital imbecile, the trial court held that she "neither was, nor is, an idiot, a lunatic or utterly imbecile. She was and is, however, a person of undeveloped intellect (R. 132)

* * * mentally incompetent to execute a conveyance * * *" (R. 133). She attended school for years, married, was accepted as a competent party to a series of business transactions extending over a period of years and moved freely about the world. (R. 211, 221, 232, 241, 265)

Mrs. Christian's interest in the property at the time of her lease and her deed (her father and other relatives joined in the execution of both of these as to their interests) was contingent; dependent upon her surviving her father and being his sole heir. The contingency vested in 1922 when her father died. (R. 953)

The property in question (referred to in the opinions as the Holt lands) is a one-third interest in 14,000 acres of land on the Island of Oahu. As shown by the attached map, it forms a wedge in the center of Waialua's unified plantation, and comprises 28% of its entire area. When the 1905 lease was delivered the land was a barren waste, but following the lease it was cleared, and water was developed on it and surrounding lands at great cost. Waialua spent $630,722.12 in improvements on the property, and $504,652.94 off it, but in connection with it, in reliance on the validity of the instruments. (R. 557, 1507, 1515)

These improvements were constructed for the operation of the plantation as a unit. They consist of railroads, telephone lines, electric plant, roads, bridges, irrigation ditches, reservoirs, dams, spillways, elaborate pumps and syphons, and many buildings, all located and constructed without reference to the boun-

daries of the part of the plantation here involved, but solely with a view to their utility to serve the whole plantation. (R. 578, 1494 to 1505)

Suit was commenced in the Circuit Court of the First Circuit of the Territory of Hawaii[1] in 1928 to cancel the deed. Some eighteen persons who might otherwise have testified, including those who acted for Waialua in the transaction, and the public officials who participated in the execution of the challenged instruments, had died. (R. 977)

After trial, cancellation of the deed was decreed and a judgment for $540,806.07 for rents was entered. On appeal, the Supreme Court of Hawaii affirmed the cancellation of the deed but reversed the judgment for rental on the ground that even though the deed was cancelled, Waialua was entitled to hold possession by virtue of the lease of 1905.

The cause was remanded to the trial court where the complaint was amended to attack the lease (the term had already expired) and after trial, the lease was cancelled and the trial court entered judgment for $606,785.79 in rents. The Supreme Court of Hawaii on May 3, 1934 reversed the decree cancelling the lease, upon the ground that the lease was beneficial to Mrs. Christian and her incompetence (if she was incompetent in 1905) had not been a factor in the transaction.

Both parties appealed to the Circuit Court of Appeals for the Ninth Circuit which on December 9,

(1) The Circuit Court of the First Circuit is hereinafter referred to as the "trial court."

1937 reversed the decree of the Supreme Court of Hawaii, held the deed void and remanded the cause to the lower courts to determine whether Mrs. Christian was incompetent when the lease was made in 1905, and if so, to cancel the lease and fix the rental damages. It also decreed the return of the purchase price of $30,000 with interest, and directed that an allowance be made for the cost of improvements on the land, not exceeding the increase in value attributable thereto.

The decree of the Circuit Court of Appeals determines all of the questions of law and leaves to the lower courts only the determination of subordinate questions of fact. These determinations will be unnecessary, if our view of the law is sustained, and a judgment here favorable to petitioner will finally dispose of the entire cause.

The following facts are established by the decisions below:

Mrs. Christian was incompetent in 1910 when the deed was made. (R. 1592)

Waialua had no knowledge of the incompetence and paid an adequate consideration. (R. 304, 1605)

The contingency vested in 1922, when Mrs. Christian's father died. (R. 1590)

The 1905 lease was for an adequate consideration and highly desirable to the lessor. (R. 558, 560)

Waialua has incorporated the land into its unified plantation and has expended more than $1,-

000,000 in improvements on and off the land in reliance on the validity of the instruments. (R. 578, 1493, 1507, 1515)

The land has increased greatly in value. (R. 294)

In 1910 Waialua purchased a contingent remainder in 14,000 acres of partially cultivated land. The decree requires it to surrender in 1938 a vested fee in an integral part of its plantation, greatly increased in value, and improved by the expenditure of more than $1,000,000.

OPINIONS BELOW.

The opinions of the courts below are found in the following pages of the record:

Opinions of the trial court (unreported):

First Opinion dated May 11, 1929 (R. 111).

Opinion on Remand, dated August 18, 1932 (R. 472).

Opinions of the Supreme Court of Hawaii:

First Opinion dated April 18, 1931 (R. 202, 31 Haw. 817).

Second Opinion dated May 3, 1934 (R. 547, 33 Haw. 34).

Opinions of the Circuit Court of Appeals:

Opinions dated December 9, 1937 (R. 1586, 93 Fed.(2d) 603).

Opinion denying Rehearing dated February 1, 1938 (R. 1633, not reported).

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered on December 8, 1937. A petition for rehearing was seasonably filed on January 7, 1938, which after consideration was denied on February 1, 1938. The mandate has been stayed pending the filing and disposition by this Court of this petition (R. 1639).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (USCA, Title 28, Section 347).

THIS COURT MAY NOW FINALLY DISPOSE OF ENTIRE CAUSE.

While we realize that this Court is ordinarily reluctant to review an interlocutory decree, we point out that for all practical purposes this is a final decree, for it settles all questions of law, leaving only subordinate questions of fact for decision. This cause has been in the courts for years. If this writ is granted, and the questions of law are determined as we contend, a final decree may now be entered, and no further proceedings will be necessary in any court. A writ may issue in such circumstances.

United States v. Gulf Refining Company, 268 U. S. 542, 545;

Stringfellow v. Atlantic Coast Line R. Co., 290 U. S. 322;

Clark v. Willard, 292 U. S. 112;

Prudence Company, Inc. v. Fidelity and Deposit Company of Maryland, 297 U. S. 198.

QUESTIONS PRESENTED.

The questions here may be summarized as follows:

1. Is the deed of an incompetent (before adjudication) to an innocent purchaser for an adequate consideration void, as the Circuit Court of Appeals has held?

2. Should such a deed made in 1910, conveying a contingent interest, be now set aside (as the Circuit Court of Appeals has held) after the contingency has vested, and after more than $1,000,000 has been spent in improvements on the faith of its validity, upon a mere showing of incompetence, and upon the return of the purchase price plus an allowance of the cost of improvements on the land not exceeding their enhancement of its value?

3. Will a lease made in 1905, to an innocent lessee, for an adequate rental, which expired in 1930, be now set aside (as the Circuit Court of Appeals has held), upon a mere showing of incompetence, where the lease was beneficial, and large sums were expended upon improvements in the belief that it was valid?

4. Finally, what is the law regarding the deed of an incompetent to an innocent purchaser for an adequate consideration:

   (a) Is the deed void, and will it be set aside upon the return of the consideration and an allowance for enhanced value from improvements,

without weighing all of equities, as was declared by the Circuit Court of Appeals;[1] or

(b) Is the deed voidable, and will it stand in the absence of any showing of inequitable circumstances or advantage taken of the incompetent as declared by Story, Williston, and Pomeroy, in accord with the weight of authority and the Common Law?

(c) Is status quo restored by a return of the consideration plus the cost of improvements on the land not exceeding their enhancement of its value (as was decided by the Circuit Court of Appeals), where a contingency has vested, the property has increased in value, and the purchaser has irredeemably changed its position?

REASONS FOR ALLOWANCE OF WRIT.

This cause involves the question of whether the deed of a mental incompetent (before adjudication) to a bona fide purchaser is void or merely voidable, and the principles which shall govern a court of equity in a suit to cancel such a deed.

The overwhelming weight of authority is that such a deed is voidable only. Yet the court below has held

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(1) The Circuit Court of Appeals declared: "This as will appear does not mean that the court should balance all equities of the parties as was done by the trial court." (R. 1600.)

such a deed to be void. This decision not only is contrary to authority and principle, but adds confusion to the already existing confusion in the Federal courts as to the correct rule.

This confusion arises largely from a statement of this Court in *Dexter v. Hall*, 15 Wall. 9, 20, that

> "The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic or person non compos mentis, has nothing which the law recognizes as a mind, and it would seem therefore, upon principle, that he cannot make a contract which may have any efficacy as such."

In that case this Court held that a power of attorney executed by a lunatic is "void", and while under the facts there presented the result was doubtless correct, for the principal at the time was confined in an asylum, the court's expression has been interpreted by many Federal courts[1] as a declaration that the deed of an incompetent to an innocent purchaser is "void" to such an extent that many of the courts have characterized it as "Federal" rule to be applied in all Federal courts, irrespective of the law of the situs of the land. It is referred to in encyclopedias and some text books as the "Federal" rule.[2]

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(1) *Plaster v. Rigney*, 97 Fed. 12;
Edwards v. Davenport, 20 Fed. 756;
Anglo Californian Bank v. Ames, 27 Fed. 727;
Clark Car Co. v. Clark, 11 Fed.(2d) 814;
White's Guardian v. Martin, 2 Alaska 495.

(2) 1 *Federal Law of Contracts*, Sec. 336.7 (1934 Edition).

And in this cause the grantor not only contended that there was a "Federal" rule but also that the court below was bound to follow that rule.[1] (R. 1627)

The court below in declaring the deed of an incompetent void, cited *Dexter v. Hall* as authority for its declaration "We hold that contracts made by an incompetent are void because an incompetent is incapable of giving the required assent thereto. *Dexter v. Hall,* supra, * * *." (R. 1597)

Sothern v. United States, 12 F.(2d) 936, 937 summarized the law on this subject as follows:

> "* * * the courts of the United States have uniformly held a contract of a lunatic or an insane person is wholly void and subject to collateral attack. The leading case on that subject is Dexter v. Hall * * *."

The inaccuracy of this statement and the existence of a direct conflict in the Federal courts, is illustrated in *Kevan v. John Hancock Life Insurance Company,* 3 Fed. Supp. 288, 289, 290, where District Judge Otis declared:

> "I do not find a single federal appellate court decision announcing the rule that contracts generally, entered into by insane persons, not adjudicated insane, are absolutely void."
>
> "My view of the matter is that it cannot be said that a Supreme Court dictum and five scat-

(1). The grantor's Brief had a topic heading as follows: "Eliza was incompetent and the rule of the Federal Courts is that the contract of an incompetent person is void and a nullity * * *."

tered District Court opinions, established any such federal rule as plaintiff contends for.

"The overwhelming weight of authority in this country in the state courts is that the contracts of insane persons who have not been adjudged insane, are voidable only."

Notwithstanding the confusion that exists in the Federal decisions, the overwhelming weight of general authority, and we submit the better view, is that the deed of an incompetent, before adjudication, is voidable and not void. That is the law in the great majority of states, it is the common law, it is the law of England, and it is the law as announced by text writers and commentators such as Williston, Story, Chitty, Pollock and Pomeroy.

And we submit such is the law as declared by this Court, and this view has been taken by some lower Federal courts.(1) In *Luhrs v. Hancock*, 181 U. S. 567, 574, this Court declared, "The deed of an insane person is not absolutely void: it is only voidable; that is, it may be confirmed or set aside."

That there is confusion and conflict among the Federal courts on this question, cannot be denied, and for this reason alone the writ should be granted. It will permit this Court to declare its view with finality and end the misinterpretation and misapplication of its earlier decisions.

The reasons for granting this writ may be summarized as follows:

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(1) *Beale v. Gibaud*, 15 Fed. Supp. 1020;
Kevan v. John Hancock Ins. Co., 3 Fed. Supp. 288;
Safe Deposit Co. v. Tait, 54 Fed.(2) 383;
Levine v. Whitney, 9 Fed. Supp. 161.

1. The court below, in holding the deed of an incompetent void as against an innocent purchaser who paid an adequate consideration, has decided an important question of general law contrary to the great weight of authority.

2. The court below, in holding the deed of an incompetent void, has impressed upon the Territory of Hawaii an intolerable rule of property law which, unless corrected by this Court in the exercise of its supervisory powers, will render uncertain and unstable titles to real property generally in the Territory of Hawaii and elsewhere within the jurisdiction of that court.

3. The court below, in holding the deed of an incompetent void, did so upon a misunderstanding of two decisions of this Court, to-wit:

Dexter v. Hall, 15 Wall. 9;

Luhrs v. Hancock, 181 U. S. 567,

and in direct conflict with the pronouncement of this Court in the case last cited.

4. The court below has laid down a palpably erroneous principle of equity to the effect that in a bill in equity for cancellation of a deed upon the ground of incompetence of the grantor, it is error for the trial court to balance the equities of the parties.

5. The correct rule of law to be applied to deeds of incompetents is of great importance to the public generally; the determination of the rule by this Court will be an important contribution to the jurisprudence of this country, and end the confusion and conflict which presently exists in the Federal Courts.

WHEREFORE, petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and determination, a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled in its docket as "No. 8329, Eliza R. P. Christian, an incompetent person, Appellant, v. Waialua Agricultural Company, Limited, and others,(1) Appellees; Waialua Agricultural Company, Limited, Cross-appellant vs. Eliza R. P. Christian, an incompetent person, and others,(1) Cross-appellees," and that the decree of said court be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated: San Francisco, California,
March 25, 1938.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
By HERMAN PHLEGER,
MAURICE E. HARRISON,
J. GARNER ANTHONY,
Counsel for Petitioner.

ROBERTSON, CASTLE & ANTHONY,
BROBECK, PHLEGER & HARRISON,
EVAN HAYNES,
Of Counsel.

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(1) James L. Holt and Annie Holt Kentwell, whose names appear in the title of the cause, were made parties in the trial court, but a severance was obtained in the Supreme Court of Hawaii (R. 804), and they were not parties to the appeal to the Circuit Court of Appeals.

In the Supreme Court of the United States

OCTOBER TERM, 1937

No.....

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation,
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, JAMES L. HOLT and ANNIE HOLT KENTWELL,
Respondents.

Brief in Support of Petition for Writ of Certiorari.

The Petition contains a statement of the grounds of jurisdiction, a statement of the case and references to the opinions of the court below.

ERRORS TO BE URGED.

The Circuit Court of Appeals erred in:

1. Holding the deed of 1910 void; and the lease of 1905 and the assignment of 1906 void, if the grantor was then incompetent.

2. Holding that Waialua can be restored to status quo; and that it is restored to status quo by a return of the purchase price plus an allowance for improvements.

3. Giving no consideration to the fact that Waialua purchased a contingent interest, and that the contingency did not occur until 12 years later; or to the fact that costly improvements were made off the land for its benefit, and on the land for the benefit of other lands.

4. Holding that the equities of the parties should not be balanced, and in refusing to balance such equities.

5. Holding that Mrs. Christian is entitled to recover the rental value of the land for the period, or any part thereof, of Waialua's occupation.

ONE VITAL ERROR CORRUPTS THE WHOLE JUDGMENT OF THE COURT BELOW.

When the court below held the deed to be "void", it approached the question of cancellation, not as a case where it was asked to divest a title held and acted on for many years, but on the contrary, simply as a suit to obtain a judicial declaration of an existing fact.

i. e. that the deed is void. The grantor being incompetent, says the court, her deed was void; the grantee, however innocent, has never had the title, and the grantor has never ceased to have it. The only possible question, therefore, arises (in the Court's view) out of the fortuitous circumstance that the grantor comes into equity, which may impose terms, or even perhaps refuse to act at all, leaving her to her remedies at law. (R. 1598)

It is this view of the case, this idea that the court is asked, not to take the title from the grantee and give it to the grantor, but merely to declare a pre-existing fact, which explains (although it does not justify) the following declarations of the court below:

1. That the incompetent grantor has a right to this judicial declaration of her uninterrupted ownership, "even though the bargain may seem fair" (R. 1600), i.e., even though her only reason for bringing the suit is the desire to profit by increase in value of the land, from whatever cause, in the intervening years. (R. 1600)

2. That the usual rule, that equity never effects an unjust result is inapplicable here: that in cases like this, it is not true that "the court should balance all equities". (R. 1600)

3. That in cases such as this (although the grantee may, as here, be irreparably harmed by the undoing of what was done fairly and in good faith many years before) "It is no legal hardship on the party dealing with an incompetent if he

receives back what he gave in the bargain." (R. 1603)

4. That the only account that need be taken of the grantee's changes of position in reliance on its title, is to give it quasi-contractual relief, in so far as its physical improvements "on another's land" have permanently enriched the "true owner". (R. 1617)

5. That (although the court announced that status quo should be restored), the grantor is entitled to the relief sought, however much this may injure the grantee; however fatally and inextricably the land in question may have become entangled in the grantee's other property and affairs; so long as the grantor is willing to return the purchase price and pay the grantor the present value of the physical improvements.

In other words, incompetent grantors are given an absolute option, after the lapse of no matter how many years, to elect to get back the land conveyed, for the price at which it was originally sold, plus the value of permanent additions.

Thus the court enables incompetents (or their relatives who stand to profit), to lie in wait, and whenever changed conditions make it profitable, to repudiate their deeds and contracts, even though it inflicts irreparable harm on wholly blameless persons.

And so the court here has decreed that Waialua, in 1938, surrender to Mrs. Christian a vested fee in an integral part of its plantation, greatly increased in

value, and improved by the expenditure of more than $1,000,000; when all it received in 1910, when it made the purchase, was a contingent interest in partially cultivated land.

REASONING AND DECISION OF THE CIRCUIT COURT OF APPEALS.

The following summary analysis of the decision of the court below, omits subsidiary questions and certain other matters which, having been decided, are no longer important.

After observing that the authorities are conflicting, the court says:

> "We hold that contracts made by an incompetent are void because an incompetent is incapable of giving the required assent thereto. Dexter v. Hall, supra, 20 * * *;" (R. 1597)

It then declares that even though this is true,

> "Equity does not always grant relief against a void contract. For instance a gambling contract is void (6 R. C. L. 775, §180), but the loser is granted no relief when he asks rescission and restitution of the property lost." (R. 1598)

The court then holds that even though a contract of an incompetent is fair, for an adequate consideration, and made without knowledge of incompetence, the incompetent party still has the option of repudiating it at will:

> "Even though the bargain may seem fair, the incompetent usually has special reasons in asking

for relief. The courts should not be concerned with his reason, but, after proof of incompetency, with the status of the parties, as shown hereinafter by the various factual situations. This, as will appear, does not mean that the court should balance all equities of the parties, as was done by the trial court." (R. 1600)[1]

The court then mentions the rule of the English courts, and some others, that "if the party dealing with the incompetent dealt in good faith, without overreaching and without notice, then relief is refused even though the status quo may be restored," but rejects this view and holds that:

"* * * if the parties can be placed in statu quo, the relief will be granted. (citations) It is no legal hardship on the party dealing with the incompetent if he receives back what he gave in the bargain." (R. 1603)

The court then says: "We apply these rules to the facts;" and turns to the question of relief against the deed. It first summarizes the facts found:

"Both courts found that appellant was incompetent to execute the deed; that the company had no notice of the incompetency; that the company could be placed in statu quo; and that appellant was not guilty of laches. These conclusions

(1) This startling statement on an equity appeal is the logical result of the court's initial error in holding the deed "void". Literally read, it is a declaration that Waialua is not entitled to its day in a court of equity. It is the court's reason for refusing to consider Waialua's irrevocable changes of position.

were reached after careful consideration of the evidence. Exhaustive opinions were written considering the evidence. We accept them because we can not say there was clear error, since the evidence at most was only conflicting." (R. 1605)

It then holds that the deed was properly cancelled, under the rule stated by it, because status quo was restored simply by returning the purchase price:

"In accordance with the rules above stated, and considering the company as an innocent party without notice, relief was properly given, we believe, because the status quo of the company may be and was restored by the decree by setting off the $30,000.00 purchase price, which the company paid, together with interest, against the accrued rentals to which the ward was entitled." (R. 1606)

The court then turns to relief against the lease, and adopts the facts as found by the Hawaiian court:

"It found that the company had no knowledge of the incompetency; that the consideration for the lease was adequate; that the bargain was fair and reasonable; that 'there was no fraud, actual or constructive.'" (R. 1608)

On this basis the Supreme Court of Hawaii had concluded that—

"This lease was for an adequate consideration. All its terms were fair and reasonable * * * It has been fully performed. It was in the best interests of Eliza and beneficial to her * * * The imbecility of the lessor did not enter into the transaction.

> Under these circumstances we can see no equity or justice in canceling the lease (R. 558) * * * even though the lessee can be restored to the status quo ante." (R. 560)

For this reason, the Hawaiian court held that it was unnecessary to decide whether Mrs. Christian was incompetent in 1905. The court below, however, (i.e., the Circuit Court of Appeals), holds that notwithstanding the facts found, if Mrs. Christian was incompetent at the time of the lease, she has the right to repudiate it now. (Its term expired in 1930.) It held therefore that there must be a determination of the question whether Mrs. Christian was incompetent when she executed the lease. (R. 1609)

The court then deals with the question of improvements, and notes that—

> "* * * the court below decreed that the ward convey certain lands upon which improvements existed, to the company absolutely, and permanent rights of way over other lands upon which existed other improvements; and that the company assure certain rights of way to the ward." (R. 1616)

The court disapproves of this ruling, holding that the applicable rule is that where one innocently places improvements "on another's land", he is, in some cases, entitled to relief, but relief is limited to the "enhanced value of the land caused solely by the improvements," (R. 1618) not in excess of their cost. No consideration is given to improvements made off the land for its benefit, or to improvements on the land, so far as they were made for the benefit of other lands.

Opinion on Denial of Rehearing.

The opinion denying rehearing seeks to explain several matters contained in the main opinion.

The court says that it had not reached its conclusion that the deed of an incompetent is void on the theory that a contract is a "meeting of the minds," but because "one without a mind cannot have an intention".[1] (R. 1635)

It reiterates (R. 1635) the court's earlier statement that status quo should be restored, but does nothing to change the fact that it did not even attempt to restore the status quo, beyond giving the grantee compensation for benefits conferred on the grantor. It makes clear that all the court means by "status quo" is a return of the purchase price saying:

> "We used the term 'status quo' in the sense that it meant restoration of what was received under the contract." (R. 1635)

ut adds that if it includes "both the consideration eceived and allowance for improvements," (R. 1636) hen in effect the requirement is still satisfied. The ourt still fails to realize that by refusing to give any eight to changes of position by Waialua which do ot benefit the grantor, but which nevertheless have

(1) As previously pointed out, Mrs. Christian is no natic. She had executed over the years, a number conveyances, and had been accepted without question a party to various transactions by persons whose nesty and credibility are established. (R. 221, 232, 241, , 275, 276) None of these transactions (except those in stion here) in so far as the record shows, have ever n challenged. (R. 221, 232, 241, 265)

been made or suffered by Waialua in reliance on its title, it has inflicted a grave injustice on Waialua, which is not, and cannot be, restored to status quo.

POINT I.

THE RULE THAT THE CONTRACTS OF INCOMPETENTS ARE AT MOST VOIDABLE, IS NOW ALMOST UNIVERSALLY ACCEPTED.

The tendency of the modern authorities is to go much farther in sustaining the contracts of incompetents than is required to sustain the transactions here involved.

1. The proper rule is that contracts of incompetents are valid if made in good faith and for adequate consideration.

This is the law in England,[1] and is now the settled rule in several states. We submit that it is the correct view, and is decisive of this case.

Imperial Loan Company v. Stone, L. R. (1892) 1 Q. B. 599:

"A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the

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(1) Sec. 1 of the Hawaiian General Laws provides "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; * * *" Rev. Laws of Hawaii 1935, p. 73.

time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed."

See also

Molton v. Camroux, (1848) 2 Ex. 487; 4 Ex. 17.
Goldberg v. McCord, 251 N. Y. 28:

"An insane person, before office found, may convey a good title; his deed is not void, but voidable (Finch v. Goldstein, 245 N. Y. 300, 157 N. E. 146); and it is not even voidable as against bona fide purchaser for value without notice of the incompetency."

In upholding the deed of a lunatic to an innocent purchaser the court said in *Ashcraft v. De. Armond,* 44 Ia. 229, 234:

"We are at loss to understand why his title should be held invalid. Not knowing that Elizabeth was wanting in mental capacity and having innocently taken her conveyance, it surely cannot be said that as to him there were any further equities of which her possession would serve to give him notice or put him on inquiry."

In *West v. Seaboard Air Line Ry.,* 151 N. C. 231, the court said:

"The well-established rule is that the mere fact that one of the parties to the contract is of un-

sound mind (he not having been found to be a lunatic by judicial proceedings) does not render the contract void, but at most only voidable, and is no ground for setting it aside where the other party had no notice of the insanity and derived no inequitable advantage from it."

See also:

Rhoades v. Fuller, 139 Mo. 179;
Beals v. See, 10 Pa. St. 56;
Rubins v. Hamnett, 294 Pa. 295;
Eaton v. Eaton, 37 N. J. Law, 108;
Mattheissen v. McMann, 38 N. J. Law, 536;
Young v. Stevens, 48 N. H. 133.

And see also the treatises cited next below.

2. In any event, it is now almost universally agreed that executed contracts of incompetents will not be set aside if made in good faith unless status quo can be restored.

There is no doubt of the proposition stated in the heading. Professor Williston speaks on the question in part as follows:

"According to the view more commonly expressed a lunatic's transactions are voidable * * * In the leading case of Molton v. Camroux, the rule was stated: 'The modern cases show that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defense cannot prevail, especially where the contract is not merely executory but executed in the whole or in part and the parties cannot be restored altogether to their original positions.' * * *

"In the United States, the weight of authority supports the rule quoted above from Molton v. Camroux. This principle applies to the case of a deed made by a lunatic."

1 *Williston on Contracts* (Rev. Ed.) Secs. 251, 254.

See also:

Anson on Contracts (5th Am. Ed.), p. 203;
Pollock on Contracts (10th Ed., 1936), p. 191;
Harriman on Contracts (2d Ed.), Sec. 407;
1 Story's Equity Jurisprudence (13th Ed.), pp. 241, 242;
32 *Corpus Juris* 730;
21 Halsbury's Laws of England (2d Ed., 1936), p. 282.

A discussion of the cases would unnecessarily encumber this brief. We quote from a note in 46 A. L. R. 419 (supplemented in 95 A. L. R. 1143):

"The great weight of authority supports the rule that where a contract with an insane person has been entered into in good faith, without fraud or imposition, for a fair consideration, without notice of the infirmity, and before an adjudication of insanity, and has been executed in whole or in part, it will not be set aside unless the parties can be restored to their original position."

3. The doctrine that a contract requires a meeting of the minds is no obstacle to the rule that contracts of incompetents are voidable and not void.

The old notion that contracts and conveyances made by incompetents are wholly void, is based, of course,

on the metaphysical idea that a contract requires a meeting of the minds, and that since an incompetent has no mind he cannot, therefore, make a contract (*Dexter v. Hall,* 15 Wall. 9). This is the view taken by the court below, and is the foundation of its decision.

The short answer to this proposition is stated by Professor Williston. He observes that the modern rule (that incompetents' contracts are voidable at most, and valid if fair), is:

> "* * * in line with the view now generally prevailing in regard to mutual assent as a requirement for the formation of contracts. According to the modern view actual mental assent is not material in the formation of contracts, the important thing being what each party is justified in believing from the actions and words of the man he is dealing with. Accordingly, if one dealing with a lunatic may reasonably suppose he is sane and makes a bargain with him on that assumption, there is no theoretical difficulty in the lack of mutual assent. Lunatics whose acts can deceive anybody are not so totally devoid of will that their words and acts can be compared to talking while asleep or signing a paper substituted by sleight of hand." (1 *Williston on Contracts (Rev. Ed.)* §254)

The objective theory of contracts is adopted in the *Restatement,* and specifically stated to be applicable to contracts of insane persons.

Restatement of the Law, Contracts, Sec. 20:

"A manifestation of mutual assent by the parties to an informal contract is essential to its

formation and the acts by which such assent is manifested must be done with the intent to do those acts; but, except as qualified by §§55, 71 and 72, neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.

"*Comment*:

"a. * * * Nor is it essential that the parties are conscious of the legal relations which their words or acts give rise to. It is essential, however, that the acts manifesting assent shall be done intentionally. That is, there must be a conscious will to do those acts; but it is not material what induces the will. Even insane persons may so act; but a somnambulist could not." (pp. 25, 26)

See also:

Williston, op. cit., Secs. 20, 21, 22;

Holland, Jurisprudence (12th Ed.), pp. 119-120;

Langdell, Summary of the Law of Contracts (2d Ed.), Sec. 180;

Holmes, The Common Law, pp. 309, 324, 325.

POINT II.

RESTORING A PARTY TO STATUS QUO MEANS SAVING HIM HARMLESS.

We need not labor the proposition that the rule forbidding cancellation of executed conveyances to blameless grantees does not mean merely that the consideration must be restored (as held here), nor merely that, plus the value of physical structures. It

means that such grantees must be substantially "reinstated in the condition in which they were prior to the purchase". (*Yauger v. Skinner,* 14 N. J. Eq. 389)

Even in cases of rescission for fraud, the same rule is applied, with appropriate exceptions, because inherent in the idea of rescission. (*Neblett v. Macfarland,* 92 U. S. 101)

And as against defendants who are without fault, the rule is unqualified, that executed transactions will not be set aside unless it can be done without harm to the innocent party against whom the relief is sought.

This for the obvious reason that to grant rescission in such a case would be to do something that equity never does: "a court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent." (*Holly v. Missionary Society,* 180 U. S. 284, 295)

A fortiori, in cases like this one, where the bargain was fair, and plaintiff has suffered no injury whatever, equity will not annul an executed transaction where to do so would inflict great and irreparable harm.

A leading case is *Grimes v. Sanders,* 93 U. S. 55, 62, where, in considering whether a conveyance should be rescinded at the suit of the buyer on the ground of a mistake of fact, the court said, speaking of rescission generally,

> "A court of equity is always reluctant to rescind, unless the parties can be put back in

statu quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. Here the appellant received the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and cannot conveniently restore it. * * * Times have since changed. There is less demand for such property, and it has fallen largely in market value. Under the circumstances, the loss ought not to be borne by the appellant."

Mr. Pomeroy states the principle thus:

> "In case of fraud, if the defendant's act has prevented a complete restoration of the status quo, he cannot, in justice, urge this fact as a defense to the rescission; but in other cases, such as mistake, it would seem reasonable that the status quo should be completely restored as a condition of equitable relief." (5 *Pomeroy, Eq. Jurisp.* (2d Ed.) §2110)

In *Price v. Berrington,* 3 Mac. & G. 486, the principle is applied in a case much less obvious than the present one. There the court refused to set aside an incompetent's conveyance where,

> "* * * the consideration being fair, there being no notice of insanity and no circumstance of fraud, the estate having also been enjoyed during the twenty-seven years since the conveyance, and made the subject of family arrangements by settlement upon the marriage of the daughter of Moggridge [the grantee], under which her children are entitled to the benefit of certain charges upon the estate. * * *

> "The purchaser, having acted *bona fide*, dealt with the estate, believing it to be his own, made important family arrangements upon that footing, the disturbance of which would, I think, be not only highly inconvenient, but unjust."

Illustrations could be multiplied, but the following will suffice:

> *Yauger v. Skinner*, 14 N. J. Eq. 389, *supra*;
> *Riggan v. Green*, 80 N. C. 236;
> *Rickman v. Houck*, 192 Ia. 340.

We turn, therefore, to what was done in the present case.

POINT III.

THE COURT BELOW HAS WHOLLY MISCONCEIVED THE RULE CONCERNING STATUS QUO.

Although the court below declared that status quo should be restored, it held that all that was necessary in this behalf was to return to Waialua the price it paid for the land, plus compensation, on quasi contract principles, for the value to the grantor, "the true owner" (R. 1617), of Waialua's physical improvements. It said, in this connection, that restoring the status quo,

> "does not mean that the court should balance all the equities of the parties, as was done by the trial court." (R. 1600)
>
> "It is no legal hardship on the party dealing with the incompetent if he receives back what he gave in the bargain." (R. 1603)

"* * * the status quo of the company may be and was restored by the decree by setting off the $30,000 purchase price, which the company paid, together with interest, against the accrued rentals to which the ward was entitled". (R. 1606)

On rehearing the court attempted to explain its position on the question of restoring status quo, as follows:

"We used the term 'status quo' in the sense that it meant restoration of what was received under the contract. * * * We believe that such meaning is correct, because the transaction against which relief is granted consists of two things, that is, each party has delivered money or property to the other. The relief returns to each party what he delivered in the transaction. In case one of the parties has by the addition of improvements increased the value of the thing which he must return, then the court may under certain circumstances, grant an allowance to such party for the increase. In a broad sense, the status quo includes both the consideration receeived and allowance for improvements. * * * However, we treated status quo as restoration of the consideration, and the allowance for improvements as a separate condition. The result is the same whether they be viewed singly or together." (R. 1635-1636)

Thus the court wholly fails to see that return of the price plus compensation for the value of improvements made innocently on "another's land" (R. 1617), does not even touch the question properly to be considered, namely, Can the innocent grantee be re-

stored substantially to the condition in which he was prior to the purchase?

1. The court below repudiates the idea that any account should be taken of Waialua's irrevocable change of position.

The Supreme Court of Hawaii attempted "an equitable restoration to status quo" (R. 580) by insuring to the grantee the use of the improvements on the Holt lands, on the theory that this would restore Waialua to status quo with respect to the improvements both on and off the Holt lands, speaking as follows:

> "These provisions * * * are intended to assure the W. A. Co. restoration now, in this suit, to it of the improvements which it has constructed and is maintaining on the Holt lands as well as the continued use and benefit of those which it has constructed off of the Holt lands." (R. 588)

This obviously does not even approximately restore Waialua to status quo; but even this limited and unsuccessful attempt to save Waialua from the irreparable harm that will result if the instruments are annulled, was flatly repudiated by the court below.

After referring (R. 1616) to this action by the Supreme Court, the court below said that this was incorrect; that in such cases the grantee is entitled only to receive compensation to the extent that the "true owner" of the land is enriched by physical improvements. (R. 1617) In other words, the effect of the decree on the grantee is irrelevant.

2. The court below refused even to consider the question whether status quo can be restored.

The court below held that status quo could be restored, because the Supreme Court of Hawaii had so found, "because we cannot say there was clear error, since the evidence was at most only conflicting" (R. 1606). It made no examination of the question itself, but merely accepted the declaration of the Supreme Court, which it treated as a finding of fact, when it was a pure question of law, there being no dispute as to the facts themselves. By thus adopting without discussion or examination the conclusion of the Hawaiian court, the court below not only misapplied the law, but deprived Waialua of the review which it was the right and duty of the court below to give.

And as we have just seen, the court below, having relied on the Supreme Court's declaration that status quo could be restored, utterly ignored the basis upon which that court had made its declaration.

POINT IV.

WAIALUA CANNOT BE RESTORED TO STATUS QUO. THE INSTRUMENTS, THEREFORE, SHOULD NOT BE CANCELLED.

Even if the grantor had been prejudiced by the transactions here sought to be annulled, we submit that, (intervening events having made it wholly impossible to restore status quo), those transactions should not be disturbed.

A fortiori they should not be disturbed where, as here, the transactions assailed were fair and for adequate consideration.

1. The land has been incorporated as an integral part of the plantation, it has greatly increased in value, large sums have been expended on the land, and large sums off the land. Obviously status quo cannot be restored.

We now state as briefly as possible the essential facts showing how irrevocably Waialua has changed its position in reliance on its title.

As to deed of 1910.

1. Relying on its title Waialua incorporated the land as an integral part of its unified plantation. As shown on the attached map, the land lies as a wedge in the heart of the plantation and divides it into two almost equal parts. All improvements on the plantation are located without reference to the boundary of the Holt land, and the whole is operated as a unit. (R. 1494, 578)

2. More than $1,000,000 was expended on improvements: $630,722 on the land (R. 1507), and $504,652 off the land but used in connection with it. (R. 1515) The Supreme Court referred to some of these as follows:

> "* * * large and costly improvements had been constructed by the W. A. Co., in reliance on the deed of 1910, on lands other than Holt estate lands. More specifically * * * reconstruction in 1921 by the W. A. Co. of the

Wahiawa dam and the creation thereby of a reservoir extending back into the mountains for a distance of several miles along both the north and the south forks of the Kaukonahua stream and covering about 300 acres, the reconstruction in 1931 costing the company the sum of about $210,000, [and] the construction of a ditch more than four miles in length to lead the waters from the Wahiawa dam to the cane lands of the W. A. Co., including lands of the Holt estate as well as other lands of the company, [also] the establishment of the Poamoho pump by the W. A. Co. on grant 235 belonging to the Holts but with ditches and pipe lines (on non-Holt lands) through which the water raised by the Poamoho pump was forced and carried to cane fields both on and off the Holt lands." (R. 578)

For example the Poamoho pump was built on the Holt land in 1927 at a cost of more than $200,000. (R. 1550) Half its output is used off the Holt lands. (R. 1500) The Wahiawa extension ditch crosses the Holt lands, and carries water to lands lying to the north. The railroads, ditches, telephone and power lines cross and re-cross its boundaries. Reservoirs lay partly in and partly across its outer lines. The improvements include:

82 houses (R. 1530);
Ditches, pumps, wells, siphons and waterways;
11 reservoirs;
9.75 miles of railroad (R. 1533);
20 miles of roads (R. 1547);
4½ miles of electric power lines (R. 1548).

As to the lease of 1905.[1]

1. When this lease was made the land was a barren uncultivated waste, with the taxes delinquent for four years. (R. 557) More than $43,000 was spent in clearing it and it was three years before the first crop could be gathered on half the cultivated area. (R. 991)

2. The term was for 25 years. The lease would not have been made for less than 25 years or unless all the parties joined. (R. 1485)

3. By virtue of the lease, Mrs. Christian was able to secure an agreement of support from her cousin, which assured her of support for years when she had no other source of income. (R. 571)

4. The term of the lease (25 years) expired in 1930. It is sought to set it aside after its term has expired and after it has been fully performed.

2. Waialua purchased a contingent interest; for twelve years it bore the risk attending ownership of a contingent interest; the fee has vested; status quo cannot be restored.

The deed of 1910 conveyed a contingent undivided one-third interest. The interest was contingent absolutely on the grantor's surviving her father; and was

---

(1) The lease made in 1905 for 25 years, covered the same land as the deed. When the Supreme Court cancelled the deed it held that Waialua was entitled to hold by virtue of its lease, unless the lease were also to be cancelled. (R. 314) It held, however, that the lease should not be cancelled, even though Mrs. Christian were incompetent. (R. 558, 560)

contingent in amount upon her surviving him as his sole heir.

The father died in 1922, and therefore this risk and this contingency continued for 12 years. Every expenditure by Waialua on the property during this period ($203,513.42) was made on this risk as was also every enlargement or improvement of the balance of the plantation. It was not alone the $30,000 payment which was at hazard, it was every act and every expenditure made by Waialua after the deed and in reliance on it.

If an incompetent purchased an annuity on his own life for a lump sum and died after receiving one annual payment, would status quo be restored by the return of the lump sum paid for the annuity less the annual payment? Pollock, C. B. said no in *Molton v. Camroux*, 2 Ex. 487; 4 Ex. 17.

In *Mutual Life Insurance Co. v. Smith*, 184 Fed. 1, the court held an insurance company could not be restored to status quo after it had sold an annuity policy, by the cancellation thereof.

And in *Williams v. Penn Mutual Ins. Co.*, 6 Fed.(2) 322 (affirmed 27 Fed.(2) 1, certiorari denied 278 U. S. 638) the court held that "Where a defendant has foregone or lost a right to which he cannot be restored on the cancellation of an agreement procured by fraud, a court of equity will not decree cancellation", and refused to cancel a life insurance settlement agreement alleged to have been procured by fraud, because the year during which the insurance company was entitled to contest the policy had ex-

pired, and the policy had become incontestable by the insurance company.

See also *Breed v. Judd*, 1 Gray. 455.

Having purchased this contingent interest in 1910, and suffered the risk for twelve years, it is apparent that the bargain is not undone and the parties restored to status quo by requiring, as the court below did, that the grantee upon the return of its purchase price, surrender a title in fee.

The court below has "annulled" the transaction by requiring Waialua to "return" much more than it received (a fee in place of a contingent remainder) and it is given back much less than it parted with.

3. The intervention of many active years shows of itself that status quo cannot be restored.

Quite apart, therefore, from the foregoing matters, the fundamental fact is that during the eighteen years that intervened between the delivery of the deed and the commencement of this suit, the grantee was engaged continuously in the development of a large and highly organized and equipped plantation, of which the lands in suit are an inseparable part. It is apparent that countless decisions have been made, countless steps taken once and for all, which would have been very different except for the grantee's justified belief that the transactions now attacked were unassailable.

Quite apart, therefore, from the central fact of the intricate and inseparable relation which the land in suit has come to have physically to the grantee's other property and affairs, the effect of divesting

the grantee's title will be this: that innumerable things that were done wisely and well should have been done differently, or not at all. The grantee will thus be injured in a thousand undiscoverable (but unquestionable) ways in addition to the great and obvious injuries which appear on the face of the physical facts.

Moreover, changes in external conditions have occurred by virtue of which the setting aside of these instruments would effect grave injustice. The land has increased in value, both from the efforts and expenditures of the grantee and from other causes, described by the Supreme Court in general terms as "more profitable development of the sugar industry, a larger and more competitive market and the acquisition * * * of the fee simple estate." (R. 294)

The difficult problem of obtaining the great quantities of water necessary in the cultivation of sugar (R. 1457, 1461) was not solved for many years (R. 1496, 1505, 1507). The development of caterpillar tractors, motor trucks, and many other devices has materially changed the nature of the industry (R. 1386), as have the discovery of new fertilizers (R. 1385-7), and new methods of controlling pests (R. 1257). And as pointed out by the Supreme Court, in 1906,

> "* * it was not known to any of the parties or to any one else, that pineapples could be successfully or profitably grown on the upper lands of the Holt Estate. It was not until about fifteen years later that the W. A. Co. was able to lease the upper lands for pineapple purposes * * * * *." (R. 559),

i. e., not until 1923 (R. 973).

The fact is, therefore, that the property now sought to be taken from the grantee simply is not the same property as that received by it in 1910. Indeed, taking account of all that has occurred in the interim, it bears almost no resemblance to the property received, either physically or functionally.

POINT V.

SOLICITUDE FOR INCOMPETENT PERSONS DOES NOT JUSTIFY INJURY TO THOSE WHO DEAL WITH THEM IN GOOD FAITH.

There is no reason, either in law or in public policy, why the mere fact of incompetence should cause the setting aside of an executed transaction with an innocent grantee. Granted that an incompetent should be given the fullest protection against overreaching—there is no sound reason why, in those cases where the incompetence has not been a factor in the transaction, the transaction should be set aside to the injury of an innocent grantee. The mere fact of incompetence should not entitle a grantor to a more favorable position than a competent person; it should not entitle the incompetent grantor who has made as fair a bargain as could the most skillful and able (one joined in by relatives, as was the case here) to set it aside years after, merely because the land has increased in value.

As pointed out by Judge Story (*Equity Jurisprudence*, 13th Ed. §227):

> "The ground upon which Courts of Equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, luna-

ties and otherwise non compotes mentis, is fraud."

1. Incompetents are adequately protected by other means.

It is, of course, a fact that other adequate means are provided in the law for the conservation of the property of incompetent persons. As was said in *Coburn v. Raymond*, 76 Conn. 484:

"The argument under review also forgets the provisions which are made by statute for the protection of the property interests of incapable persons and the prompt redress of their wrongs. It is made easy to put such persons beyond the power of contracting or disposing of their estate, and to provide a competent substitute to secure redress when occasion arises. It may be safely assumed that the friendly or selfish interests of friends or relatives will, in the presence of so simple a recourse, leave few incapable persons possessed of estate free to dissipate it, or, in the event of a wasteful bargain or disposition by one whose power has not been legally restrained, that such interests will prompt speedy action which will lead to an intelligent conservation of the incompetent's interests before delay has witnessed the dissipation of the consideration received, or permitted substantial changes in the status of the bona fide grantee."

2. Persons dealing in good faith with incompetents have an equal claim on the court's concern.

The proposition stated is, we submit, self-evident. As was said in *Coburn v. Raymond*, 76 Conn. 484.

> "When the case involves an innocent, bona fi
> grantee, the court has before it two innocen
> parties between whom it is in duty bound to d
> equity to the best of its ability. It has no righ
> to shut its ears to the claims of either party . . .
> if, on the whole case, it would be inequitable t
> set aside a conveyance, there is no inexorable rul
> that it must be done because, perchance, th
> grantor was deficient in mental capacity."

And in *Edwards v. Miller* (1924), 102 Okla. 189, it is said:

> "If the lunatic and his relatives and friends and those upon whom rests the moral or legal duty to protect him in his unfortunate mental condition fail to have his mental incapacity judicially determined so that others may learn of his condition, and the mental condition and appearance of the lunatic is such that he causes even the cautious and prudent individual with whom he deals to believe in good faith that he is a fully competent person, then simple justice demands that innocent third persons be not made to suffer and lose moneys actually paid out by them in good faith in carrying into effect the contracts made by them with such lunatic whose mental condition and actions made him appear to them to be a fully competent individual."

POINT VI.

THE DOCTRINES ANNOUNCED BY THE COURT BELOW HAVE NUMEROUS UNDESIRABLE CONSEQUENCES.

The rule announced by the Circuit Court of Appeals, that the deed of an incompetent is always and

f necessity void, leads inevitably to consequences hat are wholly bad.

The incompetent will be deprived of the protection given by the voidable rule.

If an incompetent's contract is void, then it cannot e ratified (*Oakley v. Shelley*, 129 Ala. 467, 470; *Restatement of Contracts*, Sec. 13); it is subject to collateral attack (*Luhrs v. Hancock*, 181 U. S. 567, 574; *Sothern v. United States*, 12 F.(2d) 936); and it can be repudiated by the competent party. (*Sothern v. United States*, supra; *Luhrs v. Hancock*, supra.)

The situation is summed up by Williston (1 *Williston on Contracts*, Revised Edition 740):

> "Thus: If the contracts of lunatics are void, they cannot be ratified: third persons may effectually deny the title of the insane person's grantee: and a sane party to a bargain with a lunatic may repudiate it although the lunatic has performed on his side, or is ready to perform."

A bona fide purchaser from the grantee would get nothing; the stability of land titles would be greatly impaired.

If such deeds are void, even when given for value to an innocent purchaser, then necessarily a bona fide purchaser from the incompetent's grantee gets nothing. The effect on land titles generally of such a rule would be appalling. As was said in *Goldberg v. McCord*, 251 N. Y. 28:

> "Such a holding would be most disastrous to real estate titles and make the sale of real property extremely difficult and uncertain."

And in *Odom v. Riddick*, 104 N. C. 515, the court forcefully pointed out the result that would follow if a bona fide purchaser from the incompetent's grantee were not protected:

> "Any other doctrine would place all titles upon the hazard. If the title of an innocent purchaser for value, and without notice, can be upset for the alleged mental incapacity of one grantor, it can be done though the grantor may have been a very remote one. The evidence must necessarily be sought among those friendly to the heirs of such grantor,—the neighbors and acquaintances of the party of the alleged incapacity; and it would be difficult for the grantee in possession to furnish proof of the sanity of every grantor through whom he claims. Every man who shows the abnormal condition of mind which incapacitates him to make a conveyance of his property is sure to attract the attention of those around him, who have the power, and sometimes exercise it, to conceal the fact. It is a safer rule to require his heirs, or those acting for them, to take prompt steps to have the deed set aside, and parties placed in statu quo, before the property is conveyed to other parties, and while the facts are capable of full investigation, than to subject a remote grantee to maintain the integrity of his title by rebutting allegations of incapacity in any one of a long line of grantors."

This void rule will render uncertain every land title in Hawaii. None will be certain or secure during the lifetime of any grantor, and the uncertainty will continue even after the death of grantors, due to the sur-

ival of causes of action. Owners of land as well as ubsequent purchasers can only look to the future ith apprehension lest their grantor, his personal epresentative, or some grantor in the chain of title, r his guardian or personal representative, come forward with a claim of mental incompetence.

3. The incompetent could recover in ejectment, without restoring the purchase price.

The incompetent grantor or his representative or successor can, if the deed is void, recover possession in an action in ejectment, regardless of the innocence of the grantee, or of irrevocable changes of position suffered by him in reliance on his title, and without restoration even of the purchase price.

This necessarily follows from the reasoning in support of this Court's decision in *Dexter v. Hall*, 15 Wall. 9, where, indeed, this court cited with approval and relied on (p. 25) an early Pennsylvania case, *Rodgers v. Walker*, 6 Pa. St. 371, pointing out that in the *Rodgers* case it was held that the grantee of an incompetent "had no equity to be reimbursed his purchase-money, or the cost of improvements," because the deed was "absolutely void". See also *Young v. Bradley*, 101 U. S. 782.

CONCLUSION.

We are dealing here with a question which affects the security of every land title. It is contended that an inflexible rule makes transactions entered into in good faith by innocent parties void; this by the mechanical

application of a metaphysical rule. We submit that rules of law should be formulated with greater consideration of their practical results.

In this case, this court is afforded the opportunity to make an authoritative declaration on an important principle of law: one that touches transactions in general: one as to which there presently exists uncertainty and confusion in the Federal courts.

It is submitted that the writ of certiorari should be granted, the decree of the court below reversed, and the bill dismissed.

Respectfully submitted,

HERMAN PHLEGER,
MAURICE E. HARRISON,
J. GARNER ANTHONY,
Counsel for Petitioner.

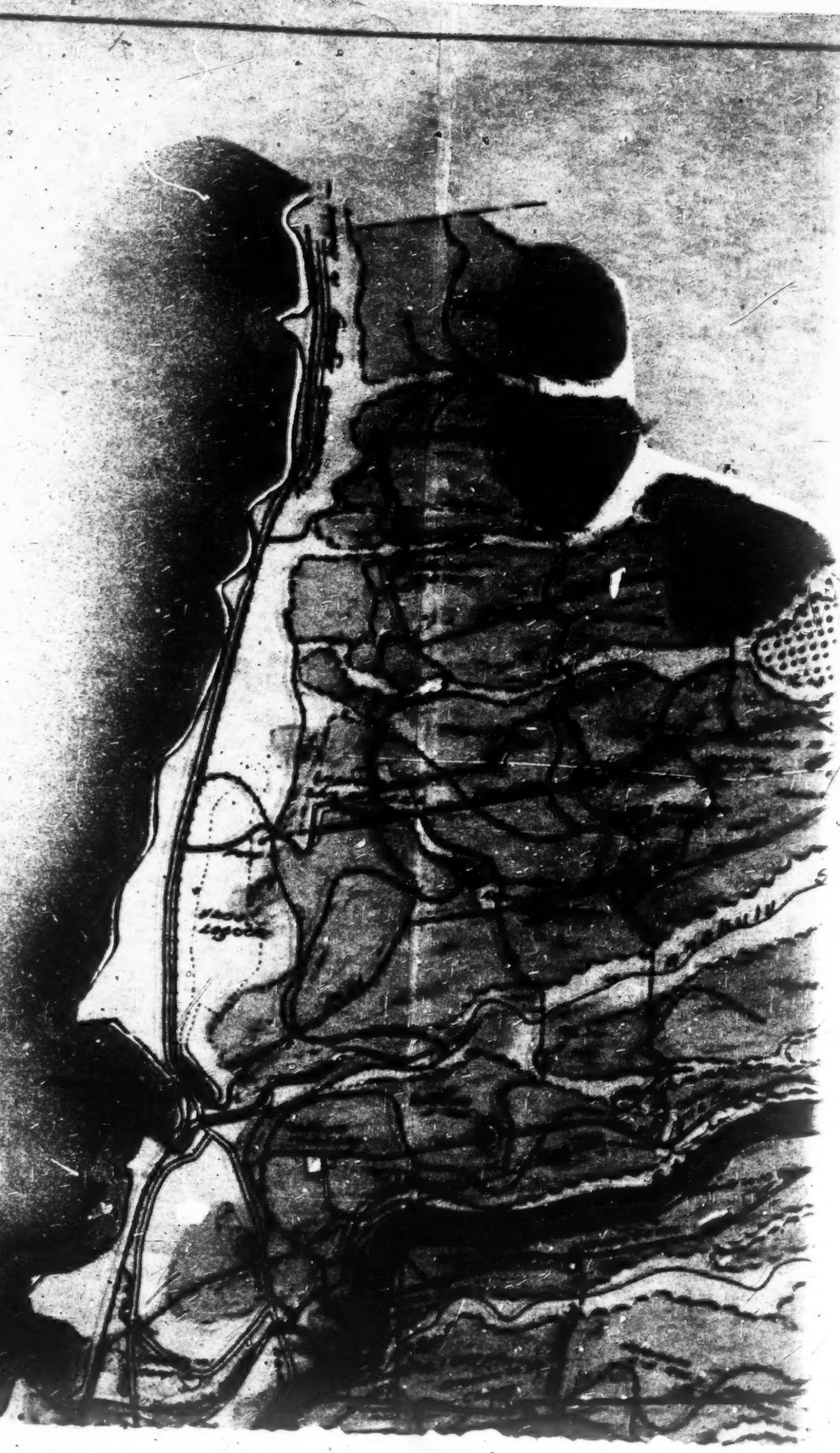
ROBERTSON, CASTLE & ANTHONY,
BROBECK, PHLEGER & HARRISON,
EVAN HAYNES,
Of Counsel.

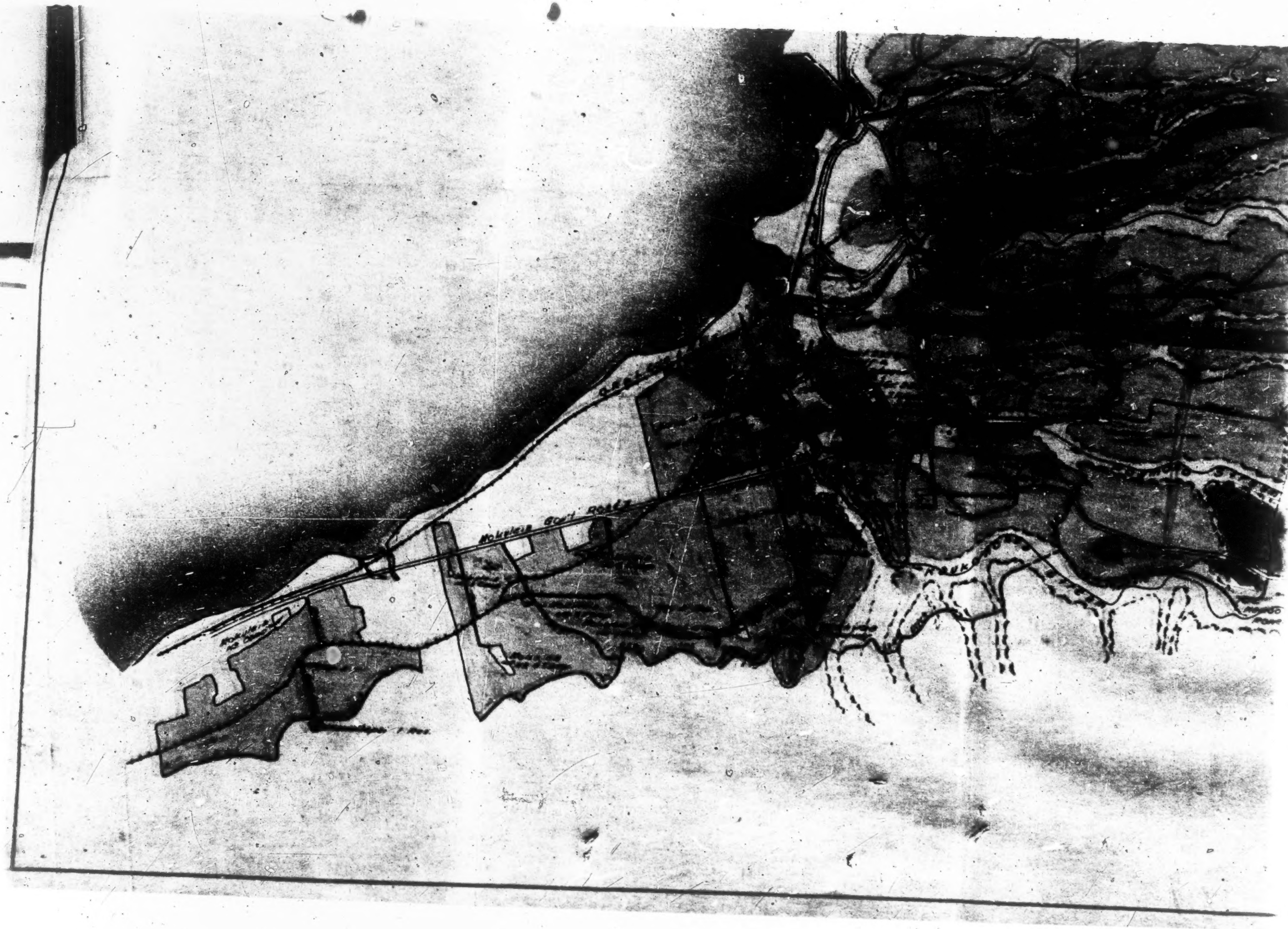
MAP OF
WAIALUA AGRICULTURAL CO., LTD. PLANTATION
WAIALUA, OAHU. T.H.

Feb. 1. 1932.

Scale : 1 inch = 2500 ft.

Compiled and reduced from map of W.A.Co.Ltd. Plantation dated 1902.
Scale 1" = 1000' J.G. Duarte - Surveyor
By C.H. Bischoff - Surveyor, W.A.Co.Ltd.





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reversed, an

for *Petitioner.*

R.P. 4475, L.C.A. 7713, Ap. 33 to Victoria Kamamalu.

E. no. 2912
Surveyor's Number 5-1
From Mar. 2/32
Del. Feb. 1932

FILED Oct 10 1932
At 12 o'clock P. M.
Deputy Clerk, Supreme Court

No. 8629
IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
SEP 12 1936
PAUL P. O'BRIEN,
CLERK

TRUE NORTH
SCALE 1" = 2500'

R.P. 4475 L.C.A. 7713-Portion Ap. 34
To Victoria Kamamalu
B.P. Bishop Estate

Territory of Hawaii
School Land

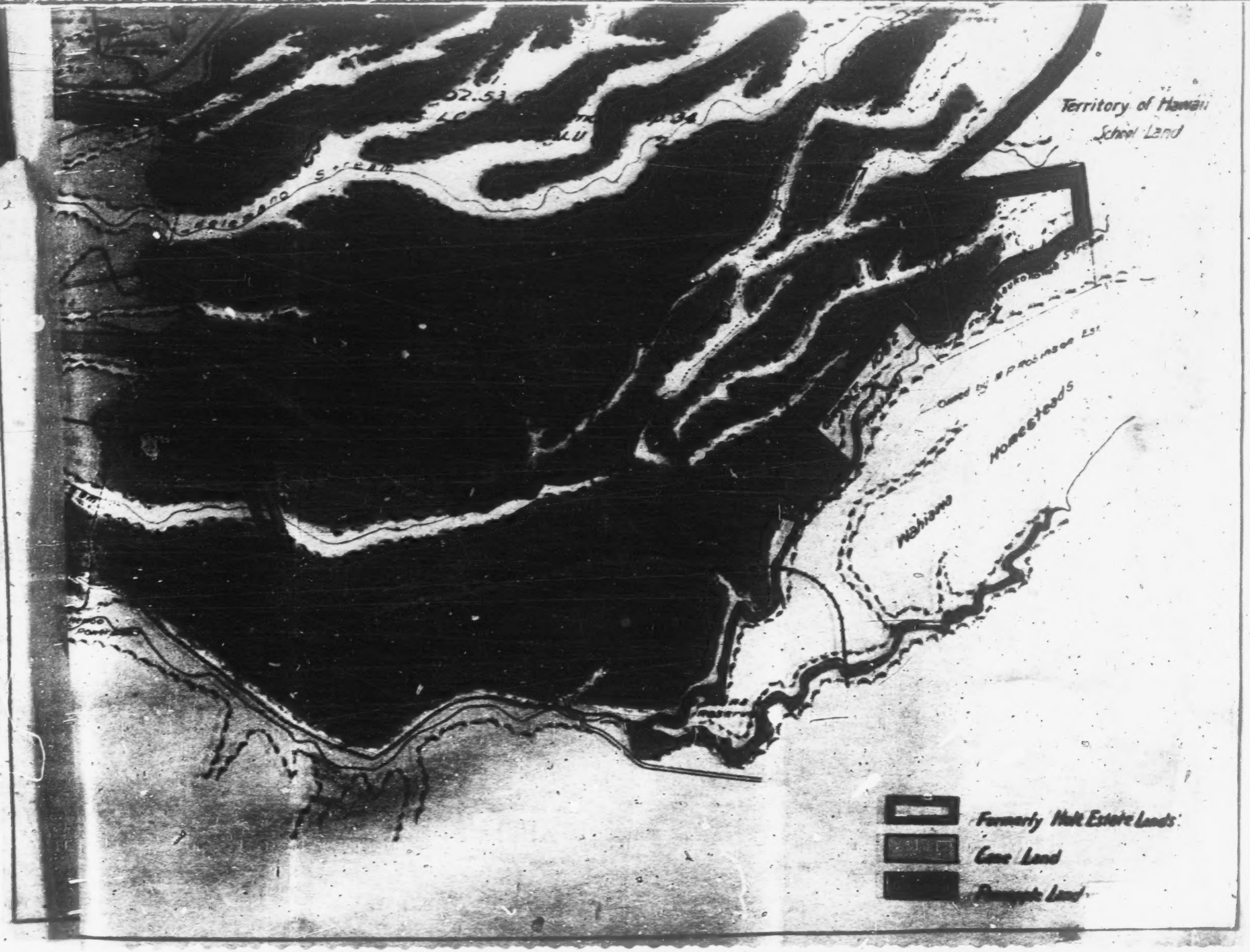
Kaaumoa Forest

Waiakamoa Stream

Kaiakamoa Stream

Ap. 34

B.P. Bishop Est.


Territory of Hawaii
School Land
Formerly Holt Estate Lands:
Cane Land
Pineapple Land

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1937

No. [redacted] 17

W[illegible] AGRICULTURAL COMPANY, LTD.
([illegible] Canadian corporation),
Petitioner and Cross-Respondent,

E[illegible] B. P. CHRISTIAN, an incompetent
[illegible] by HERMAN V. VON HOLT, her
Respondent and Cross-Petitioner.

CROSS-PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1937

No.

WAIALUA AGRICULTURAL COMPANY, LTD.
(an Hawaiian corporation),
Petitioner and Cross-Respondent,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian,
Respondent and Cross-Petitioner.

CROSS-PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your cross-petitioner, Eliza R. P. Christian, an incompetent person, by Herman V. Von Holt, her guardian, for the purpose of saving the points made herein in the

event certiorari is granted upon the petition of the cross-respondent Waialua Agricultural Company, Ltd. (hereinafter referred to as Waialua), respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the decree of said Court of Appeals entered in the above entitled cause December 9, 1937, reversing a judgment and decree of the Supreme Court of Hawaii and remanding said cause to said Court for further proceedings. A petition of the cross-respondent Waialua for a rehearing was denied February 1, 1938.

STATEMENT OF THE MATTER INVOLVED.

This suit was commenced in 1928 in the Circuit Court of Hawaii at Chambers by the cross-petitioner, then forty-three years of age, acting through her duly appointed guardian, and the complaint as amended (R. 339) sought:

(a) to set aside as to her:

(1) a lease made in 1905,

(2) an instrument made in 1906 now construed to be an assignment of rents under said lease, and

(3) a deed made in 1910; and

(b) to recover the reasonable rental value of the land covered by the deed.

All these documents relate to her undivided one-third interest in 14,000 acres of land situated in the Territory of Hawaii. The ground upon which the suit was founded was that at the date of the execution of each of the instruments the cross-petitioner was mentally incompetent. She offered to make such restoration as the Court might

deem just. (R. 357-8 and 366.) The lease of 1905 was made directly to Waialua. The assignment of rents of 1906 was made originally to another, and thereafter and through the deed of 1910, in which the assignee joined, was transferred to Waialua. The deed of 1910 was made to a nominee of Waialua and Waialua has ever since the date thereof retained the beneficial ownership of the land, although legal title has been transferred to different nominees (R. 1061) until 1921, when legal title was taken by Waialua. (R. 1589.)

The trial Court, in 1929, entered a decree in favor of the cross-petitioner (R. 186), whereupon Waialua took an appeal to the Supreme Court of the Territory of Hawaii, which latter Court rendered an opinion (R. 202, 31 Hawaii 817) and remanded the cause for additional evidence (R. 326), which was taken and a second decree entered in 1932 in favor of the cross-petitioner. (R. 533.) The trial Court found that the cross-petitioner was incompetent at the time each of the documents was executed; that she was a "congenital imbecile" (R. 476) and gave judgment for the cross-petitioner, cancelling the lease of 1905, the assignment of 1906, and the deed of 1910, and awarded the cross-petitioner a money judgment as of September 6, 1932, in the net sum of $606,785.75 for the use and occupation of her property by Waialua to that date, after deducting the consideration paid for the deed, with interest thereon at 6% per annum. Waialua took a second appeal to the Supreme Court of Hawaii, which rendered an opinion (R. 550, 33 Hawaii 34) affirming the trial Court's judgment cancelling the deed, but—one of the three justices dissenting (R. 589)—reversing it with respect to the cancellation of the lease of 1905, the cancellation of

the assignment of 1906, and the money judgment for rents, and entered a decree accordingly. (R. 631.) The finding of the trial Court that the cross-petitioner was incompetent during the whole of her life, a "congenital imbecile", was not disturbed; it was confirmed. (R. 552.) Both parties appealed to the United States Circuit Court of Appeals for the Ninth Circuit. (R. 778, 806.) That Court, on December 9, 1937, rendered its decision upon the two appeals (R. 1586, 93 Fed. (2d) 847; supplemental opinion denying a rehearing. R. 1633), in which it (a) confirmed the finding of congenital imbecility in 1910, (b) affirmed the cancellation of the deed of 1910 on the ground of incompetency coupled with the ability of the cross-petitioner to restore Waialua to *status quo*, (c) directed a remand to the trial Court to take such evidence as it deemed appropriate to enable it to make a finding on the issue of competency in 1905 and 1906, and also to fix the amount of the allowance for improvements as hereafter discussed, (d) ordered the entry of a judgment cancelling both the lease of 1905 and the assignment of 1906 if the trial Court should find upon said remand that the cross-petitioner was incompetent at both of those dates, (e) directed, as a condition to the cancellation of the deed, the return of the consideration paid by Waialua therefor, with interest, and also (in the event of the cancellation of the lease, which contains a provision that upon its termination in 1930 the improvements placed on the land should become the property of the landlord) that an allowance be made to Waialua in the amount by which the land has been enhanced in value by the addition of improvements, not, however, to exceed the cost thereof. A decree was entered accordingly. (R. 1628.)

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. In requiring as a condition to the cancellation of the deed that the cross-petitioner restore the consideration and make an allowance for the improvements, the Court has decided an important question of general law in a way probably in conflict with the weight of authority since:

(a) The burden was upon Waialua to prove that it was an innocent purchaser and it failed so to do.

Curtis v. U. S. (1923), 262 U. S. 215, 67 L. Ed. 956;

Wright-Blodgett Co. v. U. S. (1915), 236 U. S. 396, 59 L. Ed. 637;

Treat v. Rogers (C. C. A. 8—1929), 35 F(2d) 77.

Unless Waialua acquired the property without knowledge of the incompetency, restoration is not required as a condition to cancellation.

Elder v. Schumacher (1893), 18 Colo. 433, 33 Pac. 175;

Studabaker v. Faylor (1907), 83 Ind. 747, 80 N. E. 861, 170 Ind. 498, 83 N. E. 747;

Amos v. American Trust etc. Bank (1906), 221 Ill. 100, 77 N. E. 462;

Fecht v. Freeman (1911), 251 Ill. 84, 95 N. E. 1043;

Beckwith v. Cowles (1912), 85 Conn. 567, 83 Atl. 1113;

Hardy v. Dyas (1903), 203 Ill. 211, 67 N. E. 852;

Schindler v. Parzoo (1908), 52 Ore. 452, 97 Pac. 755.

See also:

Bethany Hospital Co. v. Philippi (1910), 82 Kan. 64, 107 Pac. 530;

Thrash v. Starbuck (1896), 145 Ind. 673, 44 N. E. 543.

9 *C. J.* 1216, Sec. 108, footnote 94.

This rule is recognized by the Circuit Court of Appeals in this case (R. 1600), but it did not consider its effect when coupled with the further rule that the burden of proving good faith was upon Waialua.

In its first and second answers filed in 1928 and 1929, respectively (R. 64, 101), Waialua did not plead that it was an innocent purchaser. In its third answer (R. 409) filed in 1931, after the trial in which the invalidity of the deed was decided and before the trial on the remand from the Supreme Court of Hawaii with respect to the lease and assignment, it did so plead, but it did not offer any proof thereof. The finding of the trial Court was "that it is not clearly shown that Waialua Company had actual notice of the incompetency" (R. 154); the Court stated that it "proceeded on the assumption that Waialua was ignorant of her real mental status. But this fact does not justify the conclusion that the Company was a 'subsequent grantee' or an 'innocent purchaser'." (R. 154.) The Supreme Court of Hawaii, in its second opinion, stated that Waialua did not have knowledge of the incompetency. (R. 555.) The United States Circuit Court of Appeals assumed for the purpose of its decision that Waialua did not have knowledge of the incompetency. (R. 1637.) There is no evidence in the record from which a finding that Waialua did not have knowledge of the incompetency can be made. Waialua failed to sustain its

burden of proof and the finding on the issue should have been against it.

Golson v. Dunlap (1887), 73 Cal. 457, 14 Pac. 576;
Campbell v. Buchman (1874), 49 Cal. 362;
64 *C. J.* 1258.

The decree of the United States Circuit Court of Appeals herein that the cross-petitioner should, as a condition to cancellation of the deed, restore the consideration given therefor and make an allowance for the value of the improvements, decides the question of the burden of proof contrary to the rule announced by this Court in *Curtis v. United States,* supra, and in *Wright-Blodgett Co. v. United States,* supra.

(b) The record shows affirmatively that Waialua, through its agent J. R. Holt, had knowledge of the incompetency, and accordingly restoration is not a requisite to cancellation. As admitted by the answer (R. 65-66), Waialua engaged J. R. Holt to acquire the property in its behalf. Waialua stipulated that it was the real party in interest. We quote the record (R. 1061):

"(Counsel for Waialua then admitted that the purchase of May 2, 1910, was made originally for the benefit of Waialua Company and that the series of transactions subsequent thereto gave the respondent no different status than it had by virtue of the deed of May 2, 1910 (Ex. A-21) * * *."

Holt was Waialua's dummy in the transaction. (R. 148, 155, 473, 482.) The trial Court found that Holt had knowledge of the incompetency of the cross-petitioner (R. 481-

482, 492) and the finding is not questioned by either the Supreme Court of Hawaii or the United States Circuit Court of Appeals. Holt's knowledge as agent is imputed to Waialua.

Curtis v. U. S. (1923), 262 U. S. 215, 67 L. Ed. 956;
Harrington v. U. S. (1871), 78 U. S. 356, 20 L. Ed. 157;
McCaskill Co. v. U. S. (1910), 216 U. S. 504, 54 L. Ed. 590;
U. S. v. Cooksey (C. C. A. 9, 1921), 275 Fed. 670;
Veazie v. Williams (1849), 8 How. 134, 12 L. Ed. 1018.

It is plain that every advantage was taken, by Waialua, of the condition and necessities of cross-petitioner to make the purchase at a price which the trial Court did not consider adequate. (R. 139-157.)

(c) The rule of decision in the Federal Courts is that a contract of an incompetent is void without regard to the good faith of the other contracting party; and accordingly restoration is not a requisite to relief therefrom.

Dexter v. Hall (1873), 82 U. S. 9; 21 L. Ed. 73;
Kendall v. Ewert (1922), 259 U. S. 139, 66 L. Ed. 862;
Plaster v. Rigney (C. C. A. 8, 1899), 97 Fed. 12.

The rule prevailing in the Federal Court is the rule of decision in this case arising in the Territory of Hawaii.

Kapiolani Estate v. Atcherley (1913), 21 Haw. 441;
Territory v. Ho Me (1922), 26 Haw. 331;
Colburn v. U. S. F. & G. Co. (1920), 25 Haw. 536;

Hill v. Carter (C. C. A. 9, 1931), 47 Fed. (2d) 869 (Cert. den., 284 U. S. 625);

Pyeatt v. Powell (C. C. A. 8, 1892), 51 Fed. 551;

Successors of Fantanzzie v. Municipal Assembly (C. C. A. 1, 1924), 295 Fed. 803.

(d) With respect to the consideration paid by Waialua for the deed, i.e., $30,000.00, the Supreme Court of Hawaii, on the first appeal, found that the cross-petitioner never received the money. (R. 294, 301.) This finding stands undisturbed. Restoration of the consideration is not a condition to cancellation when the incompetent has not received the same.

Jordan v. Kirkpatrick (1911), 251 Ill. 116, 95 N. W. 1079;

Hughes v. Cream (1929), 178 Minn. 545, 227 N. W. 654;

34 A. L. R. 1403;

46 A. L. R. 416, at 429;

95 A. L. R. 1442, at 1446.

This point is recognized by the Circuit Court of Appeals in discussing the general principles governing the cancellation of incompetents' contracts (R. 1603), but the Court did not consider the effect of the rule in the instant case.

(2) In remanding the suit for a determination of the issue of competency in 1905 and in 1906, when the lease and assignment, respectively, were executed, the United States Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as

to call for an exercise of this Court's power of supervision. There have been two trials (R. 111, 163, 472), two appeals to the Supreme Court of Hawaii (R. 202, 547), and two appeals to the United States Circuit Court of Appeals (52 F. (2d) 847 and R. 1586) in this suit. The trial Court found that the cross-petitioner was "both before and at the time of the conveyance * * * and ever since has been and still is incompetent to the extent of having been incapable of understanding and acting in the ordinary affairs of life * * *." (R. 136); that she "has never been competent mentally to execute a conveyance of property" (R. 157); that she "was incompetent during the entire period from and before 1910 to date." (R. 157.) The Supreme Court of Hawaii, on the first appeal, confirmed this finding, saying (R. 273):

> "The overwhelming weight of the evidence requires us to find, and we do find, that on May 2, 1910, Eliza Christian was and at all times has been mentally incompetent to execute a deed or to understand its purpose or effect, or to engage in any business transaction of consequence. She was feeble-minded. Born in 1885, in May, 1910 she had the mentality of a child of not more than five or six. * * * In short, we find that at the date of the deed she was a congenital imbecile."

The Supreme Court of Hawaii was of the view that the validity of the lease and assignment had not been at issue in the first trial (R. 323, 324) and remanded the cause (R. 326) to the trial Court for the taking of additional testimony, touching the circumstances surrounding the execution of these documents, excluding, however, the

question of competency. The evidence on the question of competency at the first trial had covered the whole of the cross-petitioner's life. It is reviewed at length by the trial Court (R. 116 to 134) and by the Supreme Court on the first appeal. (R. 202 to 273.) The latter Court, in its opinion, considered the evidence by periods of the cross-petitioner's lifetime, and one of these periods, from 1902 to 1906, covers the very time during which the lease and the assignment were executed. (R. 220.) That Court concluded from all of the evidence that she was a "congenital imbecile." (R. 273.)

In limiting the remand the Supreme Court clearly believed the evidence and the findings adequate on the question of competency in 1905 and in 1906, for otherwise it would have directed a determination of that issue. At the trial on the remand the trial Court followed the direction of the Supreme Court and refused to hear additional testimony on the question of competency. (R. 1477.) The trial Court said, in its opinion on the remand, "Hearings were had in which it was ruled that the congenital imbecility of petitioner had been found heretofore both by this Court and the Supreme Court and would not be reopened" (R. 476), and again, in discussing the lease of 1905, "Eliza Christian was at all times a congenital imbecile, incompetent to enter into a contract of such a character * * *." (R. 491.) The Supreme Court on the second appeal confirmed the trial Court's interpretation of the remand order (R. 552), and again concluded that she was a "congenital imbecile." (R. 552.) The Supreme Court then proceeded to deny relief against the assignment and the lease, regardless of the incompe-

tency of the cross-petitioner. As the opinion of the Circuit Court of Appeals declares (R. 1618), 116 witnesses have already testified on the issue of competency, touching the whole of the petitioner's life. It is beyond question that one who is a congenital imbecile in 1910 cannot be competent in 1905 or 1906, and all three Courts concur on the finding of congenital imbecility.

The limitation in the order of remand by the Supreme Court of Hawaii to exclude further evidence on the issue of competency was well within its power. (Revised Laws of Hawaii 1935, Sec. 3503.) Having once made that order, it became the law of the case in so far as that Court was concerned.

Thompson v. Maxwell etc. (1897), 168 U. S. 451, 42 L. Ed. 539.

The statement of the Supreme Court of Hawaii, on the second appeal, that it thought it erred in restricting the evidence (R. 553) does not lessen the finality of its first order. The Circuit Court of Appeals was, of course, in no way bound by the limitation of the remand order if it believed that the Supreme Court of Hawaii had abused its discretion in so limiting the evidence. A reading of the opinion of the Circuit Court of Appeals directing a remand on this issue is, we believe, most convincing that that Court does not believe that there is any deficiency in the evidence on the question of competency in 1905 and 1906. The Circuit Court of Appeals, we submit, fell into error in concluding that there was no finding on that issue. There was, as we have quoted from the record, an adequate finding, but if there were not, the

record is sufficiently complete and convincing to warrant a finding by your Honorable Court that the petitioner, having been found to be a "congenital imbecile" in 1910, was also incompetent in 1905 and 1906.

If, in truth, the Supreme Court of Hawaii was in error in limiting the order of remand, we respectfully submit that it was harmless error and should not necessitate a reversal of the trial Court's decree that the lease and assignment are both invalid. (28 U. S. C. A. Sec. 391.) Any new evidence will be merely cumulative. 116 witnesses on an issue resulting in a finding of congenital imbecility should be enough.

Drumm-Flato Com. Co. v. Edmission (1908), 208 U. S. 534, 52 L. Ed. 606, 609;

Berio v. Gay (C. C. A. 1, 1921), 272 Fed. 404, 409;

Johnsonburg Vitrified Brick Co. v. Yates (C. C. A. 3, 1910), 177 Fed. 389, 391;

Pochahontas C. C. Co. v. Johnson (C. C. A. 4, 1917), 244 Fed. 368, 374 (Cert. den. 245 U. S. 658, 62 L. Ed. 535);

Mountz v. Apt (1911), 51 Colo. 491, 119 Pac. 150, 151-2.

Had Waialua not petitioned for certiorari we would have been content to accept the judgment of the Circuit Court of Appeals, even though we consider that cross-petitioner should have been given greater relief. Since Waialua has sought certiorari, however, we are compelled to file this cross-petition to preserve the points which

we have made in it and which would, if sustained, enlarge petitioner's recovery.

Alexander v. Cosden Pipe Line Co. (1934), 290 U. S. 484, 78 L. Ed. 452;

Lloyd Sabaudo etc. v. Elting (1932), 287 U. S. 329, 77 L. Ed. 341.

Dated, San Francisco, California,
March 25, 1938.

Respectfully submitted,

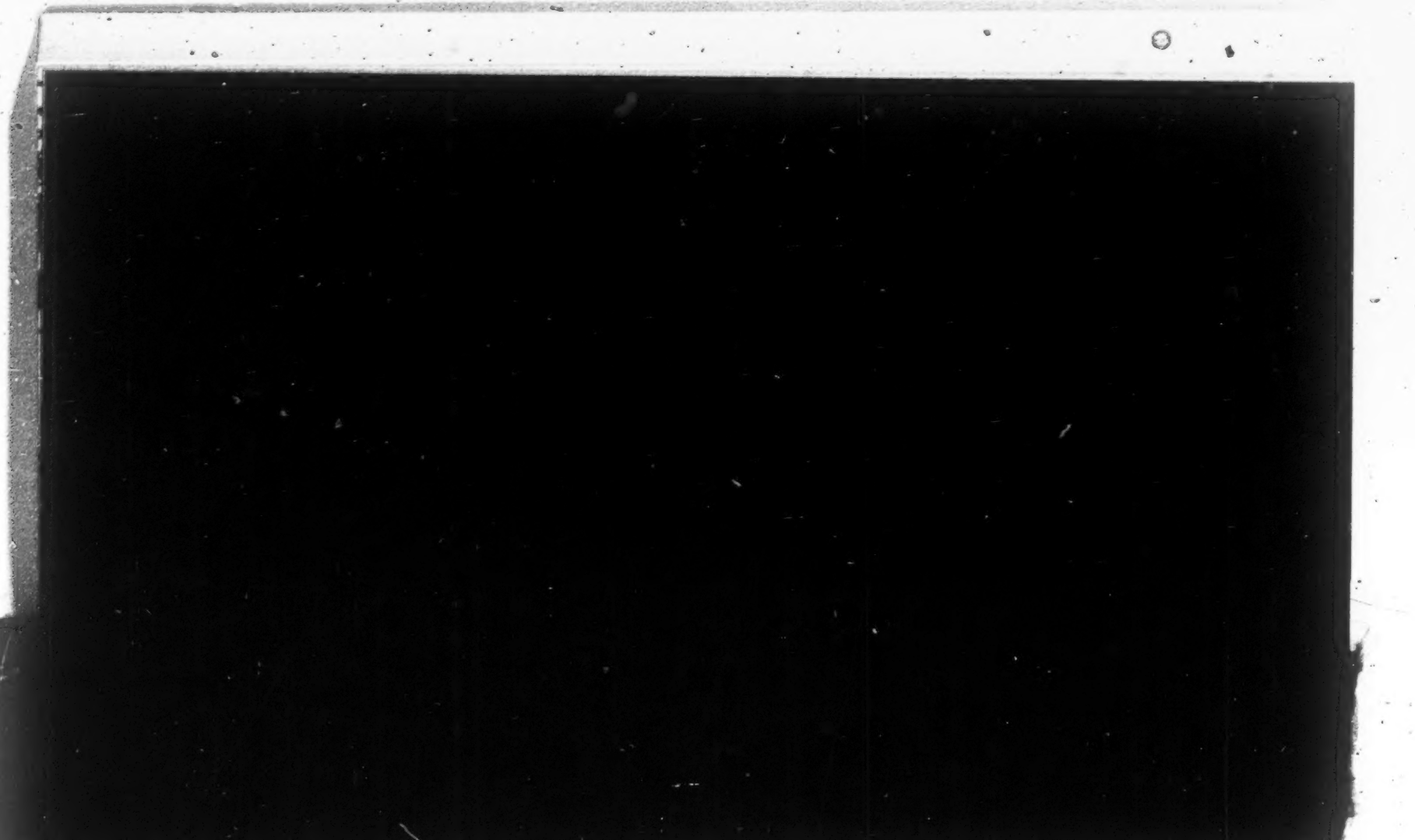
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(Appendix Follows.)





Appendix

No supporting brief is being filed. The matters required to be included in a brief under Rules 26 and 27, so far as applicable to the case, are contained in the petition or this appendix, as follows:

(a) The index and table of cases and text books cited appear at page i;

(b) The reference to the official report of the opinions delivered by the Courts below appears at pages 3 and 10 for the decisions of the Supreme Court of Hawaii, and at page 4 for the decision of the United States Circuit Court of Appeals:

(c) 1. The jurisdiction of this Court is invoked under the United States Code, Title 28, Section 347;

2. The date of the decree of the United States Circuit Court of Appeals, which petitioner seeks to have reviewed, appears at page 2, and the date of the denial of the petition of the cross-respondent Wajalua for a rehearing appears at page —.

(d) A statement of the case appears at pages 2 to 5 of the petition, under the heading "Statement of the Matter Involved", and to avoid duplication is not repeated;

(e) Errors intended to be urged are those specified at pages 5 and 9 of the petition, under the heading "Reasons Relied Upon for the Allowance of the Writ";

(f) The argument, in summary form, is included in support of the errors relied upon under the heading "Reasons Relied Upon for the Allowance of the Writ", appearing at pages 5 to 14 of the petition. For the sake of brevity we do not repeat it.

Due service and receipt of a copy of the within is hereby admitted

this _____ day of March, 1938.

_____

_____

Attorneys for Cross-Respondent.

FILE COPY

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CHARLES ELMORE CROPLEY
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In the Supreme Court of the United States

October Term, 1938

No. 15.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation,
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, JAMES L. HOLT, and ANNIE HOLT KENTWELL,
Respondents.

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1885,	Dec.	30—Eliza Holt (Mrs. Christian) born (R. 844).
1893	April	3—Eliza Holt admitted to Catholic Convent for music lessons (R. 1079).
1894	Sept.	1—Eliza Holt admitted to Catholic Convent as boarder; remained 5 years (R. 1079).
1898	Oct.	12—Waialua Agricultural Company incorporated (R. 847).
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		—Eliza Holt enters convent at San Jose, California (R. 1170).
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1902	May	27—Hall Trial. Eliza Holt testifies (R. 1130).
	June	12—Eliza Holt child adopted by George C. Sea and wife (R. 1028).
	July	1—James L. Holt purchases life estate of James R. Holt and John D. Holt and deeds them in trust to John F. Colburn (R. 852).
1903	Jan.	26—Eliza Holt marries Albert Christian (R. 845).
1905	Mar.	4—Decision entered holding Christian marriage valid and binding and denying application to annul marriage on ground of incompetence of Mrs. Christian (R. 1343).

Mar. 17—Lease to Waialua of Holt property for 25 years joined in by Mrs. Christian (the lease in question) (R. 367)

1906 Aug. 31—Mrs. Christian assigns rents to Mrs. Kentwell in consideration of support for life (R. 386)

1906 Aug. 31—Mrs. Christian leases Makaha property to Mrs. Kentwell (R. 1173).

Sept. 4—Mrs. Christian, John D. Holt and the Kentwells leave Honolulu for the mainland, where, after short stay in Cambridge, they settle at Elizabeth, New Jersey (R. 846).

1907 June 13—Mrs. Christian executes confirmation of lease to Mrs. Kentwell (R. 1319).

June 14—Mrs. Christian executes option on Makaha lands to May K. Brown (R. 1326).

June 14—Mrs. Christian joins in deed from Mrs. Kentwell to May K. Brown (R. 1328).

Oct. 26—Mrs. Christian and John D. Holt execute deed to L. L. McCandless of land at Makaha (R. 1320).

1909 June —Mrs. Christian, with John D. Holt and the Kentwells, moves to Oxford, England (R. 846).

1910 May 2—Mrs. Christian, John D. Holt and others execute deed to James L. Holt (the deed in question) (R. 953).

May 28—James L. Holt executes deed to W. R. Castle, Trustee (R. 960).

June 10—Mrs. Christian joins with John D. Holt and others in requesting appointment of James L. Holt as trustee of the Holt Estate (R. 1025).

1912 May 21—Mrs. Christian executes deed to John M. Dowsett of property in Makaha (covered by May K. Brown option) (R. 1409).

1918 June 12—John D. Holt adopts Kentwell children (R. 1192) (R. 1360).

1919 July 21—David L. Withington dies (R. 1235).

1922 April 10—John D. Holt dies (R. 843).

1923 Jan. 11—Mrs. Christian executes power of attorney to Henry Smith (R. 1358).

Mar. 16—Mrs. Christian executes second power of attorney to Henry Smith (R. 1358).

1926 June —Mrs. Kentwell appointed guardian of Mrs. Christian in England (R. 847).

1927 Feb. 1—George H. Holt appointed guardian of Mrs. Christian in Honolulu (R. 847).

1928 April 5—First claim made against Waialua that deed was invalid (R. 847).

May 8—Suit filed (R. 2).

1929 May 11—Trial Court files decision cancelling deed (R. 111).

1931 April 18—Supreme Court of Hawaii files decision affirming cancellation and reversing money judgment and remanding cause (R. 202).

1932 Aug. 18—Trial Court files decision on remand trial cancelling 1905 lease and 1906 contract (R. 472).

1934 May 3—Supreme Court of Hawaii files decision cancelling deed but denying cancellation of 1905 lease and 1906 contract (R. 547).

1937 Dec. 9—Circuit Court of Appeals decision (R. 1586).

1938 Feb. 1—Circuit Court of Appeals decision denying rehearing (R. 1633).

May 2—Certiorari granted.

In the Supreme Court of the United States

October Term, 1938

No. 15.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation,
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, JAMES L. HOLT, and ANNIE HOLT KENTWELL,
Respondents.

Brief of Waialua Agricultural Company, Limited.

This cause is here on writ of certiorari to review a decree of the Circuit Court of Appeals for the Ninth Circuit which cancelled a deed (executed in 1910) upon the ground of the mental incompetence of the grantor. The decree also directed the cancellation of a lease (executed in 1905) and contract (executed in 1906), if it should be found on remand that the maker was incompetent at the time of their execution.

The cause reached the Circuit Court of Appeals by cross appeals from a decree of the Supreme Court of the Territory of Hawaii cancelling the deed, but holding the lease and contract valid irrespective of the mental capacity of the maker.

OPINIONS BELOW.

Opinions of the Circuit Court of Appeals:

93 Federal(2d) 603 (R. 1586)

94 Federal(2d) 806 (Denying Rehearing, R. 1633)

Opinions of the Supreme Court of Hawaii:

31 Hawaii 817 (R. 202)

33 Hawaii 34 (R. 547)

Opinions of the trial court (unreported):

Opinion of May 11, 1929 (R. 111)

Opinion on Remand Aug. 18, 1932 (R. 472)

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on December 8, 1937. A petition for rehearing was denied on February 1, 1938.

The petition for a writ of certiorari was filed in this Court on March 30, 1938. The order allowing certiorari was filed on May 2, 1938.

NOTE:

For convenience Waialua Agricultural Company, Limited is referred to as Waialua.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. §347).

The jurisdiction of the Circuit Court of Appeals for the Ninth Circuit is based on Section 128(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. §225), which gives that court appellate jurisdiction to review final decisions of the Supreme Court of the Territory of Hawaii in all civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000. The jurisdictional amount is shown by the record. (R. 791)

STATEMENT OF THE CASE.

The question presented here is whether a lease, a contract and a deed of land in the Hawaiian Islands should be cancelled upon the ground that the lessor and grantor (Mrs. Christian) was mentally incompetent when they were executed. The lease was made in 1905, the contract in 1906, and the deed in 1910. This suit was filed in 1928 in the Circuit Court of the First Circuit of the Territory of Hawaii (hereafter called the trial court), Mrs. Christian having been placed under guardianship in England in 1926 for the first time, at the age of 40 years. (R. 843, 847)

The court below (the Circuit Court of Appeals) decreed the cancellation of the deed (although it found that Waialua took without knowledge of the incompetence), on the ground that the deed of an in-

competent is void and should be cancelled upon the return of the money paid with an allowance for improvements. It similarly decreed the cancellation of the lease and contract, if it should be found on remand that Mrs. Christian was incompetent when they were executed. (R. 1628)

We contend that none of these instruments should be cancelled, because the deed or contract of an incompetent is voidable, and not void, and will not be set aside as against an innocent purchaser when the deed or contract has been fully executed, as is the case here. We further contend that even if this Court should determine that the applicable rule is that the deed or contract of an incompetent, while voidable and not void, will be set aside if the parties can be restored to status quo, that these instruments should not be cancelled because it is impossible to restore status quo.

The property in question is a one-third interest in 14,000 acres of land on the Island of Oahu, in the Territory of Hawaii, referred to in the opinion as the Holt lands. These lands are shown on the attached map, and lie in the form of a wedge in the center of Waialua's plantation, comprising 28% of its entire area. (R. 843)

Mrs. Christian's interest in the property, when the lease was executed in 1905, and the deed in 1910, consisted of a one-third contingent remainder dependent upon her surviving her father and being his sole heir. Her father died in 1922, whereupon the fee vested. (R 953)

The lease was executed in 1905 for a 25-year term, at a time when the land was a barren waste. The lessors consisted of the administrator of the Holt estate, all of the owners of vested rights, and the life tenants; and the contingent remaindermen, including Mrs. Christian, joined in the lease. Mrs. Christian's father, her cousins and other relatives were among the lessors. (R. 367)

The deed (which conveyed Mrs. Christian's one-third contingent remainder in the property covered by the lease) was executed in 1910. Her father and her cousin joined in the deed as to their interests in the property. (R. 27)

The contract was executed in 1906. By it, Mrs. Christian assigned to her cousin, Mrs. Kentwell, the rentals to become due to Mrs. Christian (contingently), under the 1905 lease, as well as other rentals which might thereafter accrue, in consideration of Mrs. Kentwell's agreement to support Mrs. Christian during her life. (R. 386) Waialua succeeded to Mrs. Kentwell's interest under this agreement by the deed of 1910 to which Mrs. Kentwell was a party.

Mrs. Christian left Honolulu in 1906, accompanying her father and cousin Mrs. Kentwell. After three years spent in eastern United States, they went to Oxford, England, in 1909, where they have since resided.

In 1926 (21 years after the lease, and 16 years after the deed) Mrs. Kentwell was appointed Mrs. Christian's guardian in England. This is the first time any

incompetency proceedings had been brought against her. It was not until April, 1928, two years later, that notice was first given Waialua that it was claimed that the deed was invalid. Suit to cancel the deed was filed in the same year. (R. 847)

Proceedings in the Lower Courts.

The trial court found that Mrs. Christian was mentally incompetent when the deed was delivered and decreed its cancellation. It also entered a judgment against Waialua of $540,906.07 for use and occupation of the land.[1]

From this decree Waialua appealed. The Supreme Court of Hawaii affirmed the cancellation of the deed, but reversed[2] the money judgment. This reversal was upon the ground that by the lease of 1905 Waialua had leased the lands in question for a 25-year term; that Mrs. Christian had joined in the execution of the lease; that its validity was not in issue and had not been adjudicated (R. 313); that it was therefore error to enter a money judgment for use and occupation. The court also held that the validity of the 1906 contract, assigning rents under the lease and other rents to accrue to her, and to which instrument Waialua had succeeded, had not been in issue and if valid would also protect Waialua against a money judgment. (R. 322)

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1. The opinion of the trial court (R. 111), Opinion on Accounting (R. 163), Decree (R. 186, Oct. 16, 1929).

2. (R. 202, May 12, 1931.)

The Supreme Court of Hawaii thereupon entered an order (R. 326) remanding the cause to the trial court to permit amendments of the pleadings to put in issue the validity of the 1905 lease and the 1906 contract.

Thereafter, by amendment (May 22, 1931, R. 331) the petitioner attacked the validity of these instruments on the ground of the mental incompetence of Mrs. Christian. Thus it was not until 1931, and after the 25-year term of the lease had expired, that it was first challenged. On remand the trial court refused to permit Waialua to introduce evidence on the issue of the competence of Mrs. Christian in 1905 and 1906, when the lease and contract were executed (the deed previously attacked was executed in 1910), holding that the incompetence of Mrs. Christian had been adjudicated in the first trial. On the conclusion of the trial, the court ordered the cancellation of the 1905 lease and 1906 contract upon the ground that Mrs. Christian was mentally incompetent when she executed them, and directed a judgment against Waialua for $606,785.75. (R. 472)

From this decree Waialua appealed to the Supreme Court of Hawaii which reversed the decree of the trial court. It held that Waialua should have been permitted to introduce evidence on the issue of incompetence in 1905 and 1906, but that this was harmless error as the two instruments should not be set aside even though Mrs. Christian was incompetent when she executed them. It further held that Waialua was not liable for use and occupation and reversed the

money judgment. (R. 547) A decree was entered cancelling the 1910 deed, but upholding the 1905 lease and 1906 contract. (R. 631)

Both parties appealed from this decree, to the Circuit Court of Appeals—Waialua from that portion cancelling the 1910 deed. and Mrs. Christian from that portion holding valid the 1905 lease and 1906 contract.

The Circuit Court of Appeals decreed the cancellation of the 1910 deed, and remanded the cause to determine whether Mrs. Christian was incompetent when the 1905 lease and 1906 contract were made. with directions to cancel these instruments if Mrs. Christian were found to be then incompetent. (R. 1586)

The cause is here on certiorari, to review the decree of the Circuit Court of Appeals, Waialua's petition for a writ having been granted on May 2, 1938. A cross-petition by Mrs. Christian was granted on the same day.

ERRORS RELIED ON.

The Circuit Court of Appeals erred in:

1. Holding the deed of 1910 void; and the lease of 1905 and the assignment of 1906 void, if the grantor was then incompetent, and directing their cancellation.

2. Holding that Waialua can be restored to status quo; and that it is restored to status quo by a return

of the purchase price plus an allowance for improvements.

3. Giving no consideration to the fact that Waialua purchased a contingent interest, and that the contingency did not occur until 12 years later; or to the fact that costly improvements were made off the land for its benefit, and on the land for the benefit of other lands.

4. Holding that the equities of the parties should not be balanced; and in refusing to balance such equities.

5. Holding that Mrs. Christian is entitled to recover the rental value of the land for the period, or any part thereof, of Waialua's occupation.

SUMMARY OF ARGUMENT.

1. The Circuit Court of Appeals erred in not holding the instruments valid and unassailable. Waialua having taken in good faith without notice of incompetence for an adequate consideration. The proper rule is that deeds and contracts of incompetents are valid if made with an innocent purchaser for an adequate consideration.

2. Even under the view that the deed of an incompetent may be set aside as against an innocent purchaser, if status quo can be restored, cancellation should not be decreed here because status quo cannot be restored.

3. The grantor's attempt to sustain the erroneou decree of the Circuit Court of Appeals cancelling th 1910 deed on grounds other than those relied on b that court, is without merit.

ARGUMENT.

The Circuit Court of Appeals said:

> "Both courts found that appellant (Mrs. Christian) was incompetent to execute the deed: that the company (Waialua) had no notice of the incompetency: that the company could be placed in statu quo: and that appellant was not guilty of laches. These conclusions were reached after careful consideration of the evidence. Exhaustive opinions were written concerning the evidence. We accept them because we can not say there was clear error, since the evidence at most was only conflicting." (R. 1605)

These findings are findings of fact only with respect to the questions of incompetency and lack of notice. The finding that Waialua can be placed in status quo, as will be hereafter pointed out, is not a finding of fact, but a decision on a question of law. The question of laches, while often considered a question of fact, because determined in each particular case upon the facts and circumstances there involved, is, we submit, in this case, where there is no dispute as to the pertinent facts, also a question of law.

Although we believe that Mrs. Christian was competent to execute the instruments in question, we do

not ask this Court to examine the mass of conflicting evidence bearing on that question, and for the purpose of this review we do not challenge the finding that she was incompetent to execute the 1910 deed.

As the Circuit Court of Appeals points out, both lower courts found that Waialua had no notice of the incompetence. This was a question of fact, and as all of the courts concur in this finding, we will not burden this argument with discussion of the reasons supporting that finding.

The Supreme Court of Hawaii found that the consideration paid by Waialua was adequate (R. 304) and the Circuit Court of Appeals proceeds upon this assumption.

Our argument will therefore treat the following facts as established:

1. That Mrs. Christian was incompetent when she executed the various instruments (though as to the 1905 lease and 1906 contract, no trial has yet been had on that issue; and if this Court does not sustain our contention that her mental competence when she executed them is immaterial a further trial will be necessary to pass on that issue of fact):

2. That Waialua had no notice of her incompetence.

3. That Waialua paid an adequate consideration.

However, as the facts respecting Mrs. Christian are important to a proper understanding of the issues to be argued, they will be dealt with in our discussion of the facts.

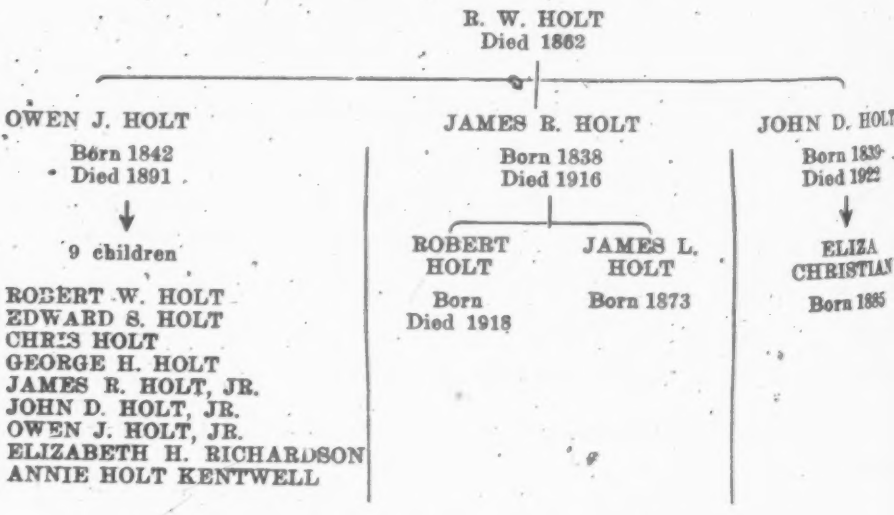
For convenience, a chronological table of facts has been inserted at the beginning of this brief.

THE FACTS.

Mrs. Christian's Family and Early Life.

Mrs. Christian was born at Makaha in the Hawaiian Islands on December 30, 1885. Her mother, a native Hawaiian, died when she was seven years of age. Her grandfather, R. W. Holt, was an Englishman who married a native Hawaiian. (R. 844)

Mrs. Christian's family relationships are shown by the following diagram (R. 843):



The grandfather died in 1862, at which time he was the owner of approximately 14,000 acres of land in Waialua, hereafter called the Holt lands, which are the lands in question. His will devised to each of the

three sons 1/3 of these lands for life, with remainder to the heirs of such son. Accordingly, John D. Holt, Mrs. Christian's father, had a life estate in 1/3 of these lands, and Mrs. Christian, as his daughter, had a contingent remainder. (R. 842)

John D. Holt had one child who died in infancy. Mrs. Christian was his only other child and survived him, John D. Holt dying in 1922. James L. Holt, whose name appears frequently in the testimony, is Mrs. Christian's cousin, as is also Mrs. Kentwell.

Residence in Honolulu.

John D. Holt and Mrs. Christian moved to Honolulu in the early 1890's. In 1901 they went to live with Mrs. Kentwell, and, save for periods when Mrs. Christian was in boarding school, have lived with her ever since. (R. 844)

In April 1893, Mrs. Christian as a child entered the Catholic Convent in Honolulu for music lessons (R. 1079). She entered as a boarder in September 1894 at the age of 9 and remained until June 1899, a period of five years. While there she studied the catechism, received communion, and attended confession. (R. 1292)

On August 3, 1900, Mrs. Christian accompanied Mrs. Kentwell to the Catholic Convent at San Jose, California, where she remained as a boarding student for one year. She then returned to Honolulu where she entered as a student at the Priory School. (R. 844)

She withdrew from this school in 1902, when she gave birth to an illegitimate child. In May 1902 she

(then aged 16) testified as a witness in a criminal prosecution of one Hall, charged with her rape, and claimed to be the father of her child. (R. 1130)

On June 12, 1902, Mrs. Christian, her father and Mr. and Mrs. George C. Sea appeared before the Circuit Court in Honolulu and participated in adoption proceedings whereby Mr. and Mrs. Sea adopted Mrs. Christian's child as their own. (P 1028)

On January 26, 1903, Mrs. Christian (then Eliza Holt, aged 17) married Albert Christian, a Dane-Scot, in the Catholic Cathedral in Honolulu. Rev. Father Clement (dead at the time of trial) performed the ceremony. The witnesses were the sister of the groom and the father of the bride. (R. 845)

After six months of married life Mrs. Christian left her husband, and returned to live with her father and Mrs. Kentwell. Some time later, Mrs. Kentwell as relative and guardian of Mrs. Christian as a minor, filed an action to annul the marriage on the ground that Mrs. Christian was mentally incompetent to contract marriage, and that her marriage was part of a conspiracy to obtain her property. (R. 846) After a trial, a decree was entered holding (March 1905) the marriage "was and is valid and legal and binding". The opinion of Judge Gear states "While it seems to me that it perhaps would have been much better for the plaintiff never to have married * * * the plaintiff has not shown such a case of incompetency as to justify the court in annulling the marriage." (R. 1342) The testimony in this proceeding is missing. (P. 1341)

Departure from Honolulu for the Mainland.

On September 4, 1906. Mrs. Christian left Honolulu for the mainland with her father and Mr. and Mrs. Kentwell. After a few months at Cambridge, Massachusetts, the family settled at Elizabeth, New Jersey, where they remained until June 1909. Mr. Kentwell attended Columbia Law School, graduating with the degree of L.L.B. During this period, a second child was born to Mrs. Christian, while on her way to a hospital. This child has since died. (R. 846)

In June 1909, Mrs. Christian, her father and the Kentwells moved to Oxford, England, where she has since lived. Mr. Kentwell continued the study of law at Oxford, receiving a law degree in 1912. He spent the next two years at King's College, Cambridge University, and was called to the Bar in 1916. (R. 846)

John D. Holt died in Oxford on April 10, 1922, leaving Mrs. Christian as his sole heir. He had attempted on June 12, 1918, to adopt the six Kentwell children, in which event they would have been heirs equally with Mrs. Christian (R. 1360), and Waialua's interest, as her successor, would have been reduced from 1/3 to 1/21. The adoption failed, however, because the Hawaiian law was not complied with. (R. 305)

In June 1926, in England (at the instance of Mrs. Kentwell) Mrs. Christian was declared incompetent and Mrs. Kentwell was appointed guardian of her estate. On February 1, 1927, a guardian was appointed in Honolulu. (R. 847)

Mrs. Christian's Business Transactions.

Until placed under guardianship in 1926 at th age of 40, Mrs. Christian moved freely about, and wa accepted by business and professional men as a com petent participant in business transactions; she ac knowledged instruments before public officials and witnesses attested to her execution. So far as the record shows, none of her transactions, with the ex ception of those here involved, have ever been chal lenged.

The business transactions in which Mrs. Christian participated in the period 1905-1923 are as follows

March 17, 1905. Mrs. Christian joined in the exe cution of the 25-year lease to Waialua, which is here being attacked. Other parties include the adminis trator of the R. W. Holt Estate, the children of Owen J. Holt, deceased, James L. Holt and John F. Colburn. All of these with the exception of Colburn, were close relatives of Mrs. Christian. Her acknowledgment was taken by N. Fernandez, who is now dead. The lease was duly recorded. (R. 874)

August 31, 1906. Mrs. Christian by contract as signed the rents to accrue to her under the 1905 lease and other rents to accrue from the Holt property, in consideration of Mrs. Kentwell's agreement to sup port her for life. The contract was also executed by Mrs. Kentwell, witnessed by John D. Holt, acknowl edged by N. Fernandez, and duly recorded. (R. 895) Waialua succeeded in 1910 to the ownership of this contract (the 1906 contract), which is also being at tacked in this suit.

August 31, 1906. Mrs. Christian executed a lease of her Makaha lands to Mrs. Kentwell for 15 years after the death of John D. Holt. This lease was likewise signed by Mrs. Kentwell, witnessed to John D. Holt, acknowledged by N. Fernandez, and duly recorded. (R. 1173)

June 13, 1907. Mrs. Christian in New Jersey executed a confirmation of a lease of John D. Holt, Jr., to Mrs. Kentwell. Her acknowledgment was taken by E. L. Mack, an attorney and notary, and duly recorded. (R. 1314)

June 14, 1907. Mrs. Christian executed an option to May K. Brown, covering the sale of Makaha lands for $10,000, the consideration for the option being $2500. The acknowledgment was taken in New York by E. L. Barnard, an attorney and notary, and duly recorded. (R. 1326)

June 14, 1907. Mrs. Christian executed a consent to the deed of Annie Kentwell to May K. Brown. This document was also executed by Mr. and Mrs. Kentwell, acknowledged in New York before E. L. Barnard, attorney and notary, and duly recorded. (R. 1328)

October 26, 1907. Mrs. Christian and John D. Holt executed a conveyance of certain property at Makaha, Oahu, to L. L. McCandless. This is the same McCandless who offered to buy her contingent interest in the Holt lands in 1910 for $30,000. The deed was acknowledged in New Jersey before E. L. Mack, attorney and notary, and duly recorded. (R. 1320)

May 2, 1910. Mrs. Christian executed the deed here under attack. This deed is also executed by Annie

Kentwell, Lawrence Kentwell and John D. Holt. It was witnessed by David L. Withington, and acknowledgments were taken in London before Richard Westacott, American Vice Consul. Albert Christian, husband of Mrs. Christian, executed his consent in San Francisco later. The deed was duly recorded. (R. 953)

May 12, 1912. Mrs. Christian executed a deed to John M. Dowsett to her contingent interest in lands at Waianae. Consideration $10,000. The acknowledgment was taken by Richard Westacott, American Vice Consul and the document was duly recorded. (R. 1409)

All of these documents were signed by Mrs. Christian, acknowledged by her and recorded. Her acknowledgments were taken by notaries and commissioners of deeds in Honolulu, New Jersey and New York, and twice by the American Consul in London.

She executed the following powers of attorney:

January 11, 1923. Power of Attorney, Mrs. Christian to Henry Smith, executed in the presence of J. Rose, a Notary Public in Oxford. (R. 1358)

March 16, 1923. Power of Attorney, Mrs. Christian to Henry Smith, executed in the City Hall of Oxford, in presence of two Notary Clerks with the certificates of James Rose, Notary Public, and the Mayor of Oxford attached. (R. 1358)

She likewise executed before a Mr. Linnel, a solicitor in Oxford, a document which was not produced. This was in the presence of Mrs. Kentwell and Dr. Steadman, her then physician. (R. 1193)

Mrs. Christian Has Been Accepted on Four Occasions by the Hawaiian Courts as a Competent Participant in Legal Proceedings.

Mrs. Christian has participated in the following court proceedings:

The Minority Guardianship Proceeding. On August 3, 1900, Mrs. Kentwell was appointed guardian of Mrs. Christian (then Eliza Holt), as a minor. (R. 1211)

The Hall Trial. In May 1902, Mrs. Christian (then Eliza Holt) appeared as a complaining witness against a man charged with rape. She was accepted as a competent witness. (R. 1130)

The Adoption of June 12, 1902. On June 12, 1902, an agreement of adoption was entered into between George and Maria Sea, John D. Holt and Mrs. Christian (then Eliza Holt) by which the Seas adopted Mrs. Christian's child. Both John D. Holt and Mrs. Christian consented to the adoption. The proceedings were before Judge W. J. Robinson, then judge of the Circuit Court, and the adoption agreement was duly recorded. (R. 1028)

The Annulment Proceeding. An action was instituted in Honolulu in 1905 by Mrs. Kentwell to annul Mrs. Christian's marriage, upon the claim that she was a congenital imbecile and mentally incompetent to contract marriage, and upon the further ground that the marriage was part of a conspiracy to obtain her property. This proceeding was decided adversely to the petitioner, the decree setting forth that the mar-

riage was not void but was valid and binding. (R 1342)

So far as the record shows, Mrs. Chrsitian was never during the 40 years prior to her guardianship in 1926, refused as a party to a legal instrument or as a witness; or in school, or in Church, or in marriage, because of her alleged incompetence.

Nor has she ever appeared in court in this proceeding, or been examined by a medical expert appointed by the court.

The Waialua Plantation.

Waialua Agricultural Company, Ltd. was incorporated under the laws of Hawaii on October 12, 1898 (R. 847)

It took over a small plantation known as the Halstead plantation at Waialua on the Island of Oahu (the island on which Honolulu is situated), and commenced the growing and manufacture of sugar. (R 847)

Its plantation now comprises 49,063 acres, of which 9,904 acres are in cane, 11,625 acres are leased to the Hawaiian Pineapple Company, and the balance is waste land. (R. 1493)

Sugar cane requires two years to mature, so that a crop from only half the area is taken each year and large amounts of working capital are required. Cane will not grow on the higher altitudes and will grow on the lower altitudes—below the 750-foot elevation—in the Waialua district only when large quantities of water are available for irrigation. (R. 990)

Pineapples do not grow at the lower elevations and the land generally suitable for sugar cane is not suitable for pineapples. (R. 995)

Pineapples were not successfully grown commercially in Hawaii until comparatively recent times. James D. Dole testified that although the first pack of pineapples was in 1903, the growing of pineapples did not become a firm and assured industry until 1921—eleven years after the deed in question was delivered and sixteen years after the lease was made. (R. 1387)

The Waialua plantation is essentially a manufacturing enterprise including in one unified operation the growing, manufacture, transportation and marketing of sugar. It requires large amounts of capital, one of the largest items being that invested in securing a supply of water. Not only is the operation of the plantation a unified enterprise, the object of which is the manufacture of sugar as a completed product, but the growing of sugar cane is in itself an intricate, hazardous and highly technical agricultural undertaking. An enormous supply of water for irrigation is absolutely essential and such water must be available upon call. It takes from 500,000 to 700,000 gallons of water to produce a ton of sugar. (R. 1457) As approximately two years are required to mature the cane, large sums must be laid out in the cultivation of the crop before it reaches maturity. (R. 986-991)

Sugar cane is of many varieties and unless a variety is selected which is suitable for the particular land,

and unless it is fertilized and cultivated in exactly the right manner, failure is inevitable. The fact that the Holt lands have been successfully cultivated for sugar cane has depended primarily upon the ingenuity and capital invested by Waialua in locating, storing and by means of pumps, dams, ditches and reservoirs, providing an unfailing source of water supply, and, in addition, upon the agricultural skill and research of its technical staff and the ability of its executives to successfully conceive, build up and operate a sugar-manufacturing enterprise.

The Waialua Lands and the Holt Property.

Exhibit S-3[1] (attached hereto) is a map, drawn to scale, showing the property in question and the improvements upon it as of February 1, 1932. The top of the map is generally north, the right hand side east, the left west, and the bottom south.

The properties of Waialua are shown in color, the yellow indicating cane land and the pink indicating pineapple land. The Holt property is enclosed in a green border. Besides the main piece, there are two small pieces south of the westerly tip of the Holt lands.

The plantation extends from the Pacific Ocean to the west, up to the heights of the Koolau mountains on the east; from sea level to an altitude of more than 1700 feet. It will be noted that the cane areas lie at the lower levels and the pineapple lands at the

1. This map is described in detail at R. 1492-1505.

higher elevations, the lower limit of the pineapple lands being about 750 feet elevation.

The Holt lands form a wedge-shaped area of 13,950 acres lying in the center of the plantation and dividing it into almost equal halves. (R. 843)

The areas are as follows (R. 1493):

Total plantation = 49,063 acres, of which
9,904 " are cane land
11,625 " are pineapple land
27,434 " are waste, forest and water land.

The Holt lands (included in the above areas) are:

13,950 acres, of which
1,623 " are cane land
6,476 " are pineapple land
5,851 " are waste, forest and water land.

The Holt lands comprise:

28+% of the total plantation area
16+% of the sugar area
55+% of the pineapple area.

The Plantation Improvements.

The plantation improvements are shown on the map (attached hereto). The mill is in the southwest section and is shown as a red circle. Around it are grouped the residences of the executives, of the mill workers, and many of the plantation laborers. (R. 1492)

An extensive system of plantation railroads, centering at the mill and extending into all parts of the plantation for the transportation of cane from the fields to the mill, is shown by the conventional crossed line. Roads are indicated by a double line; reservoirs and ditches by blue lines; tunnels by a dotted blue line; camps and pumping plants and power plants are shown by lettering; reservoirs are shown in blue.

All of the improvements, with the exception of the railroad and roads in the pineapple area, are used in connection with the growing and manufacture of sugar.

The Plantation Is One Unit.

The map indicates the essential unity of the sugar plantation. The railroads, roads and power lines all radiate from the mill and completely cover the cane area so as to serve each part; all designed to provide economical transportation from field to mill. The laborers' quarters are distributed over the entire cane area at convenient points, the men being employed primarily in the nearby areas but also working generally throughout the plantation. (R. 1494)

The irrigation system, which supplies the vital requirement of water, is also a unit (R. 1557), and is particularly designed and constructed so as to serve all parts of the sugar area. The water supply is from three sources: (1) Wahiawa reservoir, which is shown on the southeast corner; (2) mountain waters which are diverted from the streams high in the up-

lands, and brought to the low-lying sugar area through an intricate system of reservoirs and canals: and (3) pumping plants, located in the lowlands near the stream beds, and pumping into high line ditches. Practically none of the water, except that withdrawn through pumps built by Waialua at great cost, originates on the Holt lands.

The improvements also constitute a unit. Each improvement is located where it will be most effective for the service of the entire plantation. While the map shows the Holt lands, heavily outlined in green, the separation is purely imaginary. The railroads, camps, roads, telephone and power lines, ditches, reservoirs and all other improvements being located in conformity with the demands of efficiency without relation to whether they are on Holt or other plantation lands. Some are part on and part off Holt lands, some on Holt lands serve Holt lands and other lands, some off Holt lands serve the Holt lands. (R. 1494)

Changes in the Title to the Holt Lands.

As has been pointed out, the ownership of the Holt lands descended from R. W. Holt to his three sons, each of whom had a life estate with the remainder to his heirs. On June 11, 1891, the first son, Owen J. Holt, died, and one-third vested in fee in his nine children (one of whom was Mrs. Kentwell) each becoming the owner of 1/27 in fee. At the time of the 1910 deed, James L. Holt owned the life estate in the other two thirds and the contingent remainder in one of

these thirds. Mrs. Christian owned the contingent remainder in the other third.

Because the Holt lands divided the lands Waialua then had or hoped to acquire, it looked forward to their ultimate acquisition. In 1899, Waialua purchased the 1/27 fee of Robert Holt, and on June 7, 1900, the 1/27 fee of Christopher J. Holt. (R. 849). In 1899 the Holt Estate leased these lands to one Emmeluth for a period of 49 years at a rental of $10,000 a year. The lessee defaulted and in 1902 the lease was cancelled. (R. 1239)

The 1905 Lease.

As early as 1902 Colburn, Trustee for James R. Holt, approached Waialua and offered to lease the Holt lands. (R. 1241) Discussions continued over a period of years and finally culminated in a lease dated March 17, 1905 (the lease which is here being attacked). (R. 367) This lease, which was joined in by Mrs. Christian, was for a term of 25 years at a rental of $9,000 per annum net above taxes. Waialua preferred to pay $3,500 a year plus a percentage of the crop as rental, but the lessors insisted on a cash rental of $9,000 and the lease was made on their terms. (R. 557, 1242)

When the lease was made the Holt lands had never been cultivated. (R. 1489) Taxes for four years were delinquent. (R. 557) Pineapple culture was not thought of. (R. 1481) The lands were a barren waste, covered with noxious growth. (R. 1488) They had no water except the sporadic deluges that came down

the gorges from the upper lands. Under the Hawaiian law, water, except for domestic requirements, belongs[1] to the owner of the property on which it originates. (R. 1263) Therefore, the waters which passed down the streams and were the only natural sources available to the Holt lands, belonged to, and could be taken by the owners of the upper lands to the exclusion of the Holt lands. These were the property of the Bishop Estate and the Territory. Waialua since 1901 had a lease of these lands and the right to use the water from them on the Bishop Estate lands which it had leased. These lands lie to the north of the Holt lands and upwards towards the mountains. (R. 1252)

Upon the delivery of the lease of 1905 Waialua entered upon the property with a gang of men and commenced clearing the heavy growth of underbrush and the many rocks and boulders which covered its surface. Hand labor was ineffective, so a lantana-machine was necessary. (R. 1488, 1489) As many as two hundred men were employed at one time in the work of clearing, and approximately $45,000 was spent in this work during the first two years. This sum represents only the direct costs, no account being taken for indirect costs or for perquisites (housing, medical care, water, etc.) received by the laborers. (R. 1510)

The work of bringing water to the land was prosecuted as rapidly as possible, with the result that the

1. *Territory v. Gay*, 52 F.(2) 356.

necessary ditches on the lands were under construction before the end of 1905 and Wahiawa water was actually made available in the early part of 1906. (R. 1242)

The work of planting cane commenced immediately following the clearing, but only forty-five acres of cane were available for harvesting in 1907, and it was not until 1908, three years after the lease was made, that a full crop (from one-half of the land planted) was ready for gathering. (R. 991, 995)

Title to Holt Lands in 1910.

In August, 1905, a purchase of an 18/27 fee interest in the lands by Waialua was discussed with the administrator of the Holt estate. (R. 1243) This was discussed on the basis of a price of $108,000, or $6,000 for a 1/27 interest in fee. The sale fell through, however, because it was found that a fee simple title could not be conveyed by the estate, because of the contingent interests. (R. 1250)

After the 1905 lease was executed, Waialua made other purchases of interests in the Holt property as follows:

August 4, 1905, 1/27 vested fee interest of George H. Holt. (R. 894)

August 5, 1905, 1/27 vested fee interest of Mrs. Kentwell. (R. 894)

May 7, 1906, 1/27 vested fee interest of the minor children of Helen A. Holt. This sale

was confirmed by the guardianship court. (R. 894)

June 29, 1907, 2/27 fee interest of J. D. Holt Jr. and Owen J. Holt. (R. 899)

The situation with respect to the title when the May 2, 1910 deed was executed, was as follows:

Waialua owned a 7/27 interest in fee and had a lease on the entire property which would not expire until 1930.

James L. Holt, the cousin of Mrs. Christian, was the owner of his father's life estate in 1/3 which he had acquired in 1902. (R. 850) As the son of his father, he had a contingent remainder in the same 1/3, and having acquired in 1893 the contingent interest of his brother, the only other child, he was the owner of that entire 1/3 contingent remainder. (R. 849) He was also the owner of the life estate of Mrs. Christian's father, John D. Holt, in 1/3 which he had acquired in 1902. (R. 850) He therefore owned a life estate in 2/3, and a contingent remainder in 1/3 subject to the 1905 lease. These interests had been conveyed by James L. Holt in 1902 to John F. Colburn as his Trustee, and Colburn's name appears frequently in the testimony. (R. 853)

Mrs. Christian owned the contingent remainder in 1/3 dependent upon her surviving her father and being his sole heir, and subject to the 1905 lease and the 1906 contract assigning the rents to Mrs. Kentwell.

The remaining 2/27 interest in fee (subject to the 1905 lease) was owned by Elizabeth H. Richardson and Edward S. Holt.

The Negotiations Leading Up to the Purchase.

Although the evidence is fragmentary, the general outline of the negotiations leading up to the deed is clear.

James L. Holt, the owner of the life estates in 2/3 and the contingent remainder in 1/3 had been trying for some time, with the help of Colburn, his trustee, to sell to Waialua. This sale was contemplated as early as July 1902 (R. 1017), but was not made because the first takers were found to be merely life tenants and therefore could not convey a fee simple title. (R. 1017)

Holt continued his attempts to sell his interests to Waialua, but was unable to do so because Waialua refused to buy anything less than the entire two-thirds interest. (R. 1018) Holt therefore was interested in acquiring Mrs. Christian's contingent remainder, thus rendering salable his own interests to Waialua.

With respect to Mrs. Christian's interest, as far back as 1908 Kentwell was writing to Honolulu, endeavoring to arrange its sale. Holt says he wanted to buy it then, but that the deal fell through because his purchase was "predicated on getting the title straightened out in court." (R. 1018)

Further attempts by Holt to sell his interests to Waialua proving unsuccessful, he finally accepted an offer of Mrs. Christian's contingent remainder for $30,000, and Mrs. Kentwell's interest for $5,000, and

arranged for the sale of his whole interest, i.e., the two life estates and the entire two-thirds contingent remainder to Waialua for $120,000. (R. 915, 926)

Holt did not have the funds to pay Mrs. Christian (R. 1014) and suggested that Waialua advance these funds and take delivery of the deed. (R. 918) This was apparently agreed upon, for Mr. Withington, who was Mr. Castle's law partner, and who was at the time in Boston, proceeded to England, where he met Mrs. Christian, her father and the Kentwells. The deed was executed a few days later before the American Consul in London, at which time Mr. Withington paid over the purchase price. (R. 944) In due course the deed was recorded in Honolulu, Holt having already delivered his deed to Waialua of his interest and the interest acquired by him from Mrs. Christian by the 1910 deed.

Waialua Has Spent More Than One Million Dollars in Improvements on the Holt Land and Off the Holt Land in Connection With It.

Waialua had proceeded to improve the Holt lands as a part of its unified plantation, immediately after it executed the 25 year lease in 1905. It continued and expanded that work of improvement after the deed of May 2, 1910, and in reliance on it. (R. 578) It further increased its work of improvement of the Holt lands after the death of James L. Holt's father in 1916, when the fee in that 1/3 vested and after the death of Mrs. Christian's father in 1922, when the fee in the remaining 1/3 vested, and Waialua considered itself the owner of the fee.

The total expenditures for improvements on the Holt lands are shown on Exhibit S-5 (R. 1507) where they are segregated as to items and as to periods. They may be summarized as follows:

From April 1, 1905 (when lease was made) to May 2, 1910 (when deed was made)	$182,525.07
From May 2, 1910, to April 10, 1922 (when fee vested)	203,513.43
From April 10, 1922, until April 5, 1928, when deed was first questioned	244,683.62
Total	$630,722.12

In addition the Wahiawa reservoir (R. 1515) and ditch located almost entirely off the Holt lands (R. 1516) without which the successful growing of sugar cane on the Holt lands would be impossible, (they use 1/3 of the waters), cost—

Dam and spillway	$448,555.94
Ditch	66,039.00
Total	$514,594.94

The Pineapple Lands.

As already pointed out, the Holt lands comprising 13,950 acres in all, are divided into 1623 acres of cane land, 6476 acres of pineapple land, and 5,851 acres of waste and forest.

The cane lands lie below the 700 foot elevation at which the Wahiawa ditch crosses, and which provides

water for their irrigation. The upper lands, above the ditch, are not suitable for growing cane, the plantation manager testifying that he attempted to grow "dry-land" cane there in 1906 and 1907, but although he planted 40 different varieties of cane, it all was a failure. (R. 1246)

The land other than the 1623 acres of cane land, (amounting to 12,227 acres), was therefore unsuited to cane growing. In 1905 it was believed to be of use only as pasture land (R. 1490), being considered by pineapple growers as not suited for that purpose. (R. 1481)

As found by the Supreme Court of Hawaii:

> "At the time of the execution of the lease and even later at the date of the instrument of August 31, 1906, it was not known to any of the parties or to anyone else that pineapples could be successfully or profitably grown on the upper lands of the Holt estate. It was not until about fifteen years later that the W. A. Co. was able to lease the upper lands for pineapple purposes at large rentals." (R. 559)

Mr. James Dole, the pioneer of successful pineapple culture in Hawaii, testified at length regarding the growth of the pineapple industry. (R. 1385 et seq.) In 1903 the first pineapples were canned. In 1910 the industry was very depressed. Fertilizing in 1910 was in an experimental state, and large quantities have only been used during the past few years. Caterpillar tractors were introduced in 1913 and are one of the

major factors in permitting pineapple growing on a large scale. (R. 1386)

The iron sulphide spray was introduced in 1916 and made available for pineapple growing large areas where pineapples would not grow before. The great bulk of the Holt lands now used for pineapples was worthless for pineapples in May 1910, but the introduction of the iron sulphide spray in 1916 made them suitable because it supplied iron directly to the plants. Even with the introduction of the iron sulphide spray, these lands would not be as useful as they are, except for the introduction of paper mulch, which was tried out in 1920 and came into general use in 1921 and 1922. The pineapple industry was not on a firm and assured foundation until 1921. In 1910 the Hawaiian Pineapple Company could not get money from the banks unless underwritten by the large stockholders. (R. 1386, 1387)

The Pineapple Lease of January 10, 1923.

The title to the contingent 1/3 interest purchased from Mrs. Christian vested when her father John D. Holt died on April 10, 1922.

At that date the Holt pineapple lands (6476 acres) were leased to many tenants. Most of the leases were about to expire. In addition to the Holt pineapple lands Waialua had 5,674 acres of additional pineapple lands, making a total of 12,150 acres.

Waialua then entered into negotiations with the Hawaiian Pineapple Company, looking to the leasing

of the entire area. After negotiations Waialua and Hawaiian Pineapple Company executed an option agreement on October 14, 1922, whereby Waialua gave the Pineapple Company the option to lease these 12,000 acres more or less, at an annual rental of $15 per acre (a substantial increase over existing rentals). As consideration for this option, the Pineapple Company paid $60,000 in cash and gave Waialua the option to purchase a 1/3 interest in the Pineapple Company at a stated price per share of stock. The exercise of one option was not dependent upon the other. (R. 166)

On October 14, 1922, Waialua exercised its option and purchased 23,000 shares of Pineapple Company stock paying $1,214,000 in cash. On November 28, 1922, Waialua elected to purchase an additional 40,144 shares and gave its note for $2,118,019 at 5% interest in payment. (R. 168)

On January 4, 1923, the Pineapple Company exercised its option to lease the pineapple lands from Waialua and on January 10, 1923, the lease was executed. It covers 12,150 acres of which 6,475 are Holt lands, for a term of 17½ years from January 1, 1923, to June 30, 1940, at a paid up rental of $2,109,179.25, with an option for an extension of 20 years at a rental to be agreed upon. (R. 973)

The annual rent for the entire 17½ year term was discounted at 5% per annum and paid in a lump sum amounting to $2,109,179.25, which was credited on the note previously given by Waialua in payment of the

purchase price of stock in the Pineapple Company. (R. 168)

The fact therefore is that, following the death of John D. Holt in 1922, when Waialua considered it was the owner in fee of the 1/3 interest in the Holt lands purchased from Mrs. Christian, it executed a single lease to the Pineapple Company, covering all the Holt pineapple lands (6475 acres) and its other pineapple lands, to the aggregate acreage of 12,150 acres for 17½ years with an option to renew for a further period of 20 years.

And it is also the fact that when it believed it had a valid title Waialua purchased a 1/3 interest in the Pineapple Company.

In connection with the pineapple lease it was necessary to abandon certain improvements on the Holt lands. (R. 1535) These are listed on Ex. S-6 (R. 1511 et seq.) as the ones abandoned in 1923. They consisted of camps ($6,771.65); railroads ($9,159), waterways and flumes ($896.90), a total of $16,800.

Deaths of Witnesses.

In the time intervening between the execution of the instruments and the trial, the following witnesses became unavailable:

David Withington, attorney for Waialua, who supervised the transaction in London, died in 1919.

W. R. Castle, who was Mr. Withington's partner and who represented Waialua in Honolulu in con-

nection with the transaction, was permanently incapacitated and unable to testify.

John F. Colburn, who, as trustee, joined in the execution of the deed of May 28, 1910, to W. R. Castle and who knew Mrs. Christian well, was dead.

Richard Westacott, Vice Consul in London, before whom the deed of 1910 was acknowledged by Mrs. Christian and who also took the acknowledgment of Mrs. Christian's deed to Dowsett in 1912, was dead.

Clarence Ashford, attorney for J. F. Colburn, was dead.

N. Fernandez, who took the acknowledgments in Honolulu of several documents executed by Mrs. Christian, was dead.

The young man who assisted Mr. Withington in London in connection with the transaction, was dead.

Rev. Father Clement, who officiated at the marriage of Mrs. Christian at the Catholic Cathedral in Honolulu in 1903, was dead.

On page 977 of the record are listed the names of twenty-two persons whose testimony would be valuable, who were dead or otherwise unavailable.

Missing Documents.

The court records in the guardianship (minor) proceedings of Mrs. Christian in 1900 are missing. (R. 1211)

The court records in the annulment proceedings are missing with the exception of the judgment and the

opinion of the judge. This was a proceeding which directly involved the question of Mrs. Christian's competence.

The originals of Mrs. Christian's letters at the time of the transaction are missing.

The original of the alleged April 15, 1910, agreement is missing.

Many of the letters and cablegrams passing between Holt and Kentwell in connection with the 1910 transaction are missing, only copies exist as to the others.

Other letters and vouchers in connection with the transaction are lost.

Not a single original paper, letter or document was produced by the grantor. The only originals produced were recorded documents or from Waialua's files. Despite the many letters and other papers which James L. Holt and Mrs. Kentwell testified they received, not a single one was produced. (R. 1015, 1018, 1020, 1189)

Discredited Witnesses.

The trial court excluded from consideration the testimony of James L. Holt and of Mrs. Kentwell (R. 122, 159) and the Supreme Court of Hawaii did not even mention James L. Holt's testimony. The Supreme Court said regarding Mrs. Kentwell, "This witness is greatly discredited * * *" and again "Leaving out Annie Kentwell's testimony as being unreliable * * *." (R. 275)

Witnesses Not Produced.

Neither Mrs. Christian nor Lawrence Kentwell, Mrs. Kentwell's husband, were produced as witnesses.

Point I.

THE CIRCUIT COURT OF APPEALS ERRED IN NOT HOLDING THE INSTRUMENTS VALID AND UNASSAILABLE, WAIALUA HAVING TAKEN IN GOOD FAITH WITHOUT NOTICE OF INCOMPETENCE AND FOR AN ADEQUATE CONSIDERATION.

As has already been pointed out, the Circuit Court of Appeals (R. 1605) accepted the findings of the lower court "that the company had no notice of the incompetency".[1]

The Supreme Court of Hawaii held that the consideration paid for the deed was adequate, (R. 304) and that not only was there adequate consideration for the lease, but that it was highly beneficial to Mrs. Christian. (R. 558)

It is our contention that under these circumstances none of the instruments should be cancelled, and that the Circuit Court of Appeals erred in so decreeing.

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1. The Supreme Court of Hawaii held "In the case at bar as already held, while Eliza was an imbecile and mentally incompetent, the W. A. Co. had no knowledge of that incompetency at the time that it dealt with her in 1910. The same must necessarily be true as to 1905 and 1906." (R. 555)

Erroneous Rule Adopted by Circuit Court of Appeals.

So far as we can find, no state (and no other common-law jurisdiction) follows the rule that the deed of an incompetent is void. The history of the law on the question is adequately discussed by Holdsworth. (*History of English Law*, VIII, 52 et seq.)

The Circuit Court of Appeals therefore erred when it announced the rule that the deed of an incompetent is void because an incompetent is incapable of giving the required assent:

> "We hold that contracts made by an incompetent are void because an incompetent is incapable of giving the required assent thereto." (R. 1597)

In denying rehearing, the Circuit Court of Appeals recognized that it had departed from accepted views, but explained that it had reached the same result as would have been reached by other courts which do not accept the "void" rule, saying:

> "Heretofore, the majority of the courts have reached the same result on the ground that an incompetent person's contract is voidable. We were and are unwilling to accept that reasoning because we believe an incompetent person 'is incapable of giving the required assent.'" (R. 1634)

We shall point out later that other courts, applying the correct rule of law, do not reach "the same result," and that a court of equity will shield an innocent purchaser for value in the circumstances presented here.

Counsel for Mrs. Christian contend that the challenged instruments are all nullities by reason of an inexorable "Federal Rule." Their position is stated in the concluding pages of their brief in opposition to our petition for certiorari:

> "Even though we assume that the bargain was fair, the consideration adequate, that Waialua did not have knowledge of the incompetency, and that *status quo cannot* be restored, nevertheless all of the questioned instruments must be cancelled because the rule of decision in the Federal Courts is that a contract of an incompetent is void in the sense of being a nullity.
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> * * * * * * *
>
> "The rule prevailing in the Federal Court is the rule of decision in this case arising in the Territory of Hawaii." (Br. pp. 36, 37)

1. There Is No "Rule of Decision In the Federal Courts" That the Deed of An Incompetent Is a Nullity.

There is no established "federal rule". The decisions of the lower federal courts are in hopeless conflict. Those favoring the rule that such deeds are void rest on the statement in *Dexter v. Hall*, 15 Wall. 9, 20, that

> "The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic or person non compos mentis, has nothing which the law recognizes as a mind; and it would seem therefore, upon principle, that he cannot make a contract which may have any efficacy as such."

In that case this Court held that a power of attorney executed by a lunatic is "void". While under the facts there presented the result was doubtless correct, for the principal was confined in an asylum at the time, the court's expression has been interpreted by many federal courts[1] as a declaration that the deed of an incompetent to an innocent purchaser is "void" to such an extent that many of the courts have characterized it as "Federal" rule to be applied in all federal courts, irrespective of the law of the situs of the land. It is referred to in encyclopedias and some text books as the "Federal" rule.[2]

The court below in declaring the deed of an incompetent void as urged by Mrs. Christian's counsel, cited *Dexter v. Hall* as authority for its declaration "We hold that contracts made by an incompetent are void because an incompetent is incapable of giving the required assent thereto. *Dexter v. Hall*, supra, * * *." (R. 1597)

In *Sothern v. United States*, 12 F.(2d) 936, 937, the court summarized its view of the law on this subject as follows:

> "* * * the courts of the United States have uniformly held a contract of a lunatic or an

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1. *Plaster v. Rigney*, 97 Fed. 12;
Edwards v. Davenport, 20 Fed. 756;
Anglo Californian Bank v. Ames, 27 Fed. 727;
Clark Car Co. v. Clark, 11 F.(2d) 814;
White's Guardian v. Martin, 2 Alaska 495.

2. 1 *Federal Law of Contracts*, Sec. 336.7 (1934 Ed.).

insane person is wholly void and subject to collateral attack. The leading case on that subject is Dexter v. Hall * * *."

The inaccuracy of this statement and the existence of a direct conflict in the federal courts, is illustrated in *Kevan v. John Hancock Life Insurance Company*, 3 F. Supp. 288, 289, 290, where District Judge Otis declared:

"I do not find a single federal appellate court decision announcing the rule that contracts generally, entered into by insane persons, not adjudicated insane, are absolutely void."

"My view of the matter is that it cannot be said that a Supreme Court dictum and five scattered District Court opinions, established any such federal rule as plaintiff contends for.

"The overwhelming weight of authority in this country in the state courts is that the contracts of insane persons who have not been adjudged insane, are voidable only."

Notwithstanding the confusion that exists in the federal decisions, the overwhelming weight of authority, and we submit the better view, is that the deed of an incompetent, before adjudication, is at most voidable and not void. That is the law in the great majority of states, it is the common law, it is the law of England, and it is the law as announced by text writers and commentators such as Williston, Story, Chitty, Pollock and Pomeroy.

And we submit such is the law as declared by this Court, and this view has been taken by some lower

federal courts.[1] In *Luhrs v. Hancock*, 181 U. S. 567, 574, this Court declared, "The deed of an insane person is not absolutely void: it is only voidable; that is, it may be confirmed or set aside."

2. The Error of the Circuit Court of Appeals In Adopting the Rule That the Deed of An Incompetent Is Void Resulted From a Fundamental Misconception of the Law of Contracts.

The Circuit Court of Appeals adopted a Nineteenth Century view of the law of contracts, i.e. that a meeting of the minds is essential to the formation of a contract, and, hence, where one party is incompetent there can be no meeting of the minds, and, therefore, no contract, saying:

> "We hold that contracts made by an incompetent are void because an incompetent is incapable of giving the required assent thereto. *Dexter v. Hall* * * *." (R. 1597)

As we have stated before, Mrs. Christian is no lunatic. The trial court, although finding her incompetent, held that she "neither was nor is an idiot, a lunatic, or utterly imbecile. She was and is, however, a person of undeveloped intellect (R. 132) * * * mentally incompetent to execute a conveyance (R. 133)."

The Supreme Court of Hawaii found that Mrs. Christian's mental condition was not so apparent as

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1. *Beale v. Gibaud*, 15 F. Supp. 1020;
Kevgn v. John Hancock Ins. Co., 3 F. Supp. 288;
Safe Deposit Co. v. Tait, 54 F.(2d) 383;
Levine v. Whitney, 9 F. Supp. 161.

to be discoverable by ordinary observation and that when Mr. Withington met with her, in connection with the execution of the deed, he "saw nothing in her to cause him to suspect that she was not of normal mind." (R. 276) This conclusion seems irresistible in view of the various conveyances in which she had been accepted as a competent party, her participation in court proceedings, and the fact that no guardian was appointed until she was more than forty years of age. When she affixed her signature to the deed, to the contract and to the lease, there is no question but that she knew she was executing a conveyance, and intended to affix her signature thereto.

The old notion that contracts and conveyances made by incompetents are wholly void, is based on the metaphysical idea borrowed from the Civil Law that a contract requires a meeting of the minds, and that since an incompetent has no mind, he cannot, therefore, make a contract. (*Dexter v. Hall,* 15 Wall. 9.) This is the view taken by the court below, and is the foundation of its decision.

The short answer to this proposition is stated by Professor Williston. He observes that the modern rule (that incompetents' contracts are voidable at most, and valid if fair), is:

> "* * * in line with the view now generally prevailing in regard to mutual assent as a requirement for the formation of contracts. According to the modern view actual mental assent is not material in the formation of contracts, the important thing being what each party is justified

in believing from the actions and words of the man he is dealing with. Accordingly, if one dealing with a lunatic may reasonably suppose he is sane and makes a bargain with him on that assumption, there is no theoretical difficulty in the lack of mutual assent. Lunatics whose acts can deceive anybody are not so totally devoid of will that their words and acts can be compared to talking while asleep or signing a paper substituted by sleight of hand." (1 *Williston on Contracts* (Rev. Ed.) Sec. 254).

The objective theory of contracts is adopted in the Restatement, and specifically stated to be applicable to contracts of insane persons.

Restatement of the Law, Contracts, Sec. 20:

"A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; but, except as qualified by Secs. 55, 71 and 72, neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.

"Comment:

"a. * * * Nor is it essential that the parties are conscious of the legal relations which their words or acts give rise to. It is essential, however, that the acts manifestly assent shall be done intentionally. That is, there must be a conscious will to do those acts; but it is not material what induces the will. Even insane persons may so act; but a somnambulist could not."

The problem and its answer are well stated by Mr. Justice Holmes (Collected Legal Papers, Oliver Wendell Holmes, p. 178), as follows:

> "In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties' having ~~meant~~ the same thing but on their having *said* the same thing." (Author's emphasis)

See also:

Williston, op. cit., Secs. 20, 21, 22;
Holland, Jurisprudence (12th Ed.), pp. 119-120;
Langdell, Summary of the Law of Contracts, (2 Ed.) Sec. 180;
Holmes, The Common Law, pp. 309, 324, 325.

3. The Proper Rule Is That Contracts of Incompetents Are Valid If Made With An Innocent Purchaser for An Adequate Consideration.

The modern rule is concisely stated in *Imperial Loan Company v. Stone*, L. R. (1892) 1 Q. B. 599:

> "A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the men-

> tal incapacity of the one must be known to the other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed."

Unquestionably it has been the law of England for many years.[1] As we shall see, this rule has now been announced by the courts of last resort in at least ten states.

We submit that this view is sound. It makes for security and certainty in land titles and commercial transactions, and protects innocent parties from attacks by incompetents (or their relatives who as here have joined in the conveyance) who delay for years to see whether the transaction later turns out to be favorable or unfavorable to the incompetent, and, after a

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1. *Niell v. Morley*, 9 Ves. Jr. 478 (1804);
Elliot v. Ince, 7 DeG. M. & G. 475 (1857);
Beavan v. McDonnell, 9 Ex. 309 (1854);
Molton v. Camroux, 2 Ex. 487, 4 Exch. 17 (1848);
Campbell v. Hooper, 3 Sm. & G. 153, 24 L. J. Ch. 644 (1855);
Hassard v. Smith, 6 Irish Reports, Equity 429 (1872);
Dane v. Kirkwall, 8 C. & P. 679 (1838);
Brown v. Jodrell, M. & M. 105 (1827);
Baxter v. Portsmouth, 5 B. & C. 170 (1826);
Imperial Loan Co. v. Stone, 1 Q. B. 599 (1892);
York Glass Co. Limited v. Jubb, 134 L. T. R. 36 (C. A. 1926);
Broughton v. Snook, 158 L. T. R. 130 (1938).

change in circumstances or increase in value, bring action to recover the property. It affords full protection to incompetents where there is any fraud or overreaching, and, as we shall later point out, there are adequate safeguards which amply protect incompetents.

a. This rule is now established in numerous states.

In *Goldberg v. McCord*, 251 N. Y. 28, 32 (1929), the New York Court of Appeals, in rejecting the contention that the deed of an incompetent should be set aside as against an innocent purchaser for value, said:

> "To arrive at such a conclusion it is necessary to assume that the incompetent, or some one in his behalf, may set aside any conveyance which may have been made by him during a period of mental incompetency, or brain affliction. Such is not the law. An insane person, before office found, may convey a good title; his deed is not void, but voidable (*Finch v. Goldstein*, 245 N. Y. 300, 157 N. E. 146); and it is not even voidable as against bona fide purchasers for value without notice of the incompetency."

In *Rubins v. Hamnett*, 294 Pa. 295, 299, the Pennsylvania court said:

> "Dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who dealt with him on the faith of his being a person of competent mental understanding."

In *McVeagh v. Hicks*, 211 Ky. 284, 288, the Kentucky court said:

> "Sales made by persons of unsound mind will not be set aside where the price was fair and no inequity was done to the person laboring under disability."

In *Farmers' National Life Insurance Company v. R. Y. G.*, 209 Ia. 330. 333, the court, in denying relief against an innocent purchaser, referred to *First National Bank v. Sarvey*, 198 Ia. 1067, and said:

> "We there held that the defendant had the burden of proving not only the insanity, but that the payee of the note had express or implied notice of such fact, and that the status quo must be restored."

In *West v. Seaboard Air Line Ry.*, 151 N. C. 231, 234, the court said:

> "The well-established rule is that the mere fact that one of the parties to the contract is of unsound mind (he not having been found to be a lunatic by judicial proceedings) does not render the contract void, but at most only voidable, and is no ground for setting it aside where the other party had no notice of the insanity and derived no inequitable advantage from it."

In *Atkinson v. McCulloh*, 149 Md. 662, 672, the court said:

> "In this state the contract of a person who has not been adjudicated non compos mentis is not void but voidable, and it is not even voidable at

> the arbitrary discretion of the incompetent person, but only in cases where the other party knew of the disability or where there was some element of bad faith or unfairness in the contract itself."

In *Sims v. McLure,* 8 Rich. Eq. (S. C.) 286, 288, the court said:

> "Indeed, a fair contract made with a lunatic by a third person without notice of the lunacy, will not be disturbed."

In *Rhoades v. Fuller,* 139 Mo. 179, 189, the court, in refusing to cancel an exchange of real estate where one party was insane, notwithstanding his offer to restore the consideration, held:

> "Under such circumstances, Rhoades, even if insane, was not entitled to have the trade rescinded, although he offers to, and is willing to refund to defendant all moneys paid out by him on said land, and to reconvey to defendant the house and lot received by him in exchange therefor. Proof of the insanity of Rhoades, even if shown to exist at the time of the trade, in the absence of fraud practiced on him by defendant or knowledge by defendant of his condition, will not justify setting aside the contract."

A number of additional cases applying this rule are cited in the footnote[1].

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1. *Arnett's Committee v. Owens,* 23 Ky. Law Rep. 1409;
   Ashcraft v. DeArmond, 44 Ia. 229;
   Bagley v. Holliday's Committee, 248 Ky. 453;
   Beals v. See, 10 Pa. St. 56 (1848—Opinion by Gibson, C. J.);

Decisions from seven states were cited in the brief accompanying our petition (pp. 24-26) in support of the modern rule that a conveyance by an incompetent for adequate consideration will not be disturbed unless the other party knew of the incompetency. Counsel for the grantor have attempted to explain away some of these cases on the authority of earlier decisions in some of the states, and as to other states, on the ground of later cases where rescission was denied for the announced reason that status quo could not be restored. Obviously neither type of case seriously impairs the authority of the cases referred to. The later cases mentioned are confusing, but they are not inconsistent with those cited by us.

b. The departure by numerous American courts from the proper rule by the addition to it of a qualification that cancellation will be decreed if status quo can be restored, resulted from a misunderstanding of Molton v. Camroux, and has no basis in logic or principle.

Many American courts state that an incompetent's contract will not be set aside as against an innocent party who paid fair value, but add, "unless the parties can be restored to status quo."

Eaton v. Eaton, 37 N. J. Law, 108;
First National Bank v. Fidelity Title & Trust Co., 251 Pa. 529;
Green v. Hulse, 57 Colo. 238;
Groff v. Stitzer, 77 N. J. Eq. 260;
Mattheissen v. McMahon, 38 N. J. Law 536;
Mutual Life Insurance Co. v. Hunt, 79 N. Y. 541;
Phillips v. Murphy, 186 Ky. 763;
Wood v. Newell, 149 Minn. 137;
Young v. Stevens, 48 N. H. 133.

This qualification of the English rule arose out of a statement in the much cited case of *Molton v. Camroux*, (1848) 2 Ex. 487, 4 Ex. 17, wherein, after declaring that the contract of an incompetent should not be set aside in the absence of fraud or notice, the court stated, as an additional reason for its decision, that "the parties cannot be restored altogether to their original position."

The American cases in question took account of the additional reason given for the decision in *Molton v. Camroux*, and proceeded to incorporate it into the rule itself.

As a consequence, numerous courts have announced the proposition that such a contract will not be set aside where the parties cannot be restored to status quo.[1] And some of these courts have proceeded to turn the negative into an affirmative and have held that such a deed will be set aside if the parties can be restored to status quo, thus converting what was originally given as an additional reason for refusing cancellation, into an affirmative ground for granting it.

This error is analyzed in *Harriman on Contracts* as follows, (2d ed.) Sec. 410, p. 243, where the author says:

> "In many American courts an anomalous doctrine prevails. This doctrine is that if the sane party is ignorant of the other's insanity and the

1. These cases are collected in 46 A. L. R. 419; 95 A. L. R. 1442.

contract is fair and cannot be rescinded so as to place the parties in statu quo, it is binding. This doctrine rests on some loose statements in an English case decided half a century ago. The present English doctrine is perfectly clear and logical; * * * but the attempt to make the validity of the contract depend upon its performance does not and cannot lead to satisfactory or intelligible results."

Professor Williston speaks on the question in part as follows:

"In the leading case of Molton v. Camroux, the rule was stated: 'The modern cases show that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defense cannot prevail, especially where the contract is not merely executory buf executed in the whole or in part and the parties cannot be restored altogether to their original positions.' * * * In the United States the weight of authority supports the rule quoted above from Molton v. Camroux. This princi[illegible] applies to the case of a deed made by a lunati[illegible]

1 *Williston on Contracts*, (Rev. Ed.) Sec. 254.

We submit that this gloss on the English rule, in addition to being the consequence of a misapprehension, is for the reasons already stated, indefensible in principle.

c. This cause is governed by the law of Hawaii, which is the common law of England as ascertained by English and American decisions.

The Circuit Court of Appeals for the Ninth Circuit, by virtue of the Judicial Code (Section 128, 28 U. S. C., Sec. 225), is vested with general appellate jurisdiction over all cases from the Supreme Court of Hawaii where the amount in controversy exceeds $5,000. In this case, therefore, the Circuit Court of Appeals has both the power and duty to declare the law. Its action is not comparable to that of a Circuit Court of Appeals in deciding a case which arises in one of the States. *Erie R. Co. v. Tompkins,* U. S. Sup. Ct. April 25, 1938.

The law of Hawaii is declared by statute to be "the common law of England, as ascertained by English and American decisions * * *." (*Rev. Laws Hawaii,* 1935, Sec. 1)[1]. This statute has been in effect since 1893. We contend, therefore, that in deciding appeals from the territorial courts, the Circuit Court of Appeals should follow the common law and, where there

1. "Sec. 1. Common Law Applies Except When. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; *provided*, however, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory." (Laws of Hawaii 1892; c. 57.)

are conflicting rules of the common law it should follow the rule established by the English and American decisions which appears to be the better view of the common law.

That rule, we submit, is the rule that the contracts of an incompetent with an innocent purchaser for an adequate consideration are valid and will not be rescinded.

d. Solicitude for Incompetent Persons Does Not Justify Injury to Those Who Deal With Them In Good Faith.

There is no reason, either in law or in public policy, why the mere fact of incompetence should cause the setting aside of an executed transaction with an innocent grantee. Granted that an incompetent should be given the fullest protection against overreaching—there is no sound reason why, in those cases where the incompetence has not been a factor in the transaction, the transaction should be set aside to the injury of an innocent grantee. The mere fact of incompetence should not entitle a grantor to a more favorable position than a competent person; it should not entitle the incompetent grantor who has made as fair a bargain as could the most skillful and able (one joined in by relatives, as was the case here) to set it aside years after, merely because the land has increased in value.

As pointed out by Judge Story (*Equity Jurisprudence*, 13th Ed. §227):

"The ground upon which Courts of Equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics and otherwise non compotes mentis, is fraud."

Incompetents Are Adequately Protected by Other Means.

It is, of course, a fact that other adequate means are provided in the law for the conservation of the property of incompetent persons. As was said in *Coburn v. Raymond,* 76 Conn. 484:

"The argument under review also forgets the provisions which are made by statute for the protection of the property interests of incapable persons and the prompt redress of their wrongs. It is made easy to put such persons beyond the power of contracting or disposing of their estate, and to provide a competent substitute to secure redress when occasion arises. It may be safely assumed that the friendly or selfish interests of friends or relatives will, in the presence of so simple a recourse, leave few incapable persons possessed of estate free to dissipate it, or, in the event of a wasteful bargain or disposition by one whose power has not been legally restrained, that such interests will prompt speedy action which will lead to an intelligent conservation of the incompetent's interests before delay has witnessed the dissipation of the consideration received, or permitted substantial changes in the status of the bona fide grantee." (p. 490)

Persons Dealing in Good Faith With Incompetents Have An Equal Claim on the Court's Concern.

The proposition stated is, we submit, self-evident. As was said in *Coburn v. Raymond*, 76 Conn. 484:

> "When the case involves an innocent, bona fide grantee, the court has before it two innocent parties between whom it is in duty bound to do equity to the best of its ability. It has no right to shut its ears to the claims of either party * * * if, on the whole case, it would be inequitable to set aside a conveyance, there is no inexorable rule that it must be done because, perchance, the grantor was deficient in mental capacity." (p. 490)

And in *Edwards v. Miller* (1924), 102 Okla. 189, it is said:

> "If the lunatic and his relatives and friends and those upon whom rests the moral or legal duty to protect him in his unfortunate mental condition fail to have his mental incapacity judicially determined so that others may learn of his condition, and the mental condition and appearance of the lunatic is such that he causes even the cautious and prudent individual with whom he deals to believe in good faith that he is a fully competent person, then simple justice demands that innocent third persons be not made to suffer and lose moneys actually paid out by them in good faith in carrying into effect the contracts made by them with such lunatic whose mental condition and actions made him appear to them to be a fully competent individual." (p. 191)

Point II.

EVEN UNDER THE VIEW THAT THE DEED OF AN INCOMPETENT MAY BE SET ASIDE AS AGAINST AN INNOCENT PURCHASER IF STATUS QUO CAN BE RESTORED, CANCELLATION SHOULD NOT BE DECREED BECAUSE STATUS QUO CANNOT BE RESTORED.

We believe that this Court will adopt the rule that we contend for: that the executed deed of an incompetent will not be set aside as against an innocent purchaser. But even under the erroneous view which obtains in some jurisdictions[1] *i.e.* that the deed will be set aside if status quo can be restored, the instruments should not be cancelled, because status quo cannot be restored.

1. What the lower Courts did on Status Quo.

Neither the trial court nor the Supreme Court of Hawaii treated their decisions on this question as findings of fact.

The vital question is, of course, a pure question of law: what is the meaning of the rule that unless status quo can be restored, rescission will not be granted? Once that question of law is answered, no difficulty remains in the present case, the relevant facts being undisputed.

The courts below all reached radically different conclusions on the question:

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1. This view is stated by the Circuit Court of Appeals (R. 1603) as follows:

"The rule as stated means that if the parties can be placed in statu quo, the relief will be granted."

The trial court, in its first opinion, said that status quo was restored merely by returning the cash consideration. (R. 138, 159)

In its first opinion, the Supreme Court of Hawaii, having held that rescission should not be granted unless status quo could be restored and that Waialua's extensive improvements were a vital factor, expressed the opinion that all such matters could be ultimately solved in a partition suit. (R. 297-300) It therefore required merely that the $30,000 cash consideration be restored, or secured by a mortgage. (R. 300, 329)

In its second opinion, the trial court ordered that the cash consideration be returned (by being deducted from the judgment for rentals), and that

> "for the purpose of setting at rest equities of the parties in connection with restoration of status quo," (R. 527)

the grantor should (the decree having made her a cotenant with Waialua), permit Waialua to maintain exclusive possession of its improvements until such time as the property might be partitioned, and, upon partition, should permit Waialua to elect, if it chose, to include the sites of the improvements in its share of the land. (R. 527-532)

In its second opinion, the Supreme Court of Hawaii, after a lengthy consideration of the difficulties encountered in any attempt to restore Waialua to status quo (R. 577, 582, 584), decided to alter its former view, and held that in order to restore Waialua to status quo, Mrs. Christian (immediately after re-

ceiving a deed from Waialua to an undivided one-third in the Holt lands), should convey to Waialua all lands upon which permanent improvements rested, and should also convey to Waialua "permanent rights of way for all ditches, flumes, syphons, pipe lines, railroads, roads, electric power lines, telephone lines and other utilities if any, which have been constructed and are being maintained by the W. A. Co. on the Holt lands" (R. 585-586); and that Waialua should in turn convey to Mrs. Christian, rights of way across the rights of way to be granted by Mrs. Christian to Waialua.

2. The Court Below Has Wholly Misconceived the Rule Concerning Status Quo.

Although the court below declared that status quo should be restored, it held that all that was necessary in this behalf was to return to Waialua the price it paid for the land, plus compensation, on quasi contract principles, for the value to the grantor, "the true owner" (R. 1617), of Waialua's physical improvements. It said, in this connection, that restoring the status quo.

> "* * * does not mean that the court should balance all the equities of the parties, as was done by the trial court." (R. 1600)
>
> "It is no legal hardship on the party dealing with the incompetent if he receives back what he gave in the bargain." (R. 1603)
>
> "* * * the status quo of the company may be and was restored by the decree by setting off the $30,-

> 000 purchase price, which the company paid, together with interest, against the accrued rentals to which the ward was entitled." (R. 1606)

On rehearing the court explained its position on the question of restoring status quo, as follows:

> "We used the term 'status quo' in the sense that it meant restoration of what was received under the contract. * * * We believe that such meaning is correct, because the transaction against which relief is granted consists of two things, that is, each party has delivered money or property to the other. The relief returns to each party what he delivered in the transaction. In case one of the parties has by the addition of improvements increased the value of the thing which he must return, then the court may under certain circumstances, grant an allowance to such party for the increase. In a broad sense, the status quo includes both the consideration received and allowance for improvements. * * * However, we treated status quo as restoration of the consideration, and the allowance for improvements as a separate condition. The result is the same whether they be viewed singly or together." (R. 1635-1636)

Thus the court wholly fails to see that return of the price plus compensation for the value of improvements made innocently on "another's land" (R. 1617), does not even touch the question properly to be considered, namely, can the innocent grantee be restored substantially to the condition in which he was prior to the purchase?

The Court Below Repudiates the Idea That Any Account Should Be Taken of Waialua's Irrevocable Change of Position.

The Supreme Court of Hawaii attempted "an equitable restoration to the status quo" (R. 580) by insuring to the grantee the use of the improvements on the Holt lands, on the theory that this would restore Waialua to status quo with respect to the improvements both on and off the Holt lands, speaking as follows:

> "These provisions * * * are intended to assure the W. A. Co. restoration NOW in this suit, to it of the improvements which it has constructed and is maintaining on the Holt lands as well as the continued use and benefit of those which it has constructed off of the Holt lands." (R. 588)

This obviously does not even approximately restore Waialua to status quo; but even this limited and unsuccessful attempt to save Waialua from the irreparable harm that will result if the instruments are annulled, was flatly repudiated by the court below.

After referring (R. 1616) to this action by the Supreme Court of Hawaii, the court below said that this was incorrect; that in such cases the grantee is entitled only to receive compensation to the extent that the "true owner" of the land is enriched by physical improvements. (R. 1617) In other words, the effect of the decree on the grantee is irrelevant.

The Court Below Did Not Consider the Question Whether Status Quo Can Be Restored.

The court below held that status quo could be restored, because the Supreme Court of Hawaii had so found, "because we cannot say there was clear error, since the evidence was at most only conflicting". (R. 1606) It made no examination of the question itself, but merely accepted the declaration of the Supreme Court of Hawaii, which it treated as a finding of fact, when it was a pure question of law, there being no dispute as to the facts themselves. By thus adopting without discussion or examination the conclusion of the Hawaiian court, the court below not only misapplied the law, but deprived Waialua of the review which it was the right and duty of the court below to give.

And as we have just seen, the court below, having relied on the Supreme Court of Hawaii's declaration that status quo could be restored, repudiated the basis upon which that court had made its declaration.

3. Restoring a Party to Status Quo Means Saving Him Harmless.

We need not labor the proposition that the rule forbidding cancellation of an executed conveyance to blameless grantees does not mean merely that the consideration must be restored (as held below), nor merely that, plus the value of physical structures. It means that such grantees must be substantially "reinstated in the condition in which they were prior to the purchase". (*Yauger v. Skinner*, 14 N. J. Eq. 389.)

Even in cases of rescission for fraud, the same rule is applied, with appropriate exceptions, because inherent in the idea of rescission. (*Neblett v. Macfarland*, 92 U. S. 101.)

And as against defendants who are without fault, the rule is unqualified, that executed transactions will not be set aside unless it can be done without harm to the innocent party against whom the relief is sought.

This for the obvious reason that to grant rescission in such a case would be to do something that equity never does: "a court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent." (*Holly v. Missionary Society*, 180 U. S. 284, 295.)

A fortiori, in cases like this one, where the bargain was fair, and plaintiff has suffered no injury whatever, equity will not annul an executed transaction, where to do so would inflict great and irreparable harm.

A leading case is *Grymes v. Sanders*, 93 U. S. 55, 62, where, in considering whether a conveyance should be rescinded at the suit of the buyer on the ground of a mistake of fact, the court said, speaking of rescission generally,

> "A court of equity is always reluctant to rescind, unless the parties can be put back in statu quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. Here the appellant re-

> ceived the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and cannot conveniently restore it. * * * Times have since changed. There is less demand for such property, and it has fallen largely in market value. Under the circumstances, the loss ought not to be borne by the appellant."

Mr. Pomeroy states the principle thus:

> "In cases of fraud, if the defendant's act has prevented a complete restoration of the status quo, he cannot, in justice, urge this fact as a defense to the rescission; but in other cases, such as mistake, it would seem reasonable that the status quo should be completely restored as a condition of equitable relief." (5 *Pomeroy, Eq. Jurisp.* (4th Ed.) Sec. 2110.)

In *Price v. Berrington*, 3 Mac. & G. 486, the principle is applied in a case much less obvious than the present one. There the court refused to set aside an incompetent's conveyance where,

> "* * * the consideration being fair, there being no notice of insanity and no circumstance of fraud, the estate having also been enjoyed during the twenty-seven years since the conveyance, and made the subject of family arrangements by settlement upon the marriage of the daughter of Moggridge (the grantee), under which her children are entitled to the benefit of certain charges upon the estate. (p. 495) * * *
>
> "The purchaser, having acted bona fide, dealt with the estate believing it to be his own, made

important family arrangements upon that footing, the disturbance of which would, I think, be not only highly inconvenient, but unjust." (p. 497)

In *Watson Coal & Mining Co. v. Casteel,* 68 Ind. 476, where it was sought to cancel a lease of a coal mine on the ground of fraudulent representations that the land contained a vein of coal which was of sufficient extent and thickness to justify more or less extended mining operations, the court refused to set the lease aside on the ground that the parties could not be placed in statu quo, saying (p. 481):

"There are well settled rules governing the rescission of contracts: The party against whom rescission is sought must be in fault; both parties must be placed in statu quo; the party asking rescission must return or tender what he has received under the contract, and rescission must be promptly sought.

"The facts averred do not fill these requisites. Admitting that the mistake alleged against the plaintiff is a fault on his part which might authorize a rescission of the lease, yet it is very clear the parties can not be placed in statu quo. The defendant has mined quantities of coal from the land, and paid certain instalments of the royalty thereon for twenty months, and has changed the condition of the land by his mining operations to such a degree that it has become impossible to return the coal he has mined, or restore the land to the condition it was in when the lease was made."

See discussion in *Snow v. Alley*, 144 Mass. 546.

See also:

Riggan v. Green, 80 N. C. 236;
Gill v. Dingfelder, 224 Mich. 247;
Buckner v. P. & G. E. Ry., 53 Ark. 16;
Rice v. Wilson, 225 Fed. 159.

In *Rickman v. Houck*, 192 Ia. 340, specific performance of a contract to sell real estate was decreed against an incompetent vendor, where the purchaser had changed his position in reliance upon the contract by making other contracts for the purchase of lands adjoining that of the incompetent vendor. The court held that a return of the purchase price did not accomplish restoration to status quo:

> "Ordinarily in a case of this kind, the returning of the cash payment would place the injured party in the condition that existed prior to the making of the contract. Not so in the instant case. It would not compensate them for their inability to carry out their enterprise in which they invested a large amount of money." (p. 349)

In *Dent v. Long* 90 Ala. 172, cancellation of a deed conveying certain lands in Alabama was denied because of the purchaser's change of position, the court holding:

> "Unless the parties can be put in statu quo, which cannot be done when a portion of the property has been disposed of, a court of equity is reluctant to rescind a contract and will do so only when clear and strong equity compels it * * *

in the meantime two railroad companies have acquired right-of-way over the lands and Long has put improvements thereon of value from $15,000. to $20,000. Upon the facts disclosed by the record the objections to the rescission of the contract and cancellation of the conveyance are insuperable." (p. 177)

Again, in *Piedmont Land & Improvement Co. v. Piedmont Foundry & Machine Co.*, 96 Ala. 389, certain property was deeded to defendant for the operation of a factory as a part of a general scheme of improving a town. Defendant agreed to operate the plant for two years, but became heavily indebted after a few months and could not do so. A cancellation of the deed was sought and, in denying rescission, the court said:

"If there has been part performance of the contract, that is, to such an extent that the status quo can not be restored, then no rescission can be claimed." (p. 393) * * *

"* * * the bill does not negative the fact that these benefits did, in fact, accrue to appellant from the construction and operation of appellee's manufacturing establishment. From these facts it is quite manifest that, if a rescission should be decreed by the court, it would not be practicable for the parties to be put in the situation they occupied when the contract was made. What has been said disposes of the bill in so far as it seeks a rescission of the deed." (p. 394)

4. Waialua Cannot be Restored to Status Quo; Therefore, the Challenged Instruments Should not be Cancelled.

The transactions here challenged should not be disturbed since intervening events have made it wholly impossible to restore Waialua to status quo.

The Status Quo Existing at the Time the Deed was Executed (May 2, 1910) Cannot be Restored for the Reason that a Fortuitous Event has Happened Whereby the Interest Conveyed has Ripened into a Fee Simple Title.

A conclusive defense to this whole suit lies in the fact that Waialua cannot be restored to the position it occupied prior to the conveyance. It purchased a contingency at a fair price; now, after the event has happened (the death of Mrs. Christian's father), it is too late to rescind the transaction.

Thus far, we have been discussing this question as though Mrs. Christian conveyed land to Waialua in 1910. She conveyed neither land nor any vested interest in land, but a contingent remainder dependent upon her surviving her father, the life tenant.[1] Had Mrs. Christian not survived her father, we would never have heard of this case, for then the risk that Waialua took (that it might never receive the fee

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1. The contingent nature of the interest was described by the Supreme Court of Hawaii as follows:

> "If she (Mrs. Christian) predeceased him (John D. Holt) the fee simple interest upon his death would vest in his heirs at law then living. In this event the Waialua Company would get nothing by its deed nor would it be able to recover the consideration which it had paid * * * it was not beyond the range of

title) would have turned out greatly to the benefit of Mrs. Christian and her estate. Now that later events have determined that Waialua's contingent interest ripened into a fee simple title by the death of Mrs. Christian's father (twelve years after she executed the deed) she and her relatives seek to rescind the transaction and to obtain, not the contingent interest which she conveyed, but a present vested fee simple title; not a contingent interest in a partially improved property but a vested fee in a highly improved and successful sugar and pineapple plantation.

We have already pointed out that all courts are agreed that in a case of cancellation no relief can be granted unless the grantee can be restored to the status quo.

We have shown that a restoration to status quo does not mean a mere return of the consideration plus an allowance for improvements (as the court below has held), but means that the situation presently before the court must be such that the grantee can be placed in substantially the same position that it occupied before the conveyance was made; otherwise, equity will refuse cancellation. (*Grymes v. Sanders,* 93 U. S. 55, 62.)

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probability that he would adopt children who under the law would also become his heirs. Even, therefore, if Eliza survived him there might be other heirs with whom the fee simple estate would have to be shared. * * * In 1918 John D. Holt did endeavor to adopt the Kentwell children—six in number—and his effort failed solely for the reason that the proceedings were not in accordance with Hawaiian statutes." (R. 304, 305)

A leading case upon this subject is ***Molton v. Camroux,*** 2 Ex. 487, 4 Ex. 17. In that case a lunatic purchased an annuity and died before the insurance company had made any payment under its contract. The lunatic's executors endeavored to avoid the contract on the ground of insanity. The court held that an executed transaction, fairly entered into with the incompetent by a person without notice, was valid and that this rule applied:

> "* * * * especially where the contract is not merely executory, but executed in whole or in part and the parties cannot be restored altogether to their original position." (p. 19)

The insurance company, after entering into the contract and receiving the lump sum deposit, ran the risk that the annuitant might live for many years and it would have been obliged to continue payments under the contract according to its terms. After the fortuitous event happened, *i.e.* the death of the lunatic, it was then too late to avoid the bargain.

The attempt to cancel the conveyance of a contingent interest in property after the fortuitous event has happened is analogous to an attempt to cancel an aleatory contract after the fortuitous event has turned out unfavorably to the person seeking cancellation. In such instances it is well settled that the contract cannot be cancelled. 2 *Restatement of Law of Contracts,* Sec. 486:

"POWER OF AVOIDING AN ALEATORY CONTRACT FOR INNOCENT MISREPRESENTATION.

The power of avoiding an aleatory contract for innocent misrepresentation that does not make the risk of a party induced thereby to enter into the contract seem less than it is, is lost if after the formation of the contract but before manifestation of an intent to exercise the power,

(a) a fortuitous event has already happened on which depends the duty of the party seeking to avoid the contract, or * * *"

"Comment: (a)

* * * In most contracts a restoration of the consideration substantially restores the status that existed before the contract was entered into. This, however, is not always true in case of aleatory contracts. Where the fortuitous event has happened or has become either more or less likely to happen than when the contract was entered into, the status cannot be restored."

It is idle to say that the return of $30,000.00 plus an allowance for improvements, places Waialua in the position it was in prior to the execution of the deed of May 2, 1910. Up to the time of John D. Holt's death in 1922, Waialua held a contingent remainder which might be defeated by the death of Mrs. Christian during her father's lifetime (and the father did live for 12 years after the deed was delivered), or partially defeated by the introduction of additional heirs. The Supreme Court of Hawaii summed up this risk as follows:

> "Even therefore if Eliza survived him, there might be other heirs with whom the fee simple would have to be shared. In this event, Eliza's interest would be correspondingly diminished and what the Waialua Company obtained from her would to the same extent be diminished. In 1918 John D. Holt did endeavor to adopt the Kentwell children—six in number—and his effort failed solely for the reason that the proceedings were not in accordance with Hawaiian statutes." (R. 305)

The effort was not really an effort so much on the part of John D. Holt, as it was on the part of Mr. and Mrs. Kentwell, who executed an adoption agreement with John D. Holt before the American Consul on June 12, 1918 (R. 1360) whereby John D. Holt adopted their children "as his own children with all rights and privileges unto them belonging as if they were the natural children of the said party of the first part, including the right to inherit as his heirs at law" and they (the Kentwells) released all parental control and rights over their children. Fraud would seem to be a kind word to use to characterize this "adoption" but it does illustrate the essentially contingent nature of the interest which Waialua acquired through the deed of 1910.

During the years from 1910 to 1922, Waialua had parted not only with the purchase price, but had also assumed the risk of survivorship and of losing the whole estate, or of having the estate cut down by the adoption of children. Waialua paid $30,000 to Mrs.

Christian not for the estate, but for the possibility of acquiring it.

The advisers of Mrs. Christian (who joined in her deed in 1910) have stood by all these years, and now that fortuitous events have happened, making it more favorable to Mrs. Christian to undo the transaction, they come to a court of equity and seek to repurchase for the same sum of $30,000 (the fair price of her contingent interest) not the contingency which Waialua bought in 1910, but the absolute vested interest which it subsequently acquired.

A contention similar to that advanced here by Mrs. Christian came before Lord Hardwick in the case of *Nichols v. Gould*, 2 Ves., Sr. 422, where there was a life estate followed by an entail to the life tenant's sons. The life tenant was unmarried and had no sons. The owner of the reversion sold it. The life tenant died a month after the sale, so the grantee had the property in fee. The reversioner then sought to set aside the deed. Cancellation was denied.

As this court has said, "cancelling an executed contract is an exertion of the most extraordinary power of a court of equity." (*Atlantic Delaine Co. v. James*, 94 U. S. 207, 214) It is now asked, not only to exercise that extraordinary power, but to do so in direct violation of fundamental principles of equity. We earnestly contend that, independent of every other issue in this cause, assuming Mrs. Christian ever had any right of cancellation (which we deny) that right disappeared upon the happening of the fortuitous event which vested the title in Waialua.

The authorities are agreed that where a contract or executed conveyance, the performance of which or the benefit of which depends upon the happening of a fortuitous event, is subject to an equitable right of rescission, such contract or conveyance cannot be set aside after the fortuitous event has occurred, in the absence of fraud which increases the risk. This principle of equity is simply the application of an ordinary rule of fair dealing.[1]

This principle is illustrated in the case of *Breed v. Judd,* 1 Gray 455. In that case Breed, a minor living in Massachusetts, decided to go to California to try his luck in the gold rush. Lacking funds, he secured the backing of the defendants, promising to pay them one-third of the gold he might discover. Breed went to California and discovered gold, and then endeavored to avoid his bargain on the ground of infancy. He offered to repay Judd the cost of the outfit. The Massachusetts court, in denying rescission, said:

> "The case has been argued as if the gold-dust were the result of the plaintiff's labor alone, whereas it was the result of the union of the labor of the plaintiff and the capital of the defendants.
>
> "The offer of the plaintiff to deduct from the sum to be recovered the amount paid for his outfit and expenses would not place the parties in

1. The Circuit Court of Appeals held that court should not "balance all equities of the parties" (R. 1600); i.e., the deed should be set aside even if it is inequitable to do so.

statu quo. The defendants took the risk of the life, health, and good fortune of the plaintiff. If the enterprise had wholly failed, they would have had no claim upon the plaintiff for remuneration and the capital advanced would have been wholly lost. To make the defendants whole, they must be compensated for the risk assumed, and under all the circumstances of the case the sum advanced was deemed a reasonable consideration for a third part of the proceeds of the plaintiff's labor." (p. 457)

In *Mutual Life Insurance Co. v. Smith,* 184 Fed. 1, the court held an insurance company could not be restored to status quo after it had sold an annuity policy, by the cancellation thereof.

And in *Williams v. Penn Mutual Ins. Co.,* 6 Fed. (2) 322, 323 (affirmed 27 F.(2d) 1), the court held that "* * * Where a defendant has foregone or lost a right to which it cannot be restored on the cancellation of an agreement procured by fraud, a court of equity will not decree cancellation", and refused to cancel a life insurance settlement agreement alleged to have been procured by fraud, because the year during which the insurance company was entitled to contest the policy had expired. and the policy had become incontestable by the insurance company.

Neither the Circuit Court of Appeals nor the Supreme Court of Hawaii discuss the question of status quo upon cancellation of a conveyance of a contingent interest after the contingency had occurred. The Circuit Court of Appeals did not mention the fact that

what Mrs. Christian sold was a contingency and what it decrees Waialua to reconvey is a vested interest. Indeed a cursory reading of the opinion would convey the impression that the deed which it ordered cancelled, was a conveyance of a vested interest in property. Certainly no consideration was given by the court below to this point.

As we have said before, assuming that an equitable right of rescission arose by reason of the incompetence of Mrs. Christian as against an innocent purchaser who paid a fair price, (contrary to the view of the English decisions and the better reasoned American decisions) that equitable right is lost upon the happening of the contingency upon which the estate depended.

The Land has been Incorporated as an Integral Part of the Plantation, it has Greatly Increased in Value, Large Sums have Been Expended on the Land, and Large Sums off the Land. Obviously Status Quo Cannot be Restored.

We now state the essential facts showing how irrevocably Waialua has changed its position in reliance on its title. These improvements are so extensive that it required 99 pages of the decree of the Supreme Court of Hawaii to discribe them. (R. 635-734)

The expenditures of Waialua for the improvement of the Holt lands segregated as to periods may be summarized as follows:

From April 1, 1905 (when lease was made) to May 2, 1910 (when deed was made)	$182,525.07
From May 2, 1910, to April 10, 1922 (when fee vested)	203,513.43
From April 10, 1922, until April 5, 1928 (when deed was first questioned)	244,683.62
Total	$630,722.12

(R. 1507, Ex. S-5)

These expenditures were made by Waialua in the belief that it had acquired by the questioned instruments, the various titles which they purported to convey. Obviously if it had the slightest doubt of their validity it would have made none of these outlays.

Not only were large expenditures made on the Holt lands themselves, but large expenditures were made on other lands for the benefit of the Holt lands. The plantation was developed as a unit, and all plantation improvements were planned and designed as to location and capacity upon the basis that the Holt property was an inseparable part of the whole.

The Wahiawa reservoir was built off the Holt lands, which receive 1/3 of its waters. Without those waters sugar could not be successfully grown on the Holt lands. This dam and reservoir cost:

Dam and spillway	$448,555.94
Ditch	66,039.00
Total	$514,594.94

(R. 1515-1516, Ex. S-5, S-6)

The more important of these improvements off the Holt lands are briefly described by the Supreme Court of Hawaii, as follows:

> "* * * large and costly improvements had been constructed by the W. A. Co., in reliance upon the deed of 1910, on lands other than Holt estate lands. More specifically * * * the reconstruction in 1921 by the W. A. Co. of the Wahiawa dam and the creation thereby of a reservoir extending back into the mountains for a distance of several miles along both the north and the south forks of the Kaukonahua stream and covering about 300 acres, the reconstruction in 1931 costing the company the sum of about $210,000. * * * [Also] the construction of a ditch more than four miles in length to lead the waters from the Wahiawa dam to the cane lands of the W. A. Co., including lands of the Holt estate as well as other lands of the company. Similarly, * * * the establishment of the Poamoho pump by the W. A. Co. on grant 235 belonging to the Holts but with ditches and pipe lines (on non-Holt lands) through which the water raised by the Poamoho pump was forced and carried to cane fields both on and off the Holt lands." (R. 578)

Nature and Extent of Improvements on Holt Lands.

With the exception of the partial use of a plantation railroad, and of some of the roads, which are used to reach the pineapple area, all of the improvements on the Holt lands are used in connection with the cultivation, irrigation and transportation of sugar cane—that is, in connection with sugar and not with pineapples.

As will be seen from Ex. S-3, (attached to this brief) the waterways, railroads, roadways, electric lines etc. honeycomb the entire plantation, like the arteries of a body, and like the arteries of a body all radiate from and into the heart of the plantation: the sugar mill. The Holt properties are part and parcel of the plantation whole, just as the mid section of a human body is a part of that body. No boundary exists between the Holt lands and other plantation lands; the boundary is an imaginary line and the sugar fields, the waterways, the railroads and the other improvements cut across this imaginary boundary as though it were not there.

The improvements on the Holt lands are segregated as follows:

Buildings.

The buildings on the Holt property, built by Waialua, consist principally of the houses necessary to accommodate laborers. There are ten separate groups of laborers' quarters in all, containing a total of eighty-two houses and furnishing accommodations for a total of 205 laborers. (R. 1530 et seq.) A domestic water supply is provided with a comprehensive system of piping. All the water for all of the quarters, save four, is supplied from a common source. Pump No. 3, located off the Holt property on the Bishop Estate lands. (R. 1532)

While these buildings are located upon the Holt lands, the laborers living in them work generally upon the plantation as their services may be required the

camps being located geographically with a view to the most economic use of the laborers for plantation purposes. (R. 1494)

Water Supply.

The sources of the water supply for the cane lands on the Holt lands may be segregated under three headings: (a) Helemano waters; (b) Wahiawa waters; and (c) pump waters. The record shows that the growing of cane on the Holt lands would be impossible if the only water available was that originating on the lands themselves. The cultivation of dry-land cane proved to be a failure, and the cultivation of cane above the Wahiawa ditch extension proved uneconomical. (R. 1243) Nor would the growing of cane on the Holt lands be possible even with the use of the waters originating on and appurtenant to the mountain lands (Bishop lands and Territorial School lands leased to Waialua) supplemented by pumping, for the supply of mountain water is intermittent and not to be depended upon, and the pump water although essential is too costly to be used over long periods. The profitable cultivation of the sugar land on the Holt property is only possible by the use of water from all three sources.

(a) *Helemano Waters.* This term is not used to identify waters originating on the Holt lands, but to indicate waters originating on mountain lands (leased by Waialua for water purposes from the Bishop Estate lands and the Territory), which waters are caught just below the upper boundary of the Holt lands by a

system of ditches and impounded in a system of reservoirs located principally, upon the Holt lands. (R. 1498) From these ditches and reservoirs the waters find their way, depending upon the manner of their dispatch, onto the Holt lands, onto other Waialua lands, or into the Wahiawa extension ditch. The waters which find their way into the Wahiawa extension ditch are mingled with the Wahiawa waters, lose their identity and are used on the Holt lands, the Bishop Estate lands lying north of the Holt lands, and on other plantation land, without distinction as to source. (R. 1499)

Eleven reservoirs, ranging up to a capacity of 148,000,000 gallons, are required in connection with the system. Five siphons, built mostly of steel and cast iron, are required to convey the water across various gulches, some of which are as deep as 250 feet; some of the siphons being as large as 54 inches in diameter. (R. 1543 et seq.) Ditches are required to carry the water from the points of diversion into the reservoirs and from them to the place of use. These ditches are built principally of natural soil, but portions of them are lined with stone and concrete, and flumes are required to carry them over the small ravines. The total length of the main ditches, which are located entirely on Holt lands, is in excess of 89,480 feet, or more than seventeen miles. The minor waterways, permanent in nature, required to carry the water from the main ditches onto the Holt lands, aggregate ten miles in length and cost $29,207.73. Many of these waterways are lined with concrete and stone. The expenditure on

the Holt lands, for reservoirs, ditches and siphons exceeded $110,000.

The reservoirs, ditches and irrigation works are not confined to the Holt sugar lands, but gridiron the entire area, including the area devoted to the growing of pineapples.

(b) *Pump Waters.* The supply of gravity waters, including the Helemano waters and the water from Wahiawa reservoir, proving insufficient, it became necessary to provide additional pump water as a protection against lack of water at critical periods, so it was decided in 1926 to build a large, highlift pump. (R. 1553) As pumps were located on practically all of the streams, with the exception of the Poamoho, it was determined to locate the pump on that stream. Mr. Bischoff was instructed to locate the pump on fee simple land, and with this in view located it on Holt lands (R. 1553), believing that to be fee simple land.

The pump was designed to supply water in two lifts, the higher at a 380′ head and the lower at a 190′ head (R. 1500), the water to be used on Holt lands and on other lands of the plantation; the total area to be irrigated aggregating somewhat over 1,000 acres, of which approximately one-half were Holt lands.

The work of building the pump, wells and appurtenant machinery was commenced after its location was fixed in November, 1926, and was completed in April, 1928, at a total cost of $212,871.67. (R. 1507) The wells, twelve in number, cost $42,860.00. The total pump horse power is 1,050.

The electricity for the pump is supplied from three sources, the Kemoo power plant, located on the Wahiawa ditch, the plantation mill power plant, and the Hawaiian Electric Company, when the supply from the first named sources proves insufficient. (R. 1502).

The main pump, located in a concrete chamber 50 feet below the surface of the ground, is located entirely on the Holt lands, but the main discharge pipes, which are integral parts of the pump, are located partly on Holt lands and partly on other lands. (R. 1554)

Included in the installation is a domestic pump, all of the water of which is used on lands other than Holt lands.

(c) *Wahiawa Reservoir and Ditch.* Without the development of the Wahiawa reservoir water and bringing it to the Holt lands the growing of sugar cane on the Holt lands would be impossible. The continued growing of cane on the Holt area is dependent upon the continued supply of water from the Wahiawa reservoir. The Wahiawa reservoir dam, reservoir and spillway are located entirely off the Holt lands, with the exception of a portion of the reservoir area. Its waters are carried from the dam by a series of tunnels and ditches across the Waialua plantation, through the lands lying south of the Holt lands, northerly through the Holt lands onto the Bishop Estate lands, being used along its entire course for irrigation purposes.

$66,039.13 was spent in the construction of the Wahiawa ditch, which carries the water from the Wahiawa dam onto the Waialua plantation lands. (R. 1516, S-8)

(d) *The Method of Use of Waters.* The testimony shows that the waters from all sources, Helemano, pump and Wahiawa, are used indiscriminately for plantation purposes without distinction as between their place of origin and their place of use. Mr. Bischoff testified as to the manner of use of the water as follows:

> "The general practice is for each section luna (being the man in charge of a certain area of cane land) to estimate the needs of his water for the next day to see what he has on hand of his own supply. To take a specific example: the man at Kawailoa section would probably call up the man at Opaeula and say, 'I need so much water,' in terms of the unit of one-man water; then the man at Opaeula would estimate his needs and his own supply, and add onto it the supply he has to deliver to Kawailoa below. The Opaeula man would call up the man in the Helemano section, where the section luna there will go through the same process and then will get in touch with the man in the Kemoo section. The Kemoo man, having water from only one source (the Wahiawa reservoir) then estimates his own needs and adds on the supply called for from the last section, and consulting with the assistant manager, puts in the order for the supply of water to be turned on the next morning.

"When the Wahiawa reservoir is at a certain level—approximately about half full—there is a limit on the amount of water that can be drawn, and if there is more needed, we go without that water. Then the pumps are started. Every night there is an inventory of all the water on hand made under the supervision of the plantation officials. On that inventory, based upon whether water is available at certain places, the use and amount of water to be used the next day is determined. There is then no discrimination or distinction as between sources of water as to where it is used; all is mingled." (R. 1557 et seq.)

Mr. Bischoff testified that about one-third of the Wahiawa waters were used on Holt estate lands, about one-third on the lands north of the Holt estate lands, and about one-third on the lands lying south. (R. 1504) He further testified that on the Holt lands it would be impossible to tell the source of the water, whether it was Helemano waters or Wahiawa waters; and the same was true as to the Bishop lands. (R. 1502) This shows that the water supply for the plantation has been developed as a unit; that the waters gathered at the upper end of the Holt lands (belonging to Waialua by virtue of its Bishop and Territorial leases) is used not only on Holt lands but other lands; that the Wahiawa water mingles with the Helemano waters and pump waters and its place of use cannot be identified; that it is not only used on Holt lands, but on other lands.

All of the reservoirs shown on Exhibit S-5 (R. 1507) are located on Holt lands, with the exception of

Helemano No. 15 reservoir, which is located partly on the Holt lands and partly off, the water impounded in it coming partly across Holt lands but being used entirely off the Holt lands.

Railroads.

A total of 9.75 miles of railroad has been constructed on the Holt lands. (R. 1533) Of these, approximately 2.75 miles were abandoned in 1923 in connection with the making of the lease to the Hawaiian Pineapple Company. (R. 1535) The railroad crosses the Holt boundary in eight different places, its location making no distinction between Holt lands and other lands, it being placed in the most desirable location, considering the topography. Of the total mileage, somewhat less than a mile in length consists of main plantation railroad, passage over which is necessary in order to reach the Bishop lands lying to the north. The main line and the branch lines are of the same character of construction and a portion of the line is required in connection with the pineapple lease, there being no access between the pineapple area lying north of the Helemano Gulch and that lying south, thus necessitating the carriage of pineapples down to the main line of the Oahu Railway and Land Company over the Waialua Plantation Railroad. (R. 1536)

Roads.

There are twenty miles of roads and one mile of fences on the Holt lands. (R. 1547) The roads through the pineapple property were built by Waialua. All roads including those on the pineapple property cross

and re-cross the Holt boundary at many points without distinction as to ownership.

Electric and Telephone Lines.

There are four and one-half miles of electric power lines located upon the property. (R. 1548) The portion upon the Holt lands constitutes a part of the integrated power transmission system running throughout the entire plantation, the sources of power being the Kemoo Hydro-Electric Plant and the plantation mill plant, supplemented by power from the Hawaiian Electric Company. The electric lines reach all of the camps located on the Holt lands. The telephone lines are equally comprehensive and extend to each of the camps and reservoirs on the Holt lands.

Clearing Lands.

The total direct cost (not including indirect costs) of clearing the cane lands was $47,483.89. It was necessary to expend substantially all of this sum before the work of planting or cultivation could be commenced.

The Increase in Value of the Property is an Additional Reason why the Status Quo Cannot be Restored.

In 1910, Mrs. Christian was paid $30,000, a sum found to be the fair price of her contingent interest in the property. Since that time the property has greatly increased in value. As a result of the skill, energy and improvements by Waialua, and the development of the pineapple industry, the value of the land today greatly exceeds its value in 1910. For the

$30,000 paid by Waialua in 1910 it received a contingent interest in property which the court found was fairly valued at $30,000. Today, 28 years later, Waialua is ordered to reconvey to Mrs. Christian property which her counsel say is "worth millions". The Supreme Court of Hawaii held the fact that the property had greatly increased in value was immaterial. (R. 294)

The Circuit Court of Appeals made no mention of the fact that the property had increased greatly in value. We contend that this fact is an added reason why it would be inequitable to cancel the instruments. Even in cases involving fraud, where there has been a great increase in value, relief in equity will be denied.

Felix v. Patrick, 145 U. S. 317. In this case the defendant obtained title to certain land purchased from an Indian, to whom scrip had been issued pursuant to an Act of Congress. The device resorted to had the effect of impressing a trust in favor of the Indian upon the land. Many years later suit was brought for the recovery of the property which, in the meantime, had increased greatly in value. This Court, however, refused to decree cancellation upon the ground that the relief sought was wholly disproportionate to the wrong:

> "The real question is, whether equity demands that a party, who, 28 years ago, was unlawfully deprived of a certificate of muniment of title of the value of $150 shall now be put in possession of property admitted to be worth over a million

* * * In a court of equity, at least, the punishment should not be disproportionate to the offense, and the very magnitude of the consequences in this case demands of us that we should consider carefully the nature of the wrong done by the defendant in acquiring the title to these lands." (p. 338)

See also:

Wetzel v. Minn. R. R. Transfer Co., 169 U. S. 237;

Grymes v. Sanders, 93 U. S. 55.

If a great increase in value is sufficient to permit a court to deny equitable relief in the case of a fraudulent purchaser, *a fortiori* a court of equity should refuse relief against an innocent purchaser.

cf. 5 Williston op. cit. Section 1594.

Copps v. Clark, 196 Ia. 758, 764:

"It is equally true that a court of equity has power to rescind an executed contract, but it will not do so if the rescission operates inequitably upon an innocent defendant."

The point is illustrated in *Hanner v. Moulton*, 138 U. S. 486, 495; where action was filed to set aside the sale of a land certificate and the court said:

"An interval of nearly thirteen years elapsed between the sale of the certificate and the filing of the bill in this suit. The value of the property has largely increased. Parties interested and witnesses have died, and the memory of those who

> survived has decayed. Not a person who is now interested in any of the land is implicated in the fraud charged in the bill. Under the facts above stated, the plaintiffs have been guilty of such laches that they cannot have any relief in a court of equity."

In *Towart v. Sellars*, 5 Dow (H. L.) 231, it was sought to set aside a deed on the ground of the mental incompetence of the grantor. Action was brought in 1808. The lower court found in favor of the petitioner, but in 1817 the House of Lords reversed the decree, with Lord Eldon and Lord Redesdale giving opinions. As one reason for dismissing the bill, it is stated (p. 246):

> "The length of time too that elapsed from 1784 to 1807 was to be considered. The value of the property might have trebled in that time, and yet Towart was suffered to remain in possession, managing and disposing of it as his own; and the effect of this decision is to impeach all these transactions. If then the consideration was equal to the value of the property in 1784, would it be justice to put an end to the transaction in 1807 or 1808, when the value was so different?"

As this Court said in *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587:

> "No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain, or

rescind it, is allowed in a court of equity." (p. 592)

* * *

"The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit." (p. 593)

Mrs. Christian (and her relatives who joined in the deed, holding her out to the world as competent) has not only stood by while Waialua converted a barren waste into a profitable plantation, but also awaited the happening of the fortuitous event upon which her contingency depended and "not until all the hazard was over" and Waialua's "skill, energy and money" had made the purchase profitable "as any claim or assertion of right in the property made." (*Twin-Lick Oil Co. v. Marbury*, supra.)

The Intervention of Many Active Years Shows of itself that Status Quo Cannot be Restored.

Quite apart from the foregoing matters the fundamental fact is that during the eighteen years that intervened between the delivery of the deed and the commencement of this suit, the grantee was engaged continuously in the development of a large and highly organized and equipped plantation, of which the lands in suit are an inseparable part. It is apparent that countless decisions have been made, countless steps taken once and for all, which would have been very

different except for the grantee's justified belief that the transactions now attacked were unassailable.

Quite apart, therefore, from the central fact of the intricate and inseparable relation which the land in suit has come to have physically to the grantee's other property and affairs, the effect of divesting the grantee's title will be this: that innumerable things that were done wisely and well should have been done differently, or not at all. The grantee will thus be injured in a thousand undiscoverable (but unquestionable) ways in addition to the great and obvious injuries which appear on the face of the physical facts.

Moreover, changes in external conditions have occurred by virtue of which the setting aside of these instruments would effect grave injustice. The land has increased in value, both from the efforts and expenditures of the grantee and from other causes, described by the Supreme Court in general terms as "more profitable development of the sugar industry, a large and more competitive market and the acquisition * * * of the fee simple estate." (R. 294)

The difficult problem of obtaining the great quantities of water necessary in the cultivation of sugar (R. 1457, 1461) was not solved for many years. (R. 1496, 1505, 1507) The development of caterpillar tractors, motor trucks, and many other devices has materially changed the nature of the industry (R. 1386), as has the discovery of new fertilizers (R. 1386-7), and new methods of controlling pests. (R. 1257) And as pointed out by the Supreme Court, in 1906,

"* * * it was not known to any of the parties or to any one else, that pineapples could be successfully or profitably grown on the upper lands of the Holt estate. It was not until about fifteen years later that the W. A. Co. was able to lease the upper lands for pineapple purposes * * *". (R. 559),

i.e., not until 1923. (R. 973)

The fact is, therefore, that the property now sought to be taken from the grantee simply is not the same property as that received by it in 1910. Indeed, taking account of all that has occurred in the interim, it bears almost no resemblance to the property received, either physically or functionally.

In 1910, Mrs. Christian's contingent remainder was a minor part of the raw material which Waialua was in the process of assembling in furtherance of a large and difficult development of a new enterprise; attended with all the uncertainties and risks that confront any such venture.

That interest is now merged into a large going concern. If it is now taken away, with it go the fruits of the grantee's skill, energy, risk and expenditure to which the grantor contributed nothing.

To say, as the court below did, that all that need be done now to restore the status quo is to undo the exchange of title and price in 1910, is, we submit, an absurd result of wholly mechanical reasoning.

5. The 1905 Lease Has Expired. It is Utterly Impossible to Restore Status Quo if it is Cancelled.

The question of the cancellation of the 1905 lease does not arise unless the 1910 deed is cancelled. For the reasons already advanced we believe this Court will agree that the deed should not be disturbed. However, in order that the situation may be presented, we discuss it briefly at this time.

At the first trial the grantor attacked only the 1910 deed. The Supreme Court of Hawaii quite properly pointed out that even though "the deed falls, the Waialua Company had a perfect right to claim that its possession was justified by the lease" (R. 314), and hence no rentals would be due from Waialua until the term of the lease expired on April 1, 1930.

The decree of the Circuit Court of Appeals having directed the cancellation of the 1910 deed, remanded the cause for a trial of the issue of Mrs. Christian's competency on the date of the execution of the lease (March 17, 1905), with directions that in the event she is found incompetent, the lease be cancelled and an accounting had for rentals. This lease (R. 874) was for a term of 25 years from April 1, 1905. It was first sought to be cancelled two years after the term had expired. It is difficult to see how a lease which has already expired can be cancelled and more difficult to see how the *status quo* can be restored. This anomalous result can only be accounted for by the adoption of the "void" rule and the court's refusal to consider the equities of the parties.

The trial court refused to take evidence on the issue of competency of Mrs. Christian in 1905 upon the theory that the findings on the former hearing included that issue. The Supreme Court of Hawaii recognized the error of this, but held that incompetence on the date of the execution of the lease, even if proved, was insufficient to warrant cancellation of the instrument. The reasoning of Chief Justice Perry is unassailable. After detailing the circumstances surrounding the execution of the lease, the number of parties to it, and the fact that the lessors were represented by agents and counsel of integrity and ability, the Chief Justice says:

"If her interest had vested soon after the date of the lease, Eliza had no funds with which to pay the accruing taxes. She, as well as other lessors, were in some danger of losing their title and interests through enforcement of the government's claim for taxes, past and future. We think that Eliza's joinder in the lease was wise and beneficial. It enabled her to secure support and maintenance for herself, as will more clearly appear when the instrument of 1906 is under consideration. If, in February or March of 1905, Eliza (by guardian) had by proper petition applied to a court of equity for leave to join in the lease it seems to us that the court of equity so applied to, upon a showing of all of the surrounding circumstances as they existed and as they have been hereinabove recited, would readily have granted the application; and if this is so how can a court now, after the fact, after the lapse of the full period of the lease, after the performance by the

lessee of all of the requirements of the lease on its part to be performed, with any propriety cancel the lease? To do so would be to hold in effect that there is no such thing as refusing to cancel an instrument which has been executed by a person mentally incompetent. This lease was for an adequate consideration. All of its terms were fair and reasonable to the lessee and to the lessors. It has been fully performed. It was in the best interests of Eliza and beneficial to her,—fully (657) as beneficial as it could have been if it had been secured and entered into under the careful supervision of a court of equity. There was no fraud, actual or constructive. The imbecility of the lessor did not enter into the transaction. Under these circumstances we can see no equity or justice in canceling the lease.

"The only reason which can be suggested as an equity in aid of canceling the lease and the instrument of 1906 is that by doing so Eliza will now be enabled to collect as rents very much larger sums than she was entitled to under the lease. This is not a good reason nor does it constitute an equity, properly so called, in her behalf." (R. 557-559)

"It is not an equity in her favor that she leased the land for less than its rental value of fifteen or more years later. She leased it in 1905 for all that it was then worth on the market. It would be inequitable to the lessee to permit a lessor, sane or insane, subsequently to cancel a lease on the ground of greater values subsequently developed, acquired and ascertained." (R. 559)

"It is our view of the law that a lease made by an incompetent, who has not been judicially de-

cleared insane, to a lessee without knowledge of the incompetency, for an adequate rental and upon other terms that are reasonable and fair, which is beneficial to the incompetent and is in effect a provision in favor of the incompetent for necessaries for his sustenance and comfort,—a lease which has been fully performed and is accompanied by no fraud or other circumstances of inequity to the incompetent,—should not be canceled,—even though the lessee can be restored to the status quo ante." (R. 560)

It would seem that if there was ever a case where cancellation of an executed conveyance should not be decreed, the 1905 lease falls within that classification.

It has been found—

That the lessee had no notice or knowledge of the incompetence;

That the consideration was adequate;

That the lease was highly beneficial to the incompetent;

That the lessor's relatives and other parties in interest joined in the execution of the lease, and that its terms were proposed by the lessors.

In addition—

The 25-year term of the lease expired before suit was brought to cancel it;

The lessee expended approximately $45,000 in clearing the wild and uncultivated waste, before the first crop could be planted, and had to wait

two years before the first crop could be gathered from one-half of the land.

The lessee expended $182,525.07 in improvements before the 1910 deed was delivered, and $457,073.70[1] thereafter, a grand total of $639,598.77.

What is being sought here is not the cancellation of the 1905 lease, but the cancellation of the lease in so far as Mrs. Christian's interest is concerned, so that from the date of the death of her father, April 10, 1922, until the date of the expiration of the lease on April 1, 1930, she can obtain the rental value of the land in its improved condition, and at its enhanced value, instead of the rental stipulated in the lease.

Mrs. Christian was not the sole party to the lease. She was one of fourteen, and her interest was as to a 1/3 contingent remainder. What she seeks to do here is to retain for her benefit, all the advantages which accrued to her from the existence of the lease during the first 17 years of its 25-year term: and then to repudiate it for its last 8 years so she may secure a higher rental. As the Supreme Court said "Under these circumstances we can see no equity or justice in cancelling the lease." (R. 558)

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1. It is not contended that these were made in reliance on the lease. Those prior to May 2, 1910, were: those thereafter were in reliance on all the interests and titles which Waialua at the time believed it had.

A decree cancelling the lease as to Mrs. Christian would not cancel the 25-year lease; it would merely substitute (as to her interest only) a 17-year lease for a 25-year lease—one which the parties did not make and which the testimony shows, Waialua would have refused to enter into. (R. 1485).

In *Goin v. Cincinnati Realty Co.*, 200 Fed. 252, 254, a minor whose interests in certain real estate were leased for 99 years under authority of court, which lease had an option to purchase at the end of the time upon coming of age, filed a bill in equity to cancel the option provision in the lease,—in other words, to do equity by halves. The court denied relief, saying:

> "Complainant did not in this case attack the lease as an entirety. She only asked to have cut off from it that feature which she considered undesirable. * * * We see no way in which these (the lease and the option) can be considered as two contracts not interdependent. Each part is naturally a consideration for the other part. There is not room to conclude that the lessee would have agreed to pay the stipulated rent unless he had been given the option to purchase. This option is not an after-thought thrown in to make good measure after the bargain was made. It formed one of the mutual conditions negotiated before the application was made to the court. Under familiar rules complainant cannot be heard to attack one part only of an entire contract * * * nor be allowed to ratify in part only so as to get the benefits and avoid the burdens."

6. The 1906 Contract Should not be Cancelled.

If this Court, as we believe it will, refuses to cancel the 1910 deed, the question of the 1906 contract need not be considered. If the 1905 lease is not cancelled, the 1906 contract is only important because by virtue of its ownership, Waialua will not be required to pay the $3,000 annual rent, reserved to Mrs. Christian under the lease.

Having decreed the cancellation of the 1910 deed the Circuit Court of Appeals decreed the cancellation of the 1906 contract, if, on remand, it should be found that Mrs. Christian was incompetent when she executed it. No discussion is had as to the equities surrounding the execution of the agreement, and no attempt is made to restore *status quo*.

The reasons supporting the denial of cancellation of this contract are so fully developed by the Supreme Court in its opinion (R. 572-577) that we will not deal with them at length. That court's discussion shows (1) the agreement was beneficial to Mrs. Christian; (2) Mrs. Christian has been supported under it since 1906, during the first 16 years of which time (up until the death of J. D. Holt, her father), it was uncertain whether anything would ever be received under it by the other party. It is obvious not only that *status quo* cannot be restored, but that it would be highly inequitable and unjust to cancel the instrument,—for under it Mrs. Christian was provided support for 16 years, and it secures her support for the remainder of her life—a thing which in equity is of infinitely more importance than providing additional income for her relatives.

Point III.

THE GRANTOR'S ATTEMPT TO SUSTAIN THE ERRONEOUS DECREE OF THE CIRCUIT COURT OF APPEALS CANCELLING THE 1910 DEED, (ON GROUNDS OTHER THAN THOSE STATED BY THAT COURT) IS WITHOUT MERIT.

In an attempt to sustain the decree of the Circuit Court of Appeals, upon grounds other than those upon which that court based its decision, the grantor's counsel in their brief in opposition to our petition for a writ of certiorari, advance two contentions: (1) that Waialua had notice of the incompetence; (2) that the price was not adequate and Mrs. Christian did not receive it.

We shall deal but briefly with these for they directly challenge the findings of the Supreme Court of Hawaii on the question of notice and adequacy of consideration, and the suggestion that the consideration was not received by Mrs. Christian is negatived by the findings as well as the rulings of the trial court.

This attempt, it should be noted, is confined solely to that portion of the decree which cancelled the 1910 deed. The findings with respect to the 1905 lease are not challenged. The findings of the Supreme Court of Hawaii, as to the lease, as summarized by the Circuit Court of Appeals, were:

> "It found that the company had no knowledge of the incompetency; that the consideration for the lease was adequate; that the bargain was fair and reasonable; that 'there was no fraud, actual or constructive.'" (R. 1608)

1. Waialua Had No Notice of the Incompetence.

It would seem that this question has long since been settled, and that the attempt to claim, on technical grounds, that Waialua had notice when all of the courts have found to the contrary, does not merit extended answer. If there was ever any question on the subject, it was conclusively set at rest by the findings of the lower courts. Certainly if the lower courts had any doubt on the question of notice, they would not have devoted hundreds of pages to opinions on legal questions, that would not even have arisen if Waialua had notice.

The courts below all found that Waialua did not have notice.

The Circuit Court of Appeals said:

> "Both courts found * * * that the company had no notice of the incompetency." (R. 1605)

and quoted the following from the opinion of the Supreme Court of Hawaii:

> "When the W. A. Co. received the deed of Annie Kentwell, of May 2, 1910, it did so, as we have already held, without knowledge of the incompetency of Eliza." (R. 1605)

On the first appeal, the Supreme Court of Hawaii found that Waialua had no notice. (R. 275-276) On the second appeal, that court said:

> "In the case at bar, as already held, while Eliza was an imbecile and mentally incompetent the W. A. Co. had no knowledge of that incompetency at the time that it dealt with her in 1910." (R. 555)

On remand, the trial court interpreted its own earlier decision and that of the Supreme Court of Hawaii as finding that Waialua had no notice and ruled that the issue of notice was no longer before the court, but was foreclosed against the grantor and that the trial would proceed upon the basis that Waialua "acted in ignorance of the actual fact". (R. 1479) Counsel for the grantor made no objection to this ruling, and the trial went forward on that basis.

Notwithstanding these clear and conclusive findings that Waialua had no notice, counsel for the grantor now attempt to charge it with notice by resort to technical arguments.

First it is suggested that the burden was on Waialua to prove lack of notice, and that it failed to do so, and that there is no evidence in the record to sustain the courts' findings. There are many answers to this attempt to challenge the uniform findings of all the lower courts. The weight of authority is that the burden of proving notice is upon the party seeking to avoid the conveyance.[1] In the trial court petitioner not only alleged notice, (R. 87) but assumed the burden of proof, and the trial was had on this basis, thus fore-

1. *Schaps vs. Lehner*, 54 Minn. 208;
Goldberg vs. McCord, 251 N. Y. 28;
In Pfeil's Estate, 287 Pa. 21;
Goldberg vs. West End Homestead Co., 78 N. J. L. 70;
Langdell, A Summary of Equity Pleadings (2d Ed. p. 212).

closing petitioner from urging that the burden was on Waialua.[2]

Finally there is a wealth of evidence, sustaining the finding that Waialua had no notice. Notwithstanding the difficulty of proving a negative twenty years after the event, when all Waialua's representatives were either dead or permanently incapacitated from testifying; the actions of Waialua, at and after the delivery of the deed, the large expenditures which it made upon the faith of the integrity of that instrument, and a thousand other facts and circumstances are so inconsistent with the thought that Waialua had any suspicion of Mrs. Christian's incompetence, that they furnish abundant evidence sustaining the findings of lack of notice.

Second, in the face of the findings below that Waialua had no notice, counsel now ask this Court to find the contrary, contending that Holt had notice and was Waialua's agent. The evidence shows clearly that Holt was not Waialua's agent. None of the courts below held that he was Waialua's agent, and although this contention was strenuously urged upon the Circuit Court of Appeals, it adopted the findings of lack of notice made by the lower courts, thus failing to follow or adopt the grantor's contention. The contention was not even advanced in the Supreme Court of Hawaii. On the contrary, counsel there urged that Holt was Kentwell's agent.

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2. 22 *C. J.* 70; 3 *C. J.* 736; 4 *C. J.* 715;
Spokane Interstate Fair Assn. vs. Fidelity and Deposit Co. of Maryland, 15 F.(2d) 48.

The single transaction in which it is argued that Holt's agency began and ended, was one in which his interests and those of Waialua were wholly adverse, and avowedly so. Waialua refused to buy his interest so long as it was subject to Mrs. Christian's contingent remainder. His acquisition of that contingent remainder was understood by all concerned to be a part and parcel of his offer to Waialua of a two-thirds interest.

Holt dealt with Waialua throughout at arms length. He wanted to sell his share to Waialua, and he knew he could not do this unless he first acquired Mrs. Christian's interest. (R. 1018) Above everything, he wished nothing to interfere with the sale of his own interest. This was recognized by the trial court when it found: "James L. Holt, Lawrence Kentwell, his wife, and John Dominis Holt did everything in their power to represent to the Waialua Company that Eliza was a competent and willing seller, who wished to join in their attempts to sell out." (R. 133)

The suggestion that counsel for Waialua stipulated that Holt was its agent, is without foundation, as a reference to the record will demonstrate. (R. 1061) All counsel did, in an endeavor to facilitate the trial, was to agree that the numerous subsequent conveyances did not put Waialua in any superior position.

But even if Holt had been Waialua's agent (which we deny) his uncommunicated knowledge or opinion concerning the grantor's competence would not be imputable to Waialua.

Whatever knowledge Holt had of Mrs. Christian's incompetence was acquired years before his negotiations with Waialua. Mrs. Christian left Hawaii in 1906, and there is no suggestion that Holt ever saw her again. (R. 146)

All courts agree that such knowledge, acquired by an agent long before the agency was created, will not be imputed to the principal unless it is clearly shown that at the time he acted for his principal the knowledge to be imputed was actively present in his mind; present in such form that he must have been aware that it was significant to the subject matter of the agency, and that it was his duty to communicate it to his principal.[1]

This rule is obviously sound. There is no basis for imputing an agent's prior knowledge to his principal unless it can be said that he was aware of it in a manner and degree that made it his duty to communicate it to his principal.

All of the circumstances lead to the conclusion that Holt did not believe in 1910 that Mrs. Christian was incompetent to dispose of her interest. He had, for years, been trying to buy her interest himself. When he purchased her interest in 1910, he conveyed it to Waialua by a warranty deed.[2] Holt was on friendly

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1. 2 *Mechem on Agency*, (2d Ed.) Sec. 1809;
Constant vs. University, 111 N. Y. 604;
Equitable Securities Co. vs. Sheppard, 78 Miss. 217;
The Distilled Spirits, 11 Wall. 356, 366.

2. Although Holt was insolvent at the time of the trial, he was not so in 1910.

terms with Mrs. Christian and her family group, and her interest had been for sale for years. (R. 1018) Certainly if he had had any real doubt as to her competency he would have arranged for the appointment of a guardian for Mrs. Christian.

Holt testified for the defense on the annulment trial resisting the claim that Mrs. Christian was incompetent (R. 1026) and at the trial of this cause he refused to deny that he had not testified in the annulment proceedings in 1906 that Mrs. Christian "was a bright girl."

Although the trial court found that Holt had knowledge of the incompetence, it is pretty clear that the court found this to be mere constructive knowledge, rather than actual knowledge or belief, for it said: "Lawrence Kentwell and James Lawrence Holt did know the facts which would be notice of this mental incompetency." (R. 158)

It is of course obvious that mere constructive knowledge of the agent acquired before the agency was created is not imputed to the principal: this because the agent could not possibly be conscious of a duty to communicate constructive knowledge (*New England Trust Co. v. Farr*, 57 F.(2d) 103, 110).

Nor is guilty knowledge of an agent ever imputed to an innocent principal who like Waialua cannot be restored to status quo. The rule is stated in the *Restatement of the Law of Agency*, as follows:

"§263. Unless he has changed his position, a principal whose agent has fraudulently acquired property for him, holds it subject to the interests of the defrauded person."

"§274. The knowledge of an agent who acquires property for his principal affects the interests of his principal in the subject-matter to the same extent as if the principal had acquired it with the same knowledge, except where . . . a change in conditions makes it inequitable thus to affect the principal."

Finally, it is appropriate to recall that the whole doctrine of imputed notice "is a dangerous one" (*Allen v. Seckham,* 11 Ch. D. 790); that it "must not be carried to such an extent as to defeat honest purchasers", a limit that has sometimes "been lost sight of" (*Bailey v. Barnes* (1894), 1 Ch. 25).

As stated by Pomeroy:

"The rule of constructive notice through agent to principal, like the doctrine of constructive notice in general, must find its ultimate foundation and only support in motives of policy and expediency. * * * As the doctrine is thus based entirely on motives of policy, it should never in its application transcend the scope and limits of those motives. Whenever its operation in a given state of facts would produce manifest injustice, the courts should, if not absolutely compelled by express authority, withhold such operation. A tendency to restrict the doctrine—to confine it within the limits already established—is clearly exhibited by many of the recent decisions." (1 *Pomeroy's Equity Jurisprudence* (4th ed.) §676.)

And see:

Wittenbrock v. Parker, 102 Cal. 93; 103;
Trentor v. Pothen, 46 Minn. 298;
U. S. v. Detroit Lumber Co., 200 U. S. 321.

2. The Price Paid Was Adequate, and Mrs. Christian Received It.

The Supreme Court of Hawaii, where the question had been extensively briefed and argued, held that the price paid by Waialua was adequate. Although this finding was challenged by counsel for the grantor in the Circuit Court of Appeals, it was not disturbed by that court, which considered and disposed of the case on the basis of the Supreme Court of Hawaii's finding.

The Supreme Court of Hawaii discussed this question at length, and the grounds which it gives in support of its finding are so compelling, that we do not believe the point merits further argument other than to quote from the opinion of that court:

> "Another reason assigned for the cancellation of the deed is that the consideration was inadequate. We cannot agree with this. At the time the deed was signed Eliza's interest was entirely contingent. Whether it ever ripened into an absolute interest depended on her survivorship of her father who was the life tenant. If she predeceased him the fee simple interest upon his death would vest in his heirs at law then living. In this event the Waialua Company would get nothing by its deed nor would it be able to recover the consideration which it had paid. * * * At the time the deed was signed Eliza's father was seventy-one years of age, and while it was unlikely that she would

marry and beget other children, it was not beyond the range of probability that he would adopt children who under the law would also become his heirs. Even, therefore, if Eliza survived him there might be other heirs with whom the fee simple estate would have to be shared. In this event Eliza's interest would be correspondingly diminished, and what the Waialua Company obtained from her would to the same extent be diminished. In 1918 John D. Holt did endeavor to adopt the Kentwell children—six in number—and his effort failed solely for the reason that the proceedings were not in accordance with Hawaiian statutes. (R. 304)

"While the Waialua Company was negotiating for the purchase of Eliza's interest, L. L. McCandless, a man of large financial means and an experienced dealer in agricultural lands in this community, was also endeavoring to purchase it. It is inferable from the evidence that he knew of the Waialua Company's activities and also knew what it had offered. Notwithstanding this he offered the same amount and at no time was his offer increased. This is a strong indication that McCandless considered $30,000 to be all Eliza's interest was then worth. It appears from the testimony of James L. Holt that as far back as 1908 Lawrence Kentwell was trying to dispose of Eliza's interest and there is no evidence that at any time more than $30,000 was offered for it. Prior sales of undivided interests in these same Holt lands tend to show a market value of not exceeding $30,000 for a one-third contingent interest. (R. 305)"

The suggestion was also made that Waialua's conduct was not equitable, because James L. Holt, so it is claimed, received a secret profit. Any support that might be found for this contention disappears in the light of the finding of the Supreme Court of Hawaii that the consideration paid Mrs. Christian for her contingent interest was adequate. The suggestion is also dissipated by the fact that upon the basis of valuation fixed by the Supreme Court, James L. Holt received no more than his fair proportion of the total purchase price of $120,000.

That the parties dealt on this basis is shown by the letter of Colburn dated April 12, 1910 (R. 923), wherein Holt's interests, without Mrs. Christian's interest, were offered for exactly the same price that Holt received after he had, by purchasing Mrs. Christian's interest, combined it with his own. In other words, Holt, by acquiring Mrs. Christian's interest and selling it to Waialua, together with his own, received no greater price for his own interests than the price at which he had been offering his own interests separately. The only possible advantage which accrued to Holt through the acquisition of Mrs. Christian's interest was that it permitted him to sell his own interests to Waialua, as Waialua had always refused to purchase less than the entire two-thirds. (R. 1018)

Mrs. Christian Received the Consideration.

The final suggestion of the grantor's counsel, offered in support of the decree of the Circuit Court of Ap-

peals (but not mentioned by it) is that Mrs. Christian did not receive the $30,000 which Waialua paid.

In the first place there is no question but that $30,000 was paid for Mrs. Christian's interest. The intimation is that, although paid, it was not received or retained by Mrs. Christian personally, but was received and retained by Lawrence Kentwell, who acted as her attorney and agent.

Notwithstanding the inherent difficulty of proving the fact, some twenty years after the event, and after Waialua's agent, Mr. Withington, who made the payment, and Mr. Westacott, the American Consul before whom the deed was signed and payment made, had died, the evidence is abundant that the money was paid to Mrs. Christian.

The deed itself, executed by Mrs. Christian, acknowledges the receipt of the consideration by her. (R. 27) This, without more, is proof of payment (13 C. J. p. 760).

The reputation of Mr. Withington, both as to integrity and professional attainments, is unquestioned. (R. 276) That he was meticulous in his attention to detail is demonstrated by his cables and letters, which were contemporaneous with the transaction.

In his letter to Professor John Chipman Gray (R. 928) Mr. Withington states that it is proposed to purchase Mrs. Christian's interest for $30,000. The cable of April 28, 1910 to Mr. Withington authorized him to pay Mrs. Christian $30,000 (R. 940) and upon his

return to America, he reported by letter to his law firm that he had "paid Eliza Holt Christian $30,000 at 4.88½, £6141.5" (R. 940), and he enclosed with his letter reporting the transaction the memorandum of The Canadian Bank of Commerce, London, which was the bank issuing the drafts to the grantors, which memorandum read:

"$30000@488½=£6141— 5- 0
5000@ do =£1023—10-10
Cash . 45— 4- 2
£7210

Also with the letter was an undated slip of The Canadian Bank of Commerce, London, with the following in longhand 'Mrs. Annie Holt Kentwell 5,000, Mrs. Eliza R. P. Christian 30,000.'" (R. 947)

This evidence is corroborated by the deposition of Annie Kentwell, who says that payment was by "check" (R. 1178). The memoranda quoted above, as well as almost universal business practice, call for the conclusion that the draft named Mrs. Christian as payee. Unless her indorsement was forged (which is not suggested), discharge of the instrument was payment to her.

Upon this state of the record the trial court found:

"14. That Waialua Company did pay $30,000 in cash on May 2, 1910 to those who then had and continued to have charge of petitioner and the responsibility for maintenance of petitioner and who continued to maintain petitioner.

"15. That the persons who would have knowledge of the uses made of said moneys and the benefit, if any derived by petitioner, are the persons who are substantially discredited in this court as witnesses.

"16. That it would be inequitable to require respondent Waialua Company to show from such witnesses what actually became of the money and its benefits." (R. 159)

While it is true that the Supreme Court of Hawaii (R. 301) discusses this question and concludes by inference that Mrs. Christian did not receive the payment, it seems clear that what the court really questions is whether, after the purchase price was paid, Mrs. Christian retained it: not the receipt of the money but its application. The only evidence on this question is Annie Kentwell's testimony that Mrs. Christian had no bank account and that "so far as my knowledge goes," Mrs. Christian "had no sum of money since the execution of the document" (R. 1179). But this, obviously, is perfectly consistent with the money's having been used or invested for her benefit; and fraud or theft will not be presumed.

We submit that the conclusions and reasoning of the trial court are eminently sound, and that not only does the evidence show the payment to Mrs. Christian, but that it would be highly inequitable to require any higher standard of proof as to this transaction of more than 20 years ago or require Waialua not only to prove the payment but to prove what became of the

money after it was paid. This is further confirmed by the fact that during the course of the trial, when the question of introducing additional evidence as to what had become of the money after it was paid was raised, the trial judge excluded such evidence, ruling that it was immaterial "as to just which one of the group received the money at the time it was paid". (R. 1344)

CONCLUSION

We are dealing here with a question which affects the security of every title to land in Hawaii. It is contended that an inexorable rule of the federal courts makes transactions entered into by an innocent party with an incompetent void, and this by the mechanical application of a metaphysical rule. We have shown that the rule of law which found expression in the decree appealed from is supported by neither nor equity. In this field of the law, certainty and security of transactions are essential;

> "Such rules may be and ought to be of general and absolute application." (*Pound, Law & Morals,* p. 71)

Here, as nowhere else, the law must display a conspicious measure of "certainty and order". (*Cardozo, The Growth of the Law,* p. 82), and should subordinate "the equity of a particular situation to the overmastering need of certainty in the transactions of commercial life". (*Cardozo,* op. cit. 110)

It is submitted that the decree appealed from should be reversed and that the cause be remanded with directions to dismiss the bill.

Respectfully submitted,

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ROBERTSON, CASTLE AND ANTHONY,
BROBECK, PHLEGER & HARRISON,
EVAN HAYNES,
Of Counsel.

Dated, San Francisco, California,
September 14, 1938.

MAP OF

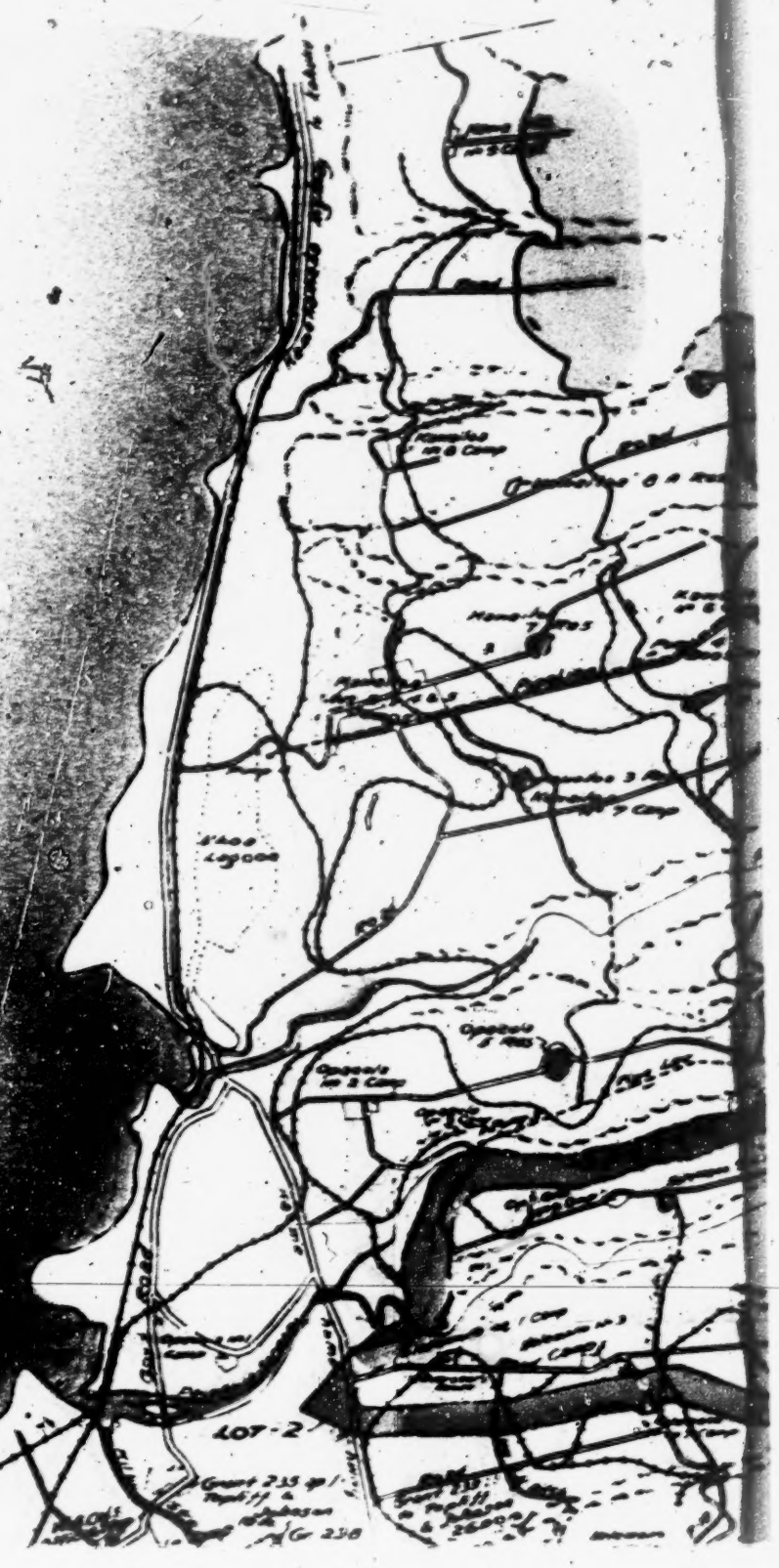
WAIALUA AGRICULTURAL CO., LTD. PLANTATION

WAIALUA, OAHU. T.H.

Feb. 1. 1932.

Scale : 1 inch = 2500 ft.

Compiled and reduced from map of W.A.Co.Ltd. Plantation dated 1902
Scale 1" = 1000 J.G.Duarte - Surveyor
By C.H. Bischoff - Surveyor, W.A.Co.Ltd.




Richmond, Fredericksburg & Potomac R.R. Co.
Richmond, Fredericksburg & Potomac R.R. Co.
Richmond, Fredericksburg & Potomac R.R. Co.

R.P. 4475, L.C.A. 7713, Ap. 33 to Victoria Kamamalu

E 2915 —

Mar 4/32

FILED Oct 1, 1932

PAUL P. O'BRIEN
CLERK

R. P. 4475 L.C.A 7713 ~ Portion Ap. 34
To Victoria Kamamalu
B.P. Bishop Estate

TRUE NORTH
SCALE 1" = 2500

Territory of Hawaii
School Land

Kamaiba Forest

Kamaiba Intake

Ditch

Kawaiki Intake

Kawaiki Ditch

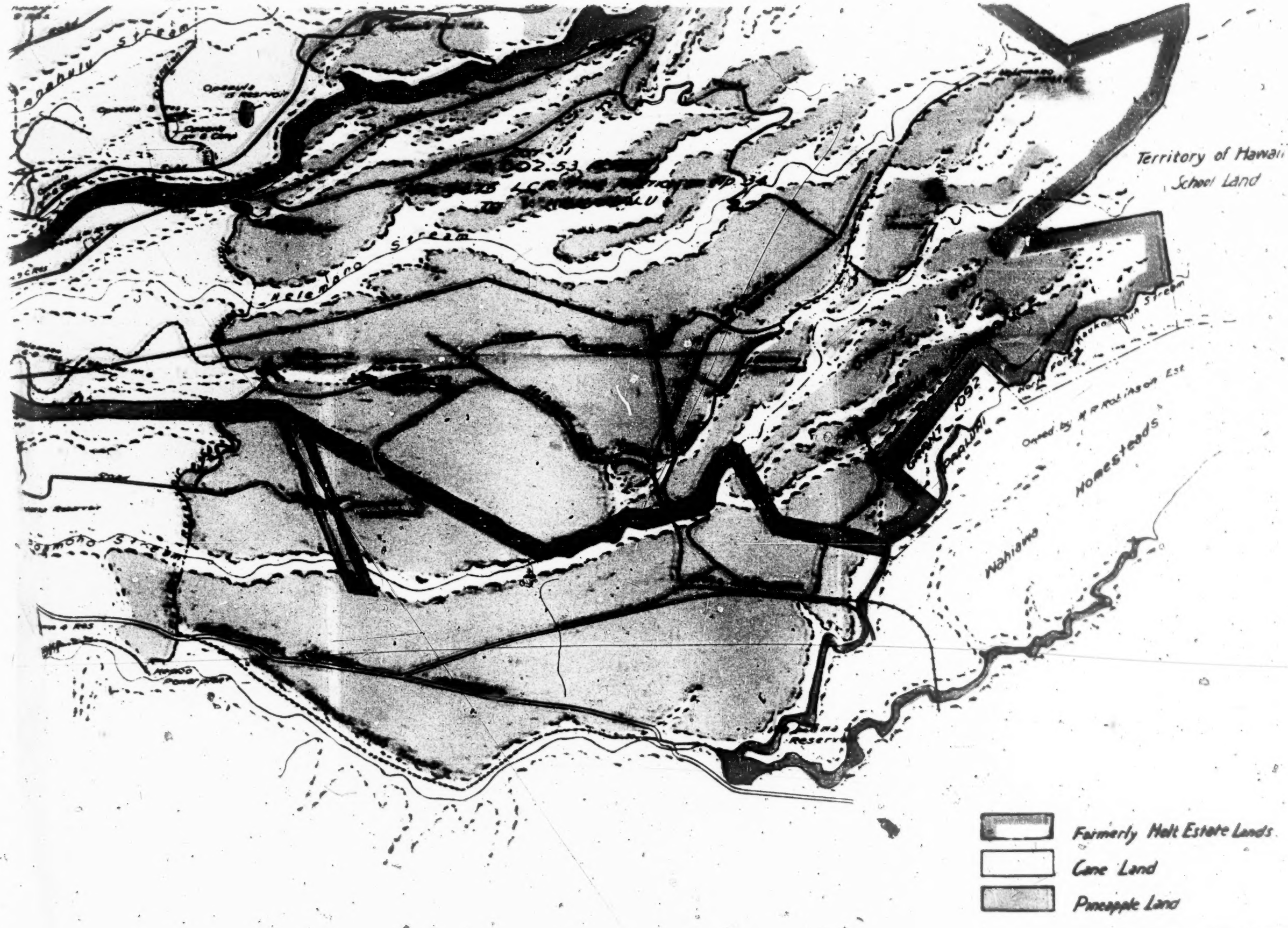
Arabian Stream

Opaeula Reservoir

602.53

Waiakoa Stream

Waiakoa Stream


Territory of Hawaii
School Land
Owned by H P Robinson Est
Homesteads
Nahiawa
Formerly Halt Estate Lands
Cane Land
Pineapple Land

Due service and receipt of a copy of the within is hereby admitted this.....day of September, 1938.

.....

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.....

Attorneys for Respondents.

FILE COPY

In the Supreme Court of the United States

Supreme Court, U. S.
FILED
OCT 5 1938
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1938.

WAIALUA AGRICULTURAL COMPANY, LIMITED, *Petitioner,* vs. ELIZA R. P. CHRISTIAN, et al., *Respondent.*	No. 15
ELIZA R. P. CHRISTIAN, et al., *Petitioner,* vs. WAIALUA AGRICULTURAL COMPANY, LIMITED, *Respondent.*	No. 17

Reply Brief of Waialua Agricultural Company, Ltd.

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In the Supreme Court of the United States

OCTOBER TERM, 1938.

WAIALUA AGRICULTURAL COMPANY, LIMITED, *Petitioner,* vs. ELIZA R. P. CHRISTIAN, et al., *Respondent.*	No. 15
ELIZA R. P. CHRISTIAN, et al., *Petitioner,* vs. WAIALUA AGRICULTURAL COMPANY, LIMITED, *Respondent.*	No. 17

Reply Brief of Waialua Agricultural Company, Ltd.

The opening brief of Mrs. Christian is entitled in No. 15 and No. 17. We assume, therefore, that it is intended to be considered in both of those proceedings. We also assume, and request, that all our briefs be considered in both proceedings.

(Emphasis is supplied unless otherwise noted.)

Ostensibly the grantor's argument is directed to the errors urged in the cross-petition, i.e., that the Circuit Court of Appeals erred (a) in requiring a return of the purchase price; and (b) in remanding the cause for a trial on the issue of Mrs. Christian's competence in 1905 and 1906 when the lease and contract were made. In fact, however, the main burden of the argument is an attempt to sustain the decree below cancelling the deed of 1910, upon grounds other than those upon which the court placed it—grounds which that court, despite the strenuous insistence of counsel, did not adopt, and indeed rejected.

The only arguments made in support of the decree with respect to the lease of 1905 are a reiteration of the argument that an incompetent's conveyance is void, plus an argument (in the face of the express findings to the contrary made by all three courts below), that Waialua did not prove lack of knowledge of the incompetence.

The Circuit Court of Appeals Rejected the Contentions now urged by the Grantor as to the deed of 1910.

The Circuit Court of Appeals disposed of this cause by first determining the applicable law to be (a) that the deed of an incompetent is void; and (b) that it will be set aside as against an innocent purchaser upon restoration to status quo, which it defined as a restoration of the consideration plus an allowance for improvements. Having determined the applicable law, it then applied the law to the facts.

The court said, speaking of the deed of 1910:

> "Both courts found that appellant was incompetent to execute the deed; that the company had no notice of the incompetency; that the company could be placed in statu quo; and that appellant was not guilty of laches. These conclusions were reached after careful consideration of the evidence. Exhaustive opinions were written considering the evidence. We accept them because we can not say there was clear error, since the evidence at most was only conflicting." (R. 1605)

The court thus specifically accepted the findings of both lower courts that Waialua had no notice of the incompetence and reached its decision by applying its view of the law to the facts as found. The court thus rejected in toto the contention of counsel that Waialua had notice, and held directly to the contrary. Nor did it accept or follow the arguments of the grantor's counsel which are here urged (a) that the consideration was inadequate, and (b) that Mrs. Christian did not receive it.

Indeed, when Waialua filed its petition for rehearing in the Circuit Court of Appeals, counsel for the grantor filed a reply again urging these contentions. The court, in denying the petition, said:

> "Fourth. Appellant (Mrs. Christian's guardian) has filed a reply to the petition stating he is contented with the decision as made, but that if a rehearing is granted, his contention that the company had notice of the ward's incompetency should be first considered. Our opinion was reached on the assumption that the company did

not have such notice. We treated it in that manner because both the court below and the trial court required restoration of the amount paid. This could not have been done under any theory of the law other than that the company did not have notice. Thus, both have made an implied finding that the company did not have notice. We cannot say that 'it is clear that their conclusion was erroneous'." (R. 1637)

It is clear from this statement that the Circuit Court of Appeals not only assumed that Waialua had no notice, but gave the question consideration, and affirmatively rejected the argument that Waialua did have notice.

The Supreme Court of Hawaii had made specific findings[1] on the question of notice, and it is evident that the term "notice" as used in the opinion of the Circuit Court of Appeals, was employed, not merely in the sense of "knowledge" but in the sense of "bona fides" as the term is customarily used in discussing questions of a bona fide purchase, i.e., not only lack of knowledge, but adequate consideration and good faith.[2]

---

1. The Supreme Court of Hawaii said:

"In the case at bar, as already held, while Eliza was an imbecile and mentally incompetent, the W. A. Co. had no knowledge of that incompetency at the time that it dealt with her in 1910" (R. 555) and

"When the W. A. Co. received the deed of Annie Kentwell of May 2, 1910, it did so as we have already held without knowledge of the incompetence of Eliza (R. 575)."

2. As to "notice" in equity, see 34 Harv. L. Rev. 137; also Ames "Lectures on Legal History", p. 254 et seq.

It is important to observe that all three courts below believed, and expressly held, that, if Waialua took with knowledge of the incompetence, return of the consideration and restoration to status quo were unnecessary (R. 136-7, 274, 292-3, 1600, 1637). And all three courts required restoration of the consideration, and attempted to restore Waialua to status quo.

It is fair, therefore, to say that these arguments which counsel is urging "with all the earnestness at our command" were not only not accepted by the Circuit Court of Appeals, but were rejected by it as well. And they were also urged before all of the lower courts, which in every instance decreed the return of the purchase price, and held, either directly or by necessary implication, that Waialua had no notice. It seems absurd to suggest that courts would have devoted hundreds of pages to the discussion of controversial legal questions, when the entire case could have been disposed of by a simple finding of fact.

This would seem to dispose of the question, and we submit that the issues for consideration by this Court, are the errors of law of the Circuit Court of Appeals. We contend that their correct determination will entirely dispose of this cause.

Counsel in attempting to escape the effect of these rulings suggest that "It was not necessary for any of the three courts to find that Waialua had knowledge of the incompetency * * * It is a distasteful thing for a Trial Court in a small community, such as Honolulu, to find economically important people guilty of knowingly taking advantage of an incompe-

tent," and to clinch their argument they append a footnote to the effect that the population of Honolulu in 1910 "was only 52,183" (Brief p. 30).

This would seem to be the measurement of justice by population. The seeming accuracy of the measurement is delusive, however, for the trial was held, not in 1910, as noted by counsel, but in 1929. At that time the population of Honolulu was 137,582, not 52,183. Had counsel realized the population was so great, the suggestion probably would not have been made.

The Supreme Court of Hawaii, moreover, held that the lease of 1905 and the assignment of 1906 are valid and unassailable on the ground that in 1905 Waialua took the lease in good faith for adequate consideration without knowledge of the incompetence, and that in 1910 Waialua acquired an indefeasible title to the interest assigned by Mrs. Christian by the instrument of 1906, because by the deed of 1910 (to which Annie Kentwell was a party) Waialua purchased that interest from Annie Kentwell in good faith and without knowledge of Mrs. Christian's incompetence (R. 555, 575).

The Supreme Court of Hawaii, therefore, having reviewed the evidence fully and independently (a) expressly found in the passages quoted above in the footnote that Waialua took without knowledge of Mrs. Christian's incompetence, both in 1905 and 1910: (b) necessarily rested its decision on that finding in decreeing return of the consideration and in holding that status quo should be restored, and (c) necessarily rested its decision on that finding in upholding

as immune from attack the lease of 1905 and the interest purchased by Waialua from Annie Kentwell in and by the deed of 1910.

Nature of Arguments.

Counsel are asking this Court to find that attorneys now dead were engaged twenty-five years ago in an outright fraud. They are asking that it do this in a review of a decision of the Circuit Court of Appeals, which makes no such finding, and in the face of findings by the Supreme Court of Hawaii which are to the contrary. They ask this, moreover, on the basis of a review of fragmentary correspondence and the testimony of witnesses who, were found in the lower courts to be unworthy of belief.

Before answering the arguments advanced, it seems appropriate to recall the factual situations which bear upon these questions of fact that counsel ask this Court to decide.

Nature of the Evidence.

All of the questions of fact raised by Mrs. Christian relate to the negotiations in 1909 and 1910 culminating in the deed of May 2, 1910.

The evidence which this Court is asked to review in order to reach a finding that at this time Waialua had notice of the incompetence and acted unfairly, is oral and documentary.

Oral Testimony.

The oral testimony is that of James L. Holt and Mrs. Lawrence Kentwell.

It is to be recalled that the transaction in question consisted of (a) negotiations between James L. Holt and Lawrence Kentwell, as representative of Mrs. Christian, (b) negotiations between Waialua and James L. Holt, and (c) the final delivery to Mr. D. L. Withington, one of Waialua's attorneys, of the deed from Mrs. Christian et al. to James L. Holt; Waialua having advanced the consideration to be paid to Mrs. Christian.

Substantially all of the negotiations on behalf of Waialua, both written and oral, were conducted by Mr. D. L. Withington and Mr. W. R. Castle, its attorneys. At the time of the trial, Mr. Withington was dead and Mr. Castle was permanently incapacitated by illness and advanced age (R. 977). Mr. Lawrence Kentwell, who conducted all of the negotiations on behalf of Mrs. Christian, was not called as a witness. Mr. John F. Colburn, who acted at times for James L. Holt, was dead, as was John D. Holt, Mrs. Christian's father, who advised with her during the negotiations (R. 977).

James L. Holt. Counsel's principal contention is that Holt was Waialua's "agent", and that as he knew Mrs. Christian was incompetent, his knowledge is to be imputed to Waialua.

In support of this contention counsel rely chiefly on Holt's testimony, particularly as to the execution of the alleged agreement which they consider of such importance that they have set it forth in an appendix. They say (Brief p. 33) "Fortunately, we do have in

evidence the testimony of one of the parties thereto—Holt— * * * Since the defendant did not offer testimony to contradict that of Holt; we must assume that the arrangement was as outlined in the draft."

A reading of Holt's testimony (R. 1009-1027) can only lead to the conclusion that he is unworthy of belief.

In 1910, he had delivered to Waialua letters (R. 1353-1357) which he represented were written to him from Mrs. Christian, authorizing the sale (R. 1349). As stated by the Supreme Court of Hawaii,

> "If she was in fact the author of these letters they would afford very strong evidence of her mental competency. While by no means models of English composition * * * they indicate a reasonably sound mind—certainly a mind of sufficient maturity to execute a valid deed" (R. 267).

These letters were carefully copied by Waialua and, as the court said "The originals were returned to Holt and were apparently lost or destroyed" (R. 268). The Supreme Court of Hawaii concluded in the absence of the originals that it had not been demonstrated that these letters had been written by Mrs. Christian. Yet Holt testified "I would not say under oath that I did not write Mrs. Christian letters", and further "It may be possible that I did receive a couple of letters from her" (R. 1020) and "I said I probably did receive one or two letters from Eliza, * * *" and during this period there were letters purporting to come directly from Mrs. Christian to him (R. 1027).

Although Holt had delivered these letters to Waialua to show that Mrs. Christian desired to sell her property and had authorized Kentwell to act for her nevertheless he testified regarding Mrs. Christian "I know of my own knowledge that she was an imbecile from infancy, from the womb" (R. 1009). When cross-examined, James L. Holt was forced to admit that in the annulment proceedings in 1905 (wherein the court upheld the validity of the marriage against the claim of incompetence) he testified for the defendant, and he refused to deny that he then testified that Mrs. Christian was a bright girl or words to that effect (R. 1026). The record of testimony in this proceedings could not be found in the records of the local court (R. 1341).

The trial court expressly excluded from consideration the testimony of James L. Holt (R. 122) as not worthy of belief, and further held that "James L. Holt, Lawrence Kentwell, his wife, and John Dominis Holt did everything in their power to represent to the Waialua Company that Eliza was a competent and willing seller * * *" (R. 133). The Supreme Court of Hawaii did not even mention James L. Holt's testimony in its long opinions.

This is the witness of whom counsel say "Fortunately, we do have in evidence the testimony of one of the parties thereto—Holt—*. * *" (Brief p. 33); and further that his testimony must be true "Since the defendant did not offer testimony to contradict that of Holt * * *" (Brief p. 33). How could Waialua produce testimony to contradict that of Holt.

when all the other parties to the alleged agreement were dead?

Although he was the grantee named in Mrs. Christian's deed, and had conveyed this interest to Waialua by warranty deed, Holt, when named as a respondent in the suit, filed an answer confessing the bill (R. 50).

Mrs. Kentwell. Mrs. Christian's cousin, was the only other active participant in the transaction who testified. When asked embarrassing questions she replied "That was in 1910: remember this is 1928. That is very long ago, isn't it?" (R. 1190) and "I am under oath now and I don't know what really happened at the time" (R. 1191).

Mrs. Kentwell is Mrs. Christian's guardian in England and was instrumental in commencing this suit. After the first trial but before decree she appeared by Mrs. Christian's counsel and submitted herself "to the jurisdiction of the court" (R. 163). Later, when named as a respondent in this suit, she appeared by Mrs. Christian's attorneys (R. 783).

The trial court excluded Mrs. Kentwell's testimony from consideration (R. 122) and said that she was "substantially discredited in this court" as a witness (R. 159). It also found that she did everything in her power to represent to Waialua that Mrs. Christian was a competent and willing seller (R. 133). The Supreme Court of Hawaii said of her "This witness is greatly discredited * * *" (R. 275) and "Leaving out Annie Kentwell's testimony as being unreliable * * *" (R. 275).

As bearing upon the reliability of her testimony the following facts appear:

Mrs. Christian's interest was a contingent remainder in 1/3, dependent upon her surviving her father, John D. Holt, and being his sole heir.

By agreement executed before the American Consul in London, on June 12, 1918 (8 years after Mrs. Christian had sold her interest) John D. Holt adopted the six minor children of Mrs. Kentwell with "all rights and privileges as if they were his own natural children with the right and privilege" of inheriting from him as his natural heirs at law. By this agreement Mrs. Kentwell released to Mr. Holt all parental control and rights over her children (R. 1360).

On March 23, 1923, Mrs. Kentwell wrote to an attorney in Honolulu:

> "By the way, have you thought over the fact that Uncle adopted the children before he made his will and before the new law in Honolulu over adoption came into use, so a solicitor told me he couldn't see how Judge Banks could decide in that way and that I should write to my husband about it. I am only sorry I was not there to see it for I am sure there is a loophole somewhere. Both the Waianae people & Waialua people were anxious to have it settled this way because they had bought Eliza's interest on speculation & if they had decided that uncle's adoption of the children were legal, then it meant they had a share to the estate & Eliza's interest had diminished. Besides the children were adopted before the American Consul & Uncle was an Ameri-

can citizen, still we'll see what Lawrence says" (R. 1198).

The Supreme Court of Hawaii, in discussing the contingent nature of Mrs. Christian's interest pointed out that even though she survived her father, her interest might be cut down because "it was not beyond the range of probability he would adopt children who under the law would also become his heirs. Even therefore, if Eliza (Christian) survived him there might be other heirs with whom the fee simple estate would have to be shared.[1] In this event Eliza's interest would be correspondingly diminished, and what the Waialua Company obtained from her would to the same extent be diminished. In 1918 John D. Holt did endeavor to adopt the Kentwell children—six in number—and his effort failed solely for the reason that the proceedings were not in accordance with the Hawaiian Statute" (R. 305).

It was only because of a failure to comply with the law in the adoption proceeding, that Mrs. Kentwell's children did not succeed to 6/7 of the interest which Waialua purchased, leaving it but 1/7. Mrs. Kentwell's scheme failed by a narrow margin.

On July 22, 1923, Mrs. Kentwell wrote to Honolulu stating that Mrs. Christian had informed her that she had sent a wire to Honolulu advising that she had executed a power of attorney and requesting that money be forwarded to her (R. 1197).

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1. Professor John C. Gray's opinion, obtained by Mr. Withington before he left for England, was in error in this respect (R. 931).

On March 23, 1923, Mrs. Kentwell wrote to an attorney in Honolulu telling of Mrs. Christian's "wonderful memory. She remembers every date more so than I do R. 1198).

On May 23, 1923, Mrs. Kentwell wrote to Honolulu referring to a discussion she had had with Mrs. Christian about securities (R. 1200).

On August 22, 1923, Mrs. Kentwell wrote to Honolulu that she just came across a will[1] of Mrs. Christian executed by her before witnesses (R. 1200).

Mrs. Kentwell testified that Mrs. Christian was incompetent at all times. When confronted with these letters she said that she had previously made and written false statements concerning the mental competency of Mrs. Christian but that

> "now that I am obliged to give my statements under oath, I must say what is correct and true. The reason why I wrote these letters containing these statements that they did contain knowing these statements not to be true, was because I was hoping that Mr. Smith would use the letters to show to the Hawaiian Trust Company * * *" (R. 1199).

In June 1926, Mrs. Kentwell was appointed Mrs. Christian's guardian in England.

It seems reasonable to infer from these facts that Mrs. Kentwell believed in 1910 and for many years

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1. This will was drawn by Judge Frank Andrade, a former Circuit Court judge in Honolulu. Although demanded (R. 75), it was not produced. Judge Andrade was absent from the jurisdiction during the trial (R. 977).

thereafter that Mrs. Christian was competent to sell her property, and that it was only after her attempt to obtain 6/7 of Mrs. Christian's interest (despite its previous sale to Waialua) for her children by having them adopted by Mrs. Christian's father, that she conceived the possibility of having Mrs. Christian set aside the deed to Waialua on the ground of incompetence. Certainly there is no other logical explanation for the adoption, or for her letter of March 23, 19[illegible], or for her delay for years, to take action.

Lawrence Kentwell. Lawrence Kentwell was Mrs. Kentwell's husband. Mrs. Christian lived in his household from 1903 on. In Honolulu he was the president of the Hawaiian Realty & Maturity Company, Limited. The Supreme Court of Hawaii considered him "a man of considerable business experience and an educated lawyer" (R. 302).

In 1905 he attended Columbia University Law School and finished his course when the family lived in Elizabeth, New Jersey in 1906, receiving an LLB degree. In 1912 he received a B.A. degree from Oxford University in law; later he attended Kings College in Cambridge for two years, entered Middle Temple and was called to the bar in 1916 (R. 1189).

Counsel in their brief (p. 4) state, "Lawrence Kentwell abandoned his family in 1919" citing page 847 of the record as authority for this declaration. The statement on that page is "Lawrence Kentwell went to Shanghai, China, in 1919, and has remained there since". If this is an attempt to suggest

> come before this court with any intent or desire in any way to besmirch the name of Mr. David L. Withington. We agree that he was a man of estimable character. The only charge in this case is the mistake that was made in this instance, as is apt to be made by the best of us." (R. 276)

The testimony shows that Mr. Withington, born in 1854 in Newburyport, Massachusetts, was graduated from Harvard University in 1874, being a member of Phi Beta Kappa. He was graduated from Boston University Law School in 1876, cum laude. He practiced law in Massachusetts until 1887, when he removed to California on account of his wife's health. He practiced there until 1903, being a member of the State Senate. In 1903 he came to Hawaii where he practiced until his death. He was President of the Bar Association of Hawaii and conducted at least fifteen cases before this Court (R. 1235-7).

That Mr. Withington was a careful and painstaking lawyer is revealed by his cables, by his consultation with Professor Gray (R. 928-933), and by his letter of May 19, 1910, giving a detailed report of the transaction (R. 944). It is inconceivable that Mr. Withington, if he had the slightest question as to Mrs. Christian's competence (and he saw and talked with her at least twice, before she signed the deed) would have advised insuring her life, or would either have paid over the money or permitted his client to go forward with the expenditure of hundreds of thousands of dollars on the faith of the integrity of the deed.

Consider the importance of Mr. Withington's testimony in this case. But he was not here to defend either his client or his own honor.[1]

John L. Colburn. John L. Colburn, who acted for James L. Holt, died before the trial (R. 977).

Of the principal actors, all of Waialua's representatives were dead or permanently incapacitated from testifying. Of those who acted for Mrs. Christian, two appeared and both were found unworthy of belief. Altogether twenty-two persons, whose testimony would be valuable, are either dead or otherwise unavailable at the time of trial (R. 977).

Documentary Evidence.

It is sought to sustain a claim that Waialua did not act in good faith in 1910, and that James L. Holt was its "agent", largely on the basis of certain cablegrams and letters which then passed. Principal reliance is had, however, on an unsigned copy of a purported agreement dated April 15, 1910, which is printed as an appendix to Mrs. Christian's brief.

These documents are discussed as though they were written yesterday, instead of more than 28 years ago, and by them it is sought to show that Waialua's representatives were guilty of bad faith.

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1. The Supreme Court of Hawaii said:
"Of course, if Withington, knowing of her incompetency, had taken the deed from her notwithstanding, it would have been a highly dishonorable and unprofessional act and thoroughly inconsistent with the character and reputation which he is shown by the evidence to have possessed" (R. 276).

Not a single original paper, letter or document was produced in behalf of the grantor, or by James L. Holt or Mrs. Kentwell. Mrs. Christian's original letters are missing and although both received many important communications bearing on the transaction not a single one was produced.

Mrs. Kentwell testified that she turned a number of letters dealing with the transaction over to her counsel (R. 1189) but, although their production was demanded, none were produced.

The charge that Waialua acted unfairly in the negotiations of 1910 is claimed to be shown by excerpts from the correspondence between James L. Holt and Mrs. Kentwell's husband. The record contains seven communications passing between Holt and Kentwell during the negotiations leading up to the deed of 1910. These refer to six others passing between the same parties, all of which are missing. Five of those missing were from Holt to Kentwell, and one from Kentwell to Holt (See R. 906, 913, 915, 919). It is reasonable to infer that others also are missing, although not referred to specifically in those present in the record.

The only document produced by James L. Holt, Mrs. Kentwell or Mrs. Christian or their counsel was the unsigned draft of the alleged agreement of April 15, 1910, upon which such stress is laid. Counsel say that "although Waialua was asked for the original of this agreement 'somehow' this very important document could not be located" (Brief, p. 33). It was not produced for the obvious reason that it was never

executed. James L. Holt testified that it was executed in triplicate originals "one to Colburn, one to me and one to Castle" (R. 1012). He could not produce his original, or Colburn's original, but he did produce an unsigned copy of a preliminary draft. The only reasonable conclusion is that no such agreement was ever executed. The attempt to base an "unanswerable argument in this case" (to use counsel's own words) upon its alleged execution proved by the testimony of a discredited witness, where the other parties are in their graves, is, we submit, asking too much of a court of equity.

All of the documentary evidence, consisting of letters and cablegrams during 1909 relating to the transaction, were produced from the files of Castle & Withington, attorneys for Waialua, and from Waialua's own files (R. 905). All these, with the exception of the letters between the law partners themselves and Mr. Castle's correspondence directly with James L. Holt and Mr. Colburn, which would naturally be in these files, had been delivered to the attorneys for Waialua by James L. Holt at the time of the transaction in order to convince it that he had a contract with Mrs. Christian (R. 905, 1015, 1349-1359).

In short, all the documentary evidence on which it is now sought to fasten a charge of fraud was voluntarily produced by Waialua's counsel. No claim of privilege of attorney and client, the parol evidence rule, or other objection was raised.

The series of letters and cablegrams of more than 28 years ago, are in some cases originals, in other cases

copies. Some are fragmentary, some are not clear or understandable. The acts and motives set up as constituting the charge of fraud are sought to be shown by strained inferences from what appears in these documents although they refer to 16 other letters or cables which are missing, and which if available might greatly change the apparent meaning of those which are produced. They constitute slender evidence indeed upon which to ask this Court to make a finding 28 years after the event, that admittedly honorable men, now dead, committed a fraud—all for the purpose of sustaining a decree of the Circuit Court of Appeals on grounds not relied upon by it.

ARGUMENT IN REPLY.

For convenience, the various arguments advanced in the brief of the grantor's counsel will be dealt with under the same topic headings, and in the same order in which they there appear.

(A) THE GRANTOR'S CONTENTION THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS IS ABUNDANTLY SUPPORTED BY THE AUTHORITIES IS NOT VALID.

As already noted, this argument is addressed, not to the points raised in the grantor's cross petition for certiorari, but to the arguments raised in our petition.

(1) The grantor's contention that incompetents are entitled to set aside their deeds on making restitution, does not correctly state the law.

It is first asserted that "the decision of the Circuit Court of Appeals follows the rule obtaining through-

but the American courts, that even assuming the good faith of the other contracting party and the adequacy of the consideration, an incompetent may set aside a contract upon restoring such party to status quo."

To this we reply (a) that the Circuit Court of Appeals did not follow the rule just stated; and (b) that the rule just stated is not the rule which "obtains throughout the American courts", and is not the rule which should govern this cause.

The Circuit Court of Appeals held that the deed of an incompetent is void, and that restoration to status quo means returning the consideration, and making an allowance for improvements upon a quasi contract basis. This we assert is a rule not supported by authority or principle. The court not only followed the wrong rule, but misconceived the meaning of status quo, and hence misapplied it.

In the second place, the statement of counsel that the rule "obtaining throughout the American courts", is that the contract of an incompetent will be set aside as against an innocent purchaser if status quo can be restored, is not accurate. As set forth in 46 *A. L. R.* 419 (supplemented in 95 *A. L. R.* 1442):

> "The great weight of authority supports the rule that where a contract with an insane person has been entered into in good faith, without fraud or imposition, for a fair consideration, without notice of the infirmity, and before an adjudication of insanity, and has been executed in whole or in part, it will not be set aside unless the parties can be restored to their original position."

Counsel has reversed the rule mentioned and gives restoration to status quo as an affirmative ground for relief when the rule merely gives inability to restore status quo as a ground for denying relief. Many of the cases cited in counsel's footnote are of this character,[1]

As shown in our brief, the better rule is that contracts of incompetents are valid if made with an innocent purchaser. This rule prevails in England, and has been announced by the courts of last resort in at least ten states. We submit it is the better view, and should be applied here.

We will not stop to labor the question either of the inaccuracy of counsel's statement concerning the prevailing rule, or the merits of the rule last mentioned, since in this case, as abundantly shown, status quo cannot be restored, and a choice between these rules is, in the last analysis, unnecessary.

Status quo cannot be restored.

In our opening brief we have discussed at length the countless changes of position made and suffered

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1. An examination of the many cases cited in counsel's footnote on page 15 discloses that most of them merely state that the deed of an incompetent will not be set aside as against an innocent purchaser, if status quo cannot be restored and not that it will be set aside if status quo can be restored. Still others involve cases in which the defendant had actual notice, and others involve requiring an incompetent mortgagor to repay a loan as a condition to cancellation. Still others have been modified or overruled by later decisions in the same jurisdiction. Few involve deeds.

by Waialua by virtue of which, we believe, it is apparent that Waialua cannot be restored to status under any interpretation of the rule; and that cancellation of the instrument sought to be annulled would work a grave and inexcusable injustice upon the innocent grantee. We shall not repeat that discussion.

Grantor's counsel has cited 20 cases in support of the proposition that Waialua can be restored to status quo. Of these 14 were cases of fraud, 2 of duress, and 3 of breach of contract. Only two involved incompetents, and of these two, one was a case in which the consideration was found to have been "grossly inadequate".

In citing these cases, counsel confuses two quite distinct matters, namely, (a) the rule that a plaintiff who seeks to rescind must return whatever he received, and (b) the rule that, quite apart from return of the consideration, rescission will be denied as against a defendant who acted in good faith, if he has so changed his position in reliance on the transaction as to make cancellation inequitable.

All of the twenty cases in question deal with the first of these rules, namely, the rule requiring return of the consideration. They simply illustrate one or the other of the well recognized exceptions to or qualifications of that rule, e. g.: that minor defects in the consideration returned will be ignored; or that where the defendant was guilty of actual fraud, return of the consideration will be partially or sometimes wholly excused, if the inability to return it can be attributed to the fraud itself; or that deterioration of

the consideration returned due to inherent defects therein will not be taken account of. For a list of these exceptions see *Restatement of the Law of Restitution,* Sec. 65; *Restatement of the Law of Contracts,* Sec. 349.

It is worthy of note that the Circuit Court of Appeals, after basing its decision that status quo could be restored, on the conclusions of the lower courts to that effect, proceeded to repudiate entirely the basis upon which the Supreme Court of Hawaii had reached its conclusion. How great this departure is, is shown by comparing the decrees of the two courts. To restore status quo, the Supreme Court of Hawaii (a) upheld the 1905 lease, (b) upheld the 1906 contract and decreed that Waialua would not be required to pay rent during the remainder of Mrs. Christian's life, (c) required the outright conveyance to Waialua of the land upon which all improvements *since 1905* were situated, and (d) the return of the purchase price. The Circuit Court of Appeals only required (a) the return of the purchase price, and (b) compensation for improvements placed on the land *after 1910*. It decreed that the 1905 lease and 1906 contract should be cancelled if Mrs. Christian was then incompetent, although both instruments were upheld by the Supreme Court of Hawaii. It is perfectly obvious that the two courts had vastly different views as to what constituted restoration to status quo. The Supreme Court of Hawaii strongly intimates that it would not have cancelled the 1910 deed had it not considered the 1906 contract to be a valid transfer of rents for the period of Mrs. Christian's life (R. 572).

A status of tenancy in common will not protect Waialua on its improvements.

It has been suggested that status quo in so far as improvements are concerned is automatically restored by cancellation of the deed, because Mrs. Christian will become a tenant in common with Waialua, and as Waialua has already tenants in common owning 2/27, it will only mean that it will have an additional tenant in common owning 1/3—or tenants in common owning 11/27 instead of 2/27. This view was taken by the Supreme Court on the first appeal but was expressly overruled by the Supreme Court of Hawaii on its second appeal (R. 578), which held that its earlier decision was in error; for the court had there failed to give consideration to improvements off the Holt lands in reliance on the deed, saying "in any event the fact remains that the existence of these costly improvements away from the Holt lands was not considered in the former opinion with reference to its effect on the issue of restoration to status quo" (R. 579).

The court also agreed "that such relief as the Waialua Agricultural Company is entitled to * * * should be afforded it in this suit and not left to consideration and treatment in a future partition suit" (R. 579), thus definitely overruling the contention.

It is obvious that the status quo as to improvements (and this is but one of the many factors involved) could not be restored by making Mrs. Christian a co-tenant with Waialua. While at present it is a co-tenant with the owners of a 2/27 interest, that is a

very different thing from being a co-tenant with the holders of an 11/27 interest. For all that appears, Waialua holds a lease on the 2/27 interest of very long duration under which it retains title to such improvements. Many other reasons could be advanced in answer to this contention, including (a) Waialua has never been a co-tenant of Mrs. Christian, and a decree making her a co-tenant would not be to restore the condition which existed before the deed was delivered; (b) the co-tenancy could only relate back to 1922, whereas the deed was delivered in 1910, and hundreds of thousands of dollars of improvements were made before 1922; (c) there is no way of telling in advance what views a court of equity might entertain in partition proceedings, and a court in such proceedings would have to consider equities hereafter arising as well as present equities; (d) restoring status quo is certainly not satisfied by remitting the innocent grantee to another forum or to another action to secure its rights; (e) it is questionable whether a co-tenant who is also a lessee is entitled to compensation for improvements made during the term of the lease; (f) a future possible partition is not adequate because the measure of compensation to a co-tenant for improvements is not the value of such improvements but only the enhanced value of the land resulting therefrom; (g) the risk of doubtful questions of law which will arise in partition proceedings should not be thrown on Waialua; (h) a partition proceeding will not take into consideration improvements upon the property which inure to the benefit of other lands;

improvements abandoned to make the lease to the Hawaiian Pineapple Company; improvements located on other lands for the benefit of the Holt lands; or improvements constructed in aid of Waialua's business; (i) the nuisance value that would attach to Mrs. Christian's interest as a tenant in common in a part of Waialua's integrated plantation is too obvious for argument. Finally equity requires that all controversies between the parties be settled in this suit. Restoration to status quo is a condition precedent to cancellation, not a condition subsequent. Here status quo obviously cannot be restored by remitting Waialua to the risks and uncertainties of the position of co-tenant followed inevitably by partition proceedings.

Here, in short, the fact that cancellation would make tenants in common of the parties adds to the already overwhelming array of circumstances by virtue of which Waialua's reliance on its title through many years makes it impossible to set that title aside without great and irreparable harm.

1905 lease and 1906 contract.

As pointed out in our opening brief (p. 95) an application of correct principles of law to the question of the deed of 1910 will dispose of the necessity of considering the validity of the lease of 1905 and the contract of 1906. In discussing the 1905 lease counsel again confuse return of the consideration, with restoration of status quo, for they argue that Waialua paid

that Lawrence Kentwell was not a responsible and honest adviser of Mrs. Christian, it is entirely without foundation.

Mrs. Kentwell testified in her deposition taken on November 5, 1928, that "I am not living with Mr. Kentwell now, because he is away; there is no separation or any trouble, but he has not been able to return" (R. 1184). On May 23, 1923, she wrote that Mr. Kentwell was forwarding her £150 a month through the London Branch of the Guaranty Trust Company (R. 1200). As of the time of her deposition (1928) she testified that her husband was sending her money every month by check through the Bank in London (R. 1181). She further testified "* * * I trusted him implicitly" (R. 1173). "I had implicit faith in my husband. He attended to all business transactions * * * and if he did attend to it, it was quite all right" (R. 1186). "If the money was paid to my husband it would be quite all right" (R. 1187). "He was, I think, careful in his business affairs and decidedly truthful" (R. 1189).

Kentwell was not produced as a witness nor was his deposition taken.

It is impossible to read the correspondence between Holt and Kentwell or the testimony without concluding that Lawrence Kentwell was an honest and faithful representative of Mrs. Christian. Certainly there is no foundation in the record for an inference to the contrary.

Testimony not Available.

The representatives of Waialua in the transaction were its attorneys David L. Withington and W. R. Castle, members of the firm of Castle and Withington, of Honolulu.

W. R. Castle. W. R. Castle was so physically incapacitated that it was impossible to take his testimony, and he has since died.

David L. Withington. David L. Withington, who proceeded to London and supervised the execution and payment for the deed, died in 1919 (R. 1235). In the original petition, Mr. Withington was directly charged with having misrepresented himself as Holt's attorney, of misrepresenting the value of the property and of having actual knowledge that Mrs. Christian was incompetent (R. 10, 11). Mrs. Kentwell testified that she had told Mr. Withington that Mrs. Christian was "Non compos mentis" (R. 1177). This was the basis on which the cause was tried—a direct charge that Mr. Withington had actual knowledge. But the trial court rejected Mrs. Kentwell's testimony as unreliable, and found that it had not been shown that Waialua had knowledge (R. 158). The Supreme Court of Hawaii held after a careful review of the evidence and "leaving out Annie Kentwell's testimony as unreliable" (R. 275) that Mr. Withington saw nothing to cause him to suspect that Mrs. Christian was "not of normal mind" (R. 276), and quoted the statement of her counsel made at the trial:

> "I want to add my personal commendation of the remarks of witness, and to say that we do not

and conclusively answered by the decision of the Supreme Court of Hawaii (R. 304-308) which found that the consideration was adequate measured by (a) its market value, (b) other offers, and (c) prior sales of interests in the same lands. It went further and demonstrated that the basis of valuation used by the trial court (mortality tables) was improper, and necessarily led to an erroneous conclusion.

Counsel attempt to minimize the conclusive effect of this finding by urging that the Supreme Court of Hawaii valued Mrs. Christian's interest on the basis that it had been diminished in value by the 1906 contract, which it had construed as an assignment of rents for life, and that since the Circuit Court of Appeals held that the 1906 contract assigned only the rents under the 1905 lease, the valuation by the Supreme Court of Hawaii was therefore in error.

The shortest answer to this contention is the simple fact that the Supreme Court of Hawaii did no such thing. Its explicit and detailed finding that the consideration for the deed of 1910 was adequate is contained in its first opinion rendered April 18, 1931 (R. 304-308). At that time the lease of 1905 and the assignment of 1906 were not involved in the proceeding at all. The Supreme Court of Hawaii in this same (first) opinion said in this connection:

> "Whether the instrument of 1906 should be set aside because of Eliza Christian's mental incompetency is not within the issues presented by the pleadings." (R. 323).

Earlier in this (its first) opinion it had refused to decide the question whether the assignment was void because not signed by Mrs. Christian's husband on the express ground that in any event it was valid as the assignment of Mrs. Christian's contingent right to receive rents under the lease of 1905 saying:

> "This contention may be passed without decision for the reason that, assuming the instrument to be void as a conveyance of an interest in land, it is nevertheless valid as an assignment of rents." (R. 321)

It is apparent from the decision itself that the Supreme Court of Hawaii in finding that the consideration was adequate, did not take account at all of the fact that Mrs. Christian had assigned her contingent right to rents (R. 304-308).

We submit that the consideration was fully adequate as was found by the Supreme Court of Hawaii, and that counsel's attempt to have this Court reverse this finding of fact is without merit.

(3) The Grantor's contention that Waialua was purchasing an expectancy, and she may set aside the transaction because the consideration was inadequate and there was unfair dealing, is not supported by the facts or the law.

In the first place, Mrs. Christian's interest was not an "expectant interest" within the meaning of the

authorities cited by counsel.[1] While it was a contingent remainder, it was a present estate that could be conveyed by deed, as Professor Gray[2] advised Mr. Withington (R. 931), and it was so conveyed by the 1910 deed in which Mrs. Christian was joined by her father and her cousin, and in a transaction in which she was represented by her attorney.

In the second place, as has been just pointed out, the consideration paid Mrs. Christian was fully adequate as was found by the Supreme Court of Hawaii.

In the third place, Waialua was not guilty of any inequitable conduct. We submit that it is unfair to charge that dead men of admittedly estimable character were guilty of sharp dealing in 1910, upon the basis of fragmentary correspondence only a portion of which is quoted, and the testimony of a discredited witness.

There was no Secret Profit.

Much is made of the statement of the trial court that Waialua "knew that James L. Holt was securing

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(1) *3 Simes, Law of Future Interests*, p. 166, reads:

"While no consideration is required for the transfer of future interests *inter vivos*, one occasionally finds traces of an early English doctrine to the effect that equity will set aside the transfer if the consideration is inadequate. * * * It is believed that in so far as concerns future interests, no such doctrine is in force in most jurisdictions in this country."

(2) Professor Gray pointed out that Mrs. Christian's interest was a contingent remainder that could be conveyed or released by an ordinary deed.

a secret profit to himself and Colburn." As pointed out in our opening brief there was no profit, secret or other, and the error of the trial court in making this statement is understandable because, as found by the Supreme Court of Hawaii, the trial court erroneously believed that the price paid Mrs. Christian was inadequate, when in fact it was adequate.[1]

The trial court, apportioning the purchase price on the basis of mortality tables, computed the value of one life estate as approximately $18,000, and of Mrs. Christian's remainder as approximately $42,000. The Supreme Court of Hawaii repudiated the trial court's entire method of valuing the interest, and held that Mrs. Christian's interest was worth at most, $30,000 (R. 304). The fundamental ground therefore, on the basis of which the trial court concluded that Holt made a profit out of the purchase of Mrs. Christian's interest and its resale to Waialua, was rejected by the Supreme Court of Hawaii.

As against the suggestions of counsel, we point to the following: James L. Holt (who did not hesitate to stultify himself in other respects) did not testify that there was any profit, or any sharp dealing; Kentwell, who is argued to have been imposed upon,

1. On this issue, as on every issue of fact in the case, the hearing in the Supreme Court of Hawaii was, in effect, a trial de novo. It is a striking fact that nowhere in either of the court's long opinions does it rely on any of the trial court's findings of fact. The Supreme Court of Hawaii plainly assumed the duty, as it frequently does, of reviewing the evidence and reaching its own conclusions on all questions of fact as well as law (R. 208).

was not produced as a witness, and in the many years since the deed was delivered, he never made such a claim; the deed of Holt to Castle showing the total price on its face was publicly recorded in Honolulu within less than a month after the transaction (R. 38); the terms of the transaction were well known to the "competing" purchaser, L. L. McCandless (R. 935); the price at which Holt was offering his interest (R. 923) alone was exactly the same price that he received for it, after he had, by purchasing Mrs. Christian's interest, combined it with his own. Nor was this contention advanced by the grantor before the trial court.

That the trial court placed little weight on this phase of the case is shown by the fact that although it made the statement mentioned above, it considered that this was not a sufficient ground for cancelling the deed, if the price paid was adequate (R. 149). It was the erroneous view of the trial court as to the adequacy of the consideration, that furnished the basis of its decision, and not the claimed unfair dealing of Waialua, as to which the trial court was equally in error.

The insinuation that advantage was taken of the lack of funds of Mrs. Christian and the Kentwells is without foundation in fact. Mrs. Christian's father had an annuity of $1800 per year; she was assured of support for life by the contract of 1906; and she and the Kentwells traveled extensively for years and maintained a home and servants at Oxford. The

Kentwell's daughter Alice was educated in St. Hughes College, Oxford (R. 1089).

Counsel lay great stress upon the words "price to Waialua must be kept secret" which appears in the cablegram from Mr. Castle to Mr. Withington in London. This cablegram, quoted from frequently in the briefs of Mrs. Christian, read in full as follows:

> "Eliza and John D. accept $30,000. Must be inclusive of prospective interest. Annie Kentwell wants $5,000 her interest. Make less if possible. Must not exceed $35,000. Price to Waialua must be kept secret." (R. 934)

The cablegram in question is entirely consistent with perfectly honest motives in both the sender and the receiver. In the first place, we submit, the language of the cablegram shows that the last sentence relates only to the question of the price to be paid to Mrs. Kentwell, and has no bearing on the price to be paid to Mrs. Christian. As the first sentence of the cablegram shows, the price for Mrs. Christian's interest was fixed (which it was) by Holt's acceptance in his cablegram of April 12th, of the offer to sell her interest for that price (R. 926). As the cablegram further shows, the sender of the cable understood that the price to be paid to Mrs. Kentwell was still not fixed. This was Holt's understanding as well (R. 1019).

This being true, the direction to Mr. Withington not to disclose the price to be paid by Waialua for the two-thirds interest had reference only to the

unsettled question of the price to be paid to Mrs. Kentwell. In addition to the fact that the sum actually paid Mrs. Kentwell was the amount she asked, and there was in fact no reduction, there is no need to discuss the fairness of the circumstances surrounding the purchase of Mrs. Kentwell's interest, since the Supreme Court of Hawaii expressly held that Waialua was a bona fide purchaser for value of that interest (R. 572-575).

Independently of the foregoing, it is difficult to see upon what basis it could be held that Waialua's attorney was under any duty to disclose the price to be paid by Waialua for the two-thirds interest to be purchased by it from James L. Holt.

Indeed, the most probable explanation of the language in the cablegram is that Mr. Castle believed that it would be a breach of professional confidence for Mr. Withington to discuss in any way his knowledge of the negotiations between Waialua and Holt, which knowledge had been acquired by Mr. Withington while acting as attorney for Waialua. Moreover, Mr. Castle may well have felt that in agreeing with James L. Holt to take delivery of the deed on Holt's behalf, he and Mr. Withington were, in doing so, acting as representatives and attorneys of James L. Holt; and that this being true, they had no right to disclose their knowledge concerning his negotiations with Waialua.

It will, of course, never be known what was in Mr. Castle's mind when he sent this cablegram. Neither he nor Mr. Withington can tell us. It would be a violation of universally accepted principles to hold that

it is proper, after the lapse of the many years that have passed, to find on the basis of this isolated sentence in an incomplete series of communications, that Mr. Castle was assisting James L. Holt in the commission of a fraud by the latter, which neither he nor anyone else has testified was committed in fact.

Counsel suggest that James L. Holt's statement in a letter to Kentwell that Waialua contemplated a partition of the property constituted an unfair action on the part of Waialua. (R. 915) At the trial, W. W. Goodale, the only living officer of Waialua who would have knowledge of such a matter, testified definitely that he had never heard of such a suggestion. (R. 1256) Having in mind that the purchase-price at which Mrs. Christian's interest was finally sold, represented the amount that she asked and not the amount which she was offered, and that the property was offered not alone to James L. Holt but also to McCandless at this figure, it seems obvious that this statement in Holt's letter had no influence in the fixing of the purchase price. It is suggested that Waialua knew of Holt's statement because a copy of Holt's letter was delivered to the law clerk in Castle & Withington's office who examined the abstract (R. 143). We submit that this is too slender a thread upon which to predicate a charge of unfair dealing.

Waialua acted in good faith throughout.

At the outset of the negotiations which culminated in the delivery of the 1910 deed, Waialua was the owner of a 7/27ths undivided interest in fee simple

and held a lease of the entire property, which had twenty-one years yet to run. James L. Holt was the owner of a life estate in 1/3 and the contingent remainder in that 1/3, and he was also the owner of a life estate in the remaining 1/3. The contingent remainder in that 1/3 was owned by Mrs. Christian, subject to the 1906 contract.

Mrs. Christian, acting through her attorney, had been trying as far back as 1908 to sell her contingent interest and was offering it to various persons (R. 1018). James L. Holt had wanted to purchase it himself (which is of course entirely inconsistent with any belief on his part that Mrs. Christian was incompetent (R. 1018)), but was unable to do so for lack of funds (R. 908).

Waialua during all this time was unwilling to purchase James L. Holt's interest, which he and Colburn were offering for sale to it (R. 910, 912).

With the matter in this situation, Kentwell brought a prospective purchaser into the field, Mr. L. L. McCandless, by offering to sell him Mrs. Christian's interest for $30,000 (R. 1205). McCandless was known to be unfriendly to Waialua (R. 919). With this information, James L. Holt approached Waialua and was able to induce it to agree to enter negotiations with him to purchase his interest and that of Mrs. Christian, Holt representing to them that Mrs. Christian had offered to sell her interest for $30,000.

On March 8, 1910, Kentwell made a definite offer to James L. Holt of Mrs. Christian's interest, for

$30,000 in cash (R. 915). This offer was accepted by Holt's telegram of April 12th to Kentwell, which Kentwell confirmed by his telegram to Holt of the same day (R. 926).

This acceptance was spurred on by Kentwell's mention in his letter of March 30th to Holt that another prospective purchaser, McCandless, was in the field and had offered "a better proposition" (R. 919). The fact is that no better proposition was offered by McCandless as the Supreme Court of Hawaii found (R. 306). McCandless himself testified that he was offered Mrs. Christian's interest for this amount by Kentwell (R. 1205).

It was under these circumstances that, at the suggestion of Holt (R. 917), Mr. Withington, Mr. Castle's law partner, who was then in Boston, was requested to proceed to England to receive the deed and pay the purchase price.

The terms of James L. Holt's purchase of Mrs. Christian's interest were well known to McCandless (R. 922), and as his representative was reported to be on the way to England to purchase Mrs. Christian's interest, it is but natural that Mr. Withington was requested to proceed to England without delay. Also, as James L. Holt already had a contract covering the purchase of Mrs. Christian's interest for the definite sum of $30,000, it is obvious that Mr. Withington's task had nothing whatever to do with further negotiations with her.

Summarizing the foregoing, it can be said with certainty, notwithstanding the fragmentary state of

the evidence, that the following vital circumstances were present in these negotiations:

1. In 1910 Waialua already had a secure title to the lands for the next twenty years under the lease of 1905;

2. James L. Holt was anxious to sell his interest;

3. Mrs. Christian was desirous of selling her interest for $30,000, and it had been definitely offered for this amount to Holt on March 8, 1910 (R. 915) prior to the entry of Waialua in the transaction who up to that date had done nothing except reject offers;

4. Waialua had no desire to purchase any of these interests at this time, because of the fact that the most it could get from Holt and Mrs. Christian was an interest subject to future contingencies;

5. Waialua was finally induced to make this purchase because Kentwell introduced an allegedly competing purchaser (McCandless), unfriendly to Waialua, to whom Mrs. Christian's interest was offered at the same price.

6. When Mr. Withington went to London James L. Holt already had a definite contract for the purchase of Mrs. Christian's interest for $30,000, and nothing remained but for Mr. Withington to pay over the purchase price and receive the deed.

The following facts and factors are entitled to great weight, in considering the good faith of this transaction:

1. Mrs. Christian was adequately represented. The negotiations on her side were conducted by Lawrence Kentwell, who is described by the Supreme Court of Hawaii as "a man of considerable business experience and an educated lawyer" (R. 302). As we have seen, there is not the slightest ground upon which even to guess that he was not a faithful and energetic counsel. Throughout the negotiations, Mrs. Christian advised with Lawrence Kentwell, and with her father, John D. Holt. Although her father was given to drink from time to time, there is no suggestion that he lacked normal affection for his daughter or the solicitude for her welfare that would ordinarily be expected. He was considered a proper parent by Mrs. Kentwell, who in 1918 relinquished to him all parental control of her six children and agreed that he would become their adoptive parent (R. 1360).

2. Mrs. Christian had been living with her father and the Kentwells for years; and the relation was expected to continue. It is to be assumed that the whole family group wanted Mrs. Christian to get as good a price for her interest as possible, and there is no suggestion that this is not true.

3. Waialua's interest in acquiring Mrs. Christian's contingent remainder was not to acquire it as such, but to avoid the risk of having this con-

nothing to Mrs. Christian hence "there is nothing to be restored": and "The term of the lease of 1906 has expired" (Br. p. 22) giving no consideration to the many expenditures, and changes of position, of Waialua in reliance on the lease. That the term of the 25-year lease has expired, we submit shows that status quo cannot be restored. How can the parties, to use counsel's own expression, be put back to "substantially the position occupied before the transaction"? The transaction was in 1905, when the land was a barren waste. Suit was not brought until 1928 when the land was highly improved due to the expenditures of Waialua.

As to the argument that Waialua paid nothing to Mrs. Christian so there is nothing to return—this is answered by the fact that the rental of $3000 payable under the lease (if the 1910 deed were to be set aside) was by virtue of the 1906 contract, assigned to Mrs. Kentwell, who the Supreme Court of Hawaii found paid Mrs. Christian an adequate consideration therefor (R. 569-571), and Mrs. Kentwell had conveyed her interest to Waialua who is found to be a bona fide purchaser without notice (R. 575). It is also answered by the findings of both the Supreme Court of Hawaii (R. 558) and the Circuit Court of Appeals (R. 1609) that there was valuable consideration moving from Waialua to Mrs. Christian for the execution of the lease.

The cancellation of the lease would make a 25-year lease into a 17-year lease, one which the parties did not make, and which Waialua would have refused to

make (R. 1485). This, a court of equity will refuse to do; see:

Okill v. Whittaker, 2 Phillips 338;
Goin v. Cincinatti Realty Co., 200 Fed. 252, 254.

The Supreme Court of Hawaii's reasons for refusing cancellation of the lease are an effective answer to counsel's contention (R. 558-560).

As to the 1906 contract, no attempt was made to restore Waialua to status quo. The Circuit Court of Appeals clearly erred in reversing the decision of the Supreme Court of Hawaii that this instrument is valid and should not be set aside (R. 568-575). Grantor's counsel suggest that Waialua has not complained of the action of the Circuit Court of Appeal in construing the 1906 contract as merely an assignment of rents under the 1905 lease, thus reversing the Supreme Court of Hawaii which held the 1906 contract valid as an assignment of rentals during Mrs. Christian's life. Counsel is in error as point 5 page 16 of Waialua's Petition is addressed to this error.

(2) The Grantor's contention that the consideration was not adequate, is directly contrary to the finding of the Supreme Court of Hawaii.

Grantor's counsel ask this Court to find as a fact that the consideration was not adequate, although the Supreme Court of Hawaii held directly to the contrary, and although the Circuit Court of Appeals decided the cause on the basis of the Hawaiian court's finding. This argument, we submit, is effectively

2. On remand the trial court interpreted its own decision and that of the Supreme Court of Hawaii as finding that Waialua had no notice, and the trial was conducted on that basis (R. 1479).

3. Contrary to counsel's contention, the burden of proof was not on Waialua.[1]

4. The grantor alleged notice, assumed the burden of proof in the lower courts and the trial was had on this basis. The question cannot be raised on appeal. 22 C. J. 70; 3 C. J. 736; 4 C. J. 715. The grantor not only failed to sustain this burden, but the contrary was found, which finding is abundantly supported by the evidence.

5. The issue of notice was actually tried below, and findings made thereon. In such a case, particularly in an equity case, the question of burden of proof will be deemed immaterial on appeal. 4 C. J. 660; *Bank v. Western Union Telegraph Co.*, 141 Fed. 522, 528; *New York Life Insurance Co. v. Rees*, 19 F.(2d) 781, 787.

6. Where the parties and the court unite in trying a case on a particular theory, that theory cannot be rejected before the appellate court. *San Juan Light Co. v. Requena*, 224 U. S. 89.

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1. Cases to this effect are found in our opening brief p. 105, to which many, including the following, may be added:

Rubins v. Hamnett, 294 Pa. 295;
Atlanta Banking Co. v. Johnson, 179 Ga. 313;
First National Life Ins. Co. v. Ryg, 209 Ia. 330;
Imperial Loan Co. v. Stone, L. R. (1892) 1 Q. B. 599.

7. The decision of the Supreme Court of Hawaii upholding the 1905 lease and the 1906 contract, (the latter on the ground that Waialua was a bona fide purchaser for value thereof by the deed of 1910) establishes Waialua's status as an innocent purchaser in good faith without knowledge of the incompetence.

(2) The Grantor's attempt to charge Waialua with notice on the ground that Holt was its "agent", failed in the court below, and is not sustained by the facts or the law.

This argument of counsel advanced "with all the earnestness at our (their) command" is deemed by them "an unanswerable point in this case", i.e. that although Waialua had no actual notice of the incompetence, it is to be charged with James L. Holt's knowledge because (so it is claimed) he was Waialua's agent, notwithstanding the trial court held that Holt did everything in his "power to represent to the Waialua Company that Eliza was a competent and willing seller" (R. 133). This contention was strenuously urged by counsel in the court below, not only when the appeal was first considered, but on rehearing. With minor difference the argument was presented in its briefs before that court word for word as it is urged here. It was not accepted by the court below, which indeed in its opinion denying rehearing, specifically rejected it, pointing out that the two lower courts had also held Waialua had no notice (R. 1637).

It should also be observed that counsel do not start this argument by any attempt to prove the "agency" by reference to the transcript. The relationship is as-

sumed to exist and having sowed the seed of the conclusion in the premise by assuming the existence of an agency, an apparently logical argument is tendered upon the application of the fiction of the law of agency that the knowledge of the "agent" is "presumed" to be the knowledge of the principal; and that Waialua, although it had no knowledge in fact, should be treated as though it did have knowledge. The struggle of the courts in attempting to rationalize this fiction was aptly stated by Mr. Justice Holmes (*Collected Legal Papers, Agency,* 101):

> "* * * the whole outline of the law, as it stands to-day, is the resultant of a conflict between logic and good sense—the one striving to carry fictions out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust."

The statements in cross-petitioner's brief "The findings are that Waialua purchased the property through an agent, James L. Holt." (Br., p. 13) and that "Waialua made the bargain through its agent" (Br., p. 31), and other similar statements contained in the brief, are merely counsel's contentions. No witness (not even the discredited Holt) testified that Holt was Waialua's agent and no court found that Holt was Waialua's agent.

Counsel attempt to sustain this claim by quotations from the fragmentary correspondence, and by a claim that a certain agreement was executed, although the agreement was not produced and the only testimony that such an agreement was executed, is that of a dis-

credited witness. How easy it is to make such an assertion and out of the numerous communications, extract quotations which seem to give it color. But it is equally easy to draw directly opposite conclusions, and indeed before the Supreme Court of Hawaii counsel not only did not contend that Holt was Waialua's agent, but claimed that Waialua was Holt's agent. That that court attached no significance to Holt's participation in the transaction is demonstrated by the fact that his name is not mentioned in either of that court's lengthy opinions.

What counsel here are trying to do, is to convict Waialua of fraud, not by proving that it committed a fraud, but that its "agent" did. If they were trying to prove that Waialua (through its admittedly honest representatives) committed a fraud, would be required to prove that fact by clear and convincing evidence. Every intendment and presumption would be to the contrary. But here counsel in their attempt to prove Waialua guilty of fraud, ask this Court to sit as a trial court and to find the essential fact upon which the claim is based, i.e. that Holt was Waialua's agent, by evidence of the most unsubstantial character. We submit that proof of agency is lacking, and that the facts upon which counsel rely, not only do not prove an agency, but show that no agency existed.

In answer to the grantor's contention, we will show that James L. Holt was not Waialua's agent and that the rule of agency contended for is not applicable here.

Before we pass from the subject of proof, we point out certain inaccuracies or omissions in counsel's factual discussion, which, in the absence of comment, might prove misleading.

1. On page 32, counsel state that Waialua in 1910 "set out to acquire the incompetent's share". As already shown, Waialua, until the introduction by Kentwell of an unfriendly buyer, refused to purchase either James L. Holt's or Mrs. Christian's share, and for years had refused to purchase a contingency.

2. On the same page, counsel make a partial quotation from Waialua's answer, intended to suggest that Waialua admitted that Holt was its agent. A reading of the answer (R. 64-71) demonstrates that such a suggestion is unfounded.

3. On page 34, much is made of Holt's comment in a letter, that Waialua will resort to a suit in partition, the intimation being that this was used by Holt to induce Mrs. Christian to sell. As already pointed out, Mr. Goodale, the only living officer of Waialua who would have knowledge, testified that he never heard of such a suggestion. Nor do counsel mention that in the very same letter, from which counsel quote, Holt points out that if Mrs. Christian does not sell and survives her father, she may get more for her share (R. 914), nor is mention made that Mrs. Christian's interest at the same time is being offered for sale to another prospective purchaser at the same price.

4. On page 35 (repeated on page 39) counsel state that Kentwell wrote Holt stating that McCandless

had made a better offer, without pointing out that this statement was untrue, and that as found by the Supreme Court of Hawaii (R. 306) and as testified to by McCandless (R. 1205) the terms offered to McCandless were identical with those offered to Holt, and McCandless never made a higher offer, or indeed any offer.

5. On page 38 counsel state that Professor Gray advised Mr. Withington that children who might be adopted by Mrs. Christian's father would not take under the terms of the Holt will, without pointing out that the law of Hawaii is settled to the contrary, and that not only will adopted children take, but that Mrs. Christian's father did later attempt to adopt Mrs. Kentwell's six children and this failed only because the formalities were not complied with (R. 305).

6. On page 44, counsel state that the question of agency is settled by a stipulation by Waialua's counsel. This is simply not true. Counsel quote in support of their statement from page 1061, as follows:

> "'Counsel for Waialua then admitted that the purchase of May 2, 1910 was made originally for the benefit of Waialua Company and that the series of transactions subsequent thereto gave the respondent no different status than it had by virtue of the deed of May 2, 1910 (Exh. A-21).' (R. 1061)"

Not only is this a partial quotation, but the fact that it is partial is not indicated. The full quotation is:

"Counsel for Waialua then admitted that the purchase of May 2, 1910, was made originally for the benefit of Waialua Company and that the series of transactions subsequent thereto gave the Respondent no different status than it had by virtue of the deed of May 2, 1910 (Ex. A-21), the court ruling as follows:

> 'I understand they are not seeking to aid their position now by any series of transfers to Waialua after 1910. They are willing to abide by the evidence of the status as to what construction should be put on the 1910 transaction as if direct to Waialua at that time.'"

A reading of the record shows that the stipulation had nothing whatever to do with the question of agency (as should be obvious, because counsel never urged such a claim at the trial), but was made by Waialua's counsel to facilitate the trial. Mrs. Christian's deed was to Holt, and Holt deeded to Castle. In later years Castle deeded to Helemano Real Estate Trust, which finally deeded to Waialua. Counsel for Waialua merely agreed that it would not be claimed that these numerous subsequent transfers put it in any better position than if the deed had been directly to it.

The April 15 Agreement Was Never Executed.

The argument of agency is predicated almost entirely upon an unexecuted draft of a proposed agreement dated April 15, 1910 (R. 948) between Holt, Colburn and Castle. We submit that the alleged agreement was never executed.

Counsel say: "It was demanded by the plaintiff, but although a great many papers having to do with this rather involved transaction were available and introduced in evidence *somehow* this very important document could not be located, and we must rely therefore upon secondary evidence of its contents to determine the real relationship between Waialua and Holt. Fortunately we do have in evidence the testimony of one of the parties thereto, Holt, that the final agreement was substantially in accord with a draft thereof which was prepared by Waialua's attorneys. * * * Since the defendant did not offer testimony to contradict that of Holt, we must assume that the arrangement was as outlined in the draft." (Brief, p. 33)

It is not strange that Waialua did not produce a document which was never executed. Holt said it was executed in triplicate "* * * one to Colburn, and one to me and one to Mr. Castle." (R. 1012) No explanation is offered why Holt did not have his original, but did have an unsigned preliminary draft; or why Colburn's copy was not produced. Indeed, this unsigned draft is the only paper produced by the grantor in the entire trial, all of the others (mostly copies) having been produced from the files of Waialua's attorneys.

Holt testified that the document was a preliminary phase and that "The agreement of April 15, 1910, was signed the last part of April, 1910, I think, and to the best of my recollection it was signed before May 2, 1910." (R. 1016)

This is slender evidence to prove the execution of a lost document, allegedly executed 19 years before the testimony of a partisan witness, whom the trial court found to be "substantially discredited"; whom the trial court found did everything in his power to represent that Mrs. Christian was competent; and whose testimony was not even mentioned in either decision by the Supreme Court of Hawaii.

Nor was it possible for Waialua to produce witnesses to contradict Holt, for all the other parties were dead.

Holt was not Waialua's Agent.

Obviously the alleged agreement had not been executed by April 25, 1910, for on that day Colburn wrote to Mr. Castle saying that he would not execute it (R. 937), Holt having written on April 21 (R. 947) "* * * that said instrument should have no force or effect whatsoever and should be held to be an uncompleted instrument, never having taken effect.

This notice is given to save my rights and to avoid all misunderstanding as to the paper above referred to pending *further negotiations* with you as to the sale of the lands in question." (R. 948)

On April 25, Colburn was still *offering to sell*, not only James L. Holt's interest, but Mrs. Christian's interest combined with it "viz. 18/27 of the Holt lands at Waialua". (R. 938)

On April 28 Holt wrote McCandless notifying him that on April 12, he had contracted to purchase Mrs. Christian's interest, and that this contract was then being closed in England (R. 939).

Holt on April 12 had a contract of sale—many days before he wrote to Waialua on April 21 that he would not execute the alleged agreement of April 15—"pending further *negotiations* with you as to the sale of the lands in question" (R. 948), and while Holt and Colburn were still offering to sell Mr. Castle the two-thirds interest (including Mrs. Christian's interest which Holt had already contracted to buy on April 12).

Can it be said that on that date Holt was Waialua's agent? If so, agent for what? Agent to negotiate with Mrs. Christian? Obviously not, for he had already contracted to buy her interest. Instead of being Waialua's "agent", he was actually on that date negotiating (to use his own words) with Waialua as to terms of sale, and Colburn on April 25 was doing the same thing, both making clear that they already had contracted to purchase but were not bound to sell to Waialua.

We submit that no agreement was ever reached between Holt, Colburn and Castle until Holt and Colburn executed and delivered their deed to Mr. Castle on May 28, 1910 (R. 960). Only after Holt and Colburn's deed was recorded, was Mr. Castle willing to record the May 2 deed, running as it did to Holt, it being recorded on June 23, probably after the Holt and Colburn deed had been returned from recordation. The May 2 deed had been forwarded to San Francisco where it was executed by Albert Christian on May 16, 1910. In the ordinary course it would be received in Honolulu within 10 days, which would

time its arrival as just prior to the date on which Holt and Colburn executed their deed..

Holt testified that when he signed the deed to Mr. Castle, he had never seen the deed of May 2, 1910. (R. 1015) The reason for this is obvious. Waialua had advanced to Holt the purchase price for the deed of May 2 without having a contract with Holt and Colburn for the purchase of the 2/3. It would not deliver the deed to Holt (or record it, which was the same thing) until after Holt had made his deed and it had been recorded.

At all times Waialua's position was merely that of a possible purchaser, who, because of the calculated introduction of McCandless as a competitive purchaser, had been induced to advance money in the expectation of being able at a later day to purchase the 2/3.

Holt was an Independent Actor.

While Waialua was desirous of acquiring the Holt lands, as evidenced by its purchases of undivided fee interests in 1899 and 1900 and later in 1905-1907, it is equally clear that it would not buy the 2/3 interests in which there were contingent remainders. Until the very last, it refused to make such a purchase, until finally, through the intentional introduction by Kentwell of McCandless, as a competitive buyer, it was induced to recede from its position.

While it is clear that Waialua was unwilling to purchase the 2/3 contingent interests, it is equally clear that Holt had for many years endeavored to ac-

quire them. As far back as May 18, 1893, he purchased the contingent interest of his brother (R. 849); on March 16, 1901, he purchased his father's life estate (R. 850); on July 1, 1902, he purchased the life estate of John D. Holt (R. 851). This made him the owner of the life estates in the 2/3, and the owner of the remainder in 1/2—the only remaining outstanding interest in the 2/3 being the contingent remainder of Mrs. Christian. Holt testified that when he had acquired these interests in 1902, Colburn had tried to sell them but without success (R. 1017).

On August 23, 1905 Colburn tried to sell the property to Waialua, but as Waialua insisted on a fee simple, the sale was not made (R. 981). Holt testified further:

> "I first undertook the purchase of the Eliza Christian interest in the Holt lands in 1909 * * * In the first place I was anxious to sell my own interest, and when I heard about the McCandless deal, trying to buy Eliza's interests, I went to Castle and told him the circumstances." (R. 1010).
>
> "I don't remember any efforts to sell the property covered by the deed of trust until 1909. I knew at the time (March 31, 1909, Ex. D-3) that Mr. Colburn offered to sell the property to Waialua.
>
> "At that time I was trying to acquire the Eliza Christian interest for myself, and I wrote a letter to Mr. Castle to that effect, trying to help raise some money. I tried to acquire her interest for myself from that time on until the final consum-

tingent remainder outstanding if it purchased from James L. Holt his two-thirds interest in the property which was complete except for Mrs. Christian's outstanding contingent remainder in one-third. Waialua had no direct interest in the amount to be paid for Mrs. Christian's contingent remainder since, if it had any actual agreement with James L. Holt for the purchase of these interests (which we submit is not shown) prior to the closing of the transaction, that agreement was that the amount to be paid for Mrs. Christian's interest should be deducted from the price agreed to be paid by Waialua for Holt's entire interest including this contingent remainder.

4. Waialua, upon acquiring James L. Holt's interest, including Mrs. Christian's, became substantially the sole owner of the lands in question, which it was in the process of incorporating into its much larger plantation, the whole enterprise involving the expenditure of enormous sums. It is opposed to all natural expectations to suppose that in these circumstances Waialua would consent to or participate in a petty fraud upon one of its grantors of a part interest in the property: or that it would have proceeded to expend hundreds of thousands of dollars, if it had had the slightest doubt of the validity of the conveyance.

5. Waialua's attorneys, who represented it in the transaction, were honorable men of the highest standing. It is unthinkable that they would have themselves taken part in, or would have

permitted Waialua to take part in, any overreaching of Mrs. Christian by Holt concerning this interest in the property which it was acquiring.

We submit that a consideration of the foregoing facts and circumstances leads inevitably to the conclusion that Waialua acted in the highest of good faith throughout this entire transaction.

(B) THE CONTENTION THAT THE DECISION SHOULD HAVE GRANTED MRS. CHRISTIAN GREATER RELIEF, IS WITHOUT MERIT.

Inasmuch as this argument, though addressed to an attempt to secure even a greater measure of relief than was given by the decree (which required the return of the consideration and an allowance for improvements, as a condition of cancellation), goes directly to the merits of the entire issue, we will deal with it at greater length than otherwise would be the case.

(1) The Courts found that Waialua was an innocent purchaser, and the Grantor's argument to the contrary is unsupported.

This argument has been anticipated and is fully met in our opening brief pages 104-106, so we will not discuss it other than to point out:

1. The courts below found that Waialua did not have notice (Supreme Court of Hawaii R. 275-276; Circuit Court of Appeals R. 1605).

The agreement shows that Holt and Colburn represented to Mr. Castle that because of ownership and contract they were in a position to sell a full 2/3 interest to Waialua but were in need of funds to complete the contract. They agreed that if Mr. Castle would advance the funds to complete the contract they would sell the entire 2/3 to him for a stipulated sum. As hereafter shown, Holt testified that this was the proper construction of the relationship.

Holt did not Know or Believe in 1910 that Mrs. Christian was Incompetent.

The knowledge that is sought to be imputed to the principal is knowledge of incompetence. The alleged incompetence was not adjudicated until 1929, more than 19 years after the transaction was completed. Whether or not Mrs. Christian was incompetent in 1910 is a matter of opinion, not knowledge, upon which a large number of witnesses disagreed. The only class of witnesses that were in accord were lawyers and public officials. They were all of the opinion that Mrs. Christian was competent. Counsel would have us believe that the opinion of an alleged agent conveniently given while acting as a discredited adverse witness, in the face of disagreement among the medical profession, and in the face of his own prior, contemporaneous, contradictory testimony, is knowledge of the fact of incompetence which will be imputed to the principal.

That cannot be the rule in a court of equity, particularly where the principal closed the transaction

with the alleged incompetent, through its attorney, a highly esteemed member of the bar, who saw nothing which would arouse even a suspicion of the alleged incompetence.

We believe that Holt in 1910 was of the belief that Mrs. Christian was competent. On no other ground can one explain his subsequent conveyance with full covenants of warranty. He had, for years, been trying to purchase her interest for himself. He was on friendly terms with Mrs. Christian and her family group, and her interest had been for sale for years (R. 1018). If he had had any real doubt as to her competence, he certainly would have arranged for the appointment of a guardian. When testifying, Holt was forced to admit:

> "My cousin Mrs. Christian did marry and there was an annulment proceeding brought in respect of that marriage. I think I testified at that trial. I don't know whether I testified that Eliza was a bright girl, or words to that effect. I will not testify now or swear now that I didn't so testify at that trial.
>
> Although it is true that I testified for the defense in the annulment proceedings brought on behalf of Eliza Christian against Albert Christian, I can't positively state what I did say at those proceedings." (R. 1025)

The court records of that proceeding, except the decree, could not be found (R. 1341).

Holt admitted that he wrote to Mrs. Christian and received letters from her and the record shows that

he remitted money directly to her as late as April 28, 1919 (R. 1020-21). Furthermore, he joined with Mrs. Christian as a party to the 1905 lease (R. 890).

Nor did the Supreme Court of Hawaii find that Holt had any knowledge of Mrs. Christian's incompetence. It rejected all of his testimony and did not mention his name in its lengthy opinions.

Holt had an Adverse Interest to Waialua; He Actively Represented to it that Mrs. Christian was Competent; the Agency Rule Contended for by the Grantor is Inapplicable.

Counsel's citations support the general rule that an agent's knowledge will be imputed to his principal when such knowledge concerns a matter within the scope of his agency. The same cases also support an exception to that rule. Where the conduct or position of the agent is such as to raise a presumption that he would not communicate the facts to the principal, as where the agent is in reality acting in his own behalf or adversely to the principal or has a motive in concealing the facts from his principal, the knowledge of the agent will not be imputed to his principal.

Holt had three interests all adverse to Waialua: (a) He was anxious to acquire Mrs. Christian's interest so that he could dispose of it combined with his own—his interest standing alone being unsalable: (b) he was obligated to pay John D. Holt $150 a month, and he wanted to be relieved of that obligation; and (c) as is shown by the terms of the alleged agreement, he was indebted and wanted to secure funds to pay his obligation.

That these adverse interests were such as to induce him not to disclose any information that would interfere with the consummation of his purposed sale, is obvious. That he did not disclose such information but did everything possible to lead Waialua to believe Mrs. Christian was a competent and willing seller was found by the trial court (R. 134).

Under these circumstances knowledge is not imputed to the principal.

> "the principal is not charged with knowledge of his agent where the agent deals for himself with the principal, or where the agent's personal interests would be affected if facts known to him were known to his principal; or where he is more intent in furthering the interests of the opposite party than that of his principal."
>
> 3 *C. J. S.* 203, Sec. 269.

> "The rule that notice to an agent is notice to the principal is not one of universal application and it does not apply where the circumstances are such as to raise a clear presumption that the agent will not transmit his knowledge to his principal."
>
> 3 *C. J. S.* 196, Sec. 262.

There is also an exception to the exception to the effect that a principal will be deprived of the benefit of the exception if the agent is the sole representative of the principal in the transaction. See 3 *C. J. S.* 203, Sec. 269.

In *Curtis v. U. S.*, 262 U. S. 215, the case upon which chief reliance is placed by the grantor, the

court states the rule, the exception to the rule and then supports its opinion, if indeed it does not base its opinion, upon the exception to the exception. Chief Justice Taft states (p. 222) in speaking of the corporation: "It is charged with Holbrook's knowledge because he was the sole actor for the company in procuring the fraudulent patents": and then in distinguishing the case of *American Nat. Bank v. Miller*, 229 U. S. 517, which case was based upon the exception to the rule, the Chief Justice further states (p. 224): "If the case at bar Holbrook was the sole agent acting for the company in securing titles to land for it."

Here, assuming Holt was Waialua's agent, he was not a sole agent. Both Mr. Castle and Mr. Withington were acting for Waialua.

This is not the only distinction between the case at bar and *Curtis v. U. S.*, supra.

Counsel have set forth at length a written agreement between Holbrook, Collins and Curtis who were the prospective stockholders of the corporation in the *Curtis* case. Chief Justice Taft stated the lands in question were not secured pursuant to the written agreement, but pursuant to a subsequent oral agreement at which time the written agreeemnt had been fully executed.

The oral agreement provided that Holbrook was to acquire 30,000 acres of land under the Timber and Stone Act and deed it to the corporation at $10 per acre. Holbrook was a director, officer, manager and

large stockholder of the corporation. He was admittedly the agent of the corporation. Except for a period of one month, the frauds were committed after the corporation was formed and while Holbrook was its manager. During the entire period he had complete knowledge of the manner in which the land was being acquired. The only adverse interest that Holbrook had was that he was to make a personal profit on the deal. This interest was no more adverse than that of all agents who work for compensation. Even in the face of these facts the court found it necessary to rely upon the "sole actor" exception to the exception to the rule.[1]

The exception to the rule, as well as the basis for the rule, has been frequently stated:

In *American Nat. Bank v. Miller*, 229 U. S. 517, it is said (p. 522):

> "But if the fact of his (the agent's) own insolvency and of his personal indebtedness to the Nashville Bank were matters which it was to his interest to conceal, the law does not by a fiction charge the Macon bank, of which he was president, with notice of facts which the agent not only

1. In the *Curtis* case, so much relied on by counsel, the agreement of agency set out in the appendix to grantor's brief as a "deadly parallel" to the alleged agreement of April 15, does not furnish the basis of the finding of agency. Holbrook, as a stockholder, director, officer and manager of the corporation was admittedly its agent, as was abundantly proved by other evidence. Here the attempt is made to prove an "agency" by an unexecuted agreement, which is not corroborated by the other evidence, but is inconsistent with it.

did not disclose, but which he was interested in concealing."

In *American Surety Co. v. Pauly*, 170 U. S. 133, it is said (p. 156):

> "The presumption that the agent informed his principal * * * does not arise where the agent acts * * * to subserve simply his own personal ends or to commit some fraud against the principal."

See, also, *Maryland Casualty Co. v. Tulsa Industrial Loan and Inv. Co.*, 83 F.(2d) 14; *Fidelity & Deposit Co. v. People's Bank of Sanford*, 72 F.(2d) 932; *Schneider v. Thompson*, 58 F.(2d) 94.

In *United States v. Clark*, 138 F. 294, 301 affirmed 200 U. S. 601, the decision of the Circuit Court of Appeals was based upon facts which, even though much less favorable to the defendant than the facts in this case, are much more analogous to the case at bar than were the facts in the *Curtis* case. The court, after reviewing the circumstances surrounding certain absolute sales of timber lands by one Cobban to the defendant, said:

> "* * * Cobban and the appellee through his agents, commenced negotiations for additional lumber and timber lands. Cobban wanted the appellee to loan him money, bearing interest, with which to carry on his operations and to acquire additional lands, and to take as security his (Cobban's) deeds covering the lands, * * * That arrangement was agreed to by Cobban and the appellee, * * *. Subsequently, by agreement of the

respective parties, these mortgages were, for a money consideration, converted into absolute sales. While it is true that the record shows that the appellee knew that some of the money he loaned Cobban was intended to be used by him in acquiring additional lands, it does not show that the appellee knew, or had any reason to know, that he expected to acquire them fraudulently, or in any way unlawfully."

In affirming the decision, this Court said (p. 608):

"There is nothing sufficient to show that Clark had actual knowledge of the arrangement by which Cobban got the lands. The allegation that Cobban was Clark's agent in the purchase wholly breaks down. Clark was at a distance. He dealt as a purchaser with Cobban and paid him the market price, and a substantial profit even on the government's calculations."

Even if Holt had been Waialua's agent and had known or believed that Mrs. Christian was incompetent, that knowledge would not be imputed to Waialua.

We have shown in our opening brief, pages 107 to 111, that under accepted principles, the guilty knowledge of an agent is not charged to his innocent principal, if, in reliance on the transaction the principal has materially changed his position so as to make it inequitable to impute the guilty agent's knowledge to him.

To what there appears, we add the following: We have already referred to Sections 263 and 274 of the

Restatement of the Law of Agency. We now refer also to Section 99, Comment c of that *Restatement*:

> "c. *Change of principal's situation.* The principal is under no duty to return things received as the result of an unauthorized act, if, before becoming aware of the facts, he receives title thereto as a bona fide purchaser, or he incorporates them in something from which they cannot be separated, or if they have become so mixed with his things that they are indistinguishable. Likewise, if the situation of the principal has so changed that it is inequitable to require their return under the changed conditions, their retention does not constitute an affirmance."

See:

Frey v. Dougherty, 286 Pa. 45;
W. W. Marshall & Co. v. Kirschbraun, 100 Neb. 876;
German-American State Bank v. Mutual Benefit Ass'n., 107 Neb. 124;
Johnson v. City Co., 78 F.(2d) 782, 786;
Czyrson v. Roseau County National Bank, 172 Minn. 420.

It follows, therefore, that since Waialua took without actual knowledge of incompetence, the great and irrevocable change of position done and suffered by it in the many years that followed, makes this a case where, in any event, the imputation of an agent's knowledge to the innocent principal would not justify rescission of what was done in good faith, for adequate consideration, in 1910.

The fact that Waialua took delivery of the deed before Holt acquired legal title does not charge Waialua with Holt's knowledge.

Counsel for Mrs. Christian seem to argue that Waialua is subject to the same equities to which it is argued Holt was subject, merely because Waialua took delivery of the deed from Mrs. Christian (Opening Br. p. 43). This, of course, is not true as a matter of law.

We have already supported the propositions (a) that Holt made no profit, secret or other, in his purchase, and resale to Waialua, of Mrs. Christian's contingent interest; and (b) that he in fact believed her competent.

We now point out that in any event, one who acquires an equitable interest from a party against whom defenses would lie, takes free of those defenses if, as here, he later acquires the legal title in good faith for value without notice of the facts giving rise to the defenses against his transferor.[1]

The fact is, indeed, that Waialua is within the class of subsequent bona fide purchasers for value, under the deed of 1910. As we have seen, long before the execution of the deed, Holt had accepted an offer of Mrs.

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1. *Ames, Lectures on Legal History,* 254;
2 *Tiffany on Real Property,* 2173;
4 *Bogert on Trusts,* 2560;
Pomeroy, Equity Jurisprudence, (4th ed.) §§417, 740;
Boone v. Chiles, 10 Peters, 177, 210;
Fitzsimmons v. Ogden, 7 Cranch 2, 18;
United States v. Clark, 200 U. S. 601, 607.

Christian's interest for $30,000 (R. 926). It is apparent that Kentwell, who made the offer on behalf of Mrs. Christian, was her authorized agent to sell. Moreover, her own later performance of the contract was necessarily a ratification thereof.

The authority of an agent to sell real property did not have to be in writing, either in Hawaii or in England. *Takahâshi v. Kualu* (1905), 17 Haw. 87, 89; *Coles v. Trecothick*, 9 Ves. Jr. 250; *Heard v. Pilley*, L. R. 4 Ch. 548.

This is apparently the universal rule where the statute does not expressly require the agent's authority to be in writing. 2 *Williston on Contracts* (Rev. ed.) 1406.

The Hawaiian statute did not require the agent's authority to be in writing in 1910. (*Rev. Laws of Hawaii*, 1915, Sec. 2659), although it does now, by virtue of an amendment in 1923 (*Laws*, 1923, c. 5, sec. 1).

Moreover, whether or not Holt had a contract with Mrs. Christian, and assuming that if he did it was voidable, even so, the rule that a purchaser is protected if he acquires the legal title in good faith for value without notice, applies whether or not his intermediate transferor had and transferred a completed enforceable equity. (See the authorities cited above.

A *fortiori*, Holt's alleged knowledge and misconduct (both of which, we submit, are non-existent) are not available against Waialua.

(3) Arguments based on the contention tha. Mrs. Christian did not receive the consideration for the deed of 1910 are without merit.

This argument of the grantor, which is based on the contention that Mrs. Christian did not receive the sum paid by Waialua, is fully answered in our opening brief in No. 15, at pages 113 to 117.

(4) The argument that this cause is governed by a "rule of decision in the Federal Courts" that the deed of an incompetent is void, is unsound.

Here counsel again present their claim that there is a "rule of decision in the federal courts" to the effect that the deed of an incompetent is void: that this rule governs this cause: and as a result, Waialua, although it acted in good faith, is entitled to neither a return of the consideration nor compensation for improvements, if the deed is cancelled.

We have already pointed out in our opening brief that there is no such rule prevailing in the federal courts as counsel contends for. We have also demonstrated, we submit, that if there was such a rule, it would not govern this cause for the law to be applied here is the law of the Territory of Hawaii and not any so-called "Federal Rule".

The argument is alluring to counsel, of course, because it would entitle the grantor to a decree of cancellation automatically[1], eliminating all questions

1. This in substance is what the Circuit Court of Appeals did when it held that it would not "balance all of the equities of the parties" (R. 1600).

mation of the deed to the Waialua Agricultural Company. My interest in acquiring the one-third belonging to my cousin Eliza Christian was the fact that I wanted control of it without somebody from the outside getting hold of it. Around the latter part of 1909 Mr. Castle told me he did not want to buy my one-third, but that he wanted to buy a two-thirds interest, as I remember.

"I knew from my correspondence with Mr. Kentwell that as far back as 1908 they were trying to dispose of the Eliza Christian interest, always writing back here to see what they could get." (R. 1017)

Although Kentwell and Mrs. Christian knew at all times that Holt expected to sell Mrs. Christian's interest, after he had purchased it, together with his own, to Waialua, it is equally clear that at all times Holt was dealt with as the purchaser.

On February 17, 1910, Holt wrote Kentwell asking them to "contract" with him; that "this offer I make you now is final", and that if Mrs. Christian survives her father she "may be able to get more for her share than this amount I offer." (R. 914)

On March 30, 1910, Kentwell wrote Holt saying "I assume the offer we made is satisfactory to you" and "We want to stand by you and you must act at once." (R. 919)

After the purchase had been agreed to and Mr. Withington left for England, Holt cabled Kentwell to have the conveyance executed to him, to which Kentwell replied on April 29 that this was agreeable

(R. 942). Thus Holt made sure up to the last moment that title would vest in him.

The Alleged Agreement of April 15, if Executed, Would Not Have Created an Agency.

The alleged agreement of April 15, if it had been executed, would not have created an agency relationship but would have evidenced the independent contract of Holt with Waialua—under which he agreed to sell a 2/3 interest (of which he then owned the greater part), provided he acquired the other outstanding interests pursuant to his contract. Under it he would be acting for himself and not for Waialua.

Under the agreement, the two-thirds interest was to be conveyed by Holt and Colburn by a warranty deed (R. 951). Would an "agent" employed to acquire real estate for his "principal" agree to first purchase the property on his own account and then convey it to his "principal" by a deed containing full warranties?

Under the agreement, both Holt and Colburn were to be bound, if, within one year, they could not convey by warranty deed a full two-thirds interest, to refund with interest all money advanced by the buyer to aid in the acquisition of the outstanding interest. It is a peculiar sort of "agency" where the agent must expend time and money on the business of the principal but who, if he cannot himself convey title by warranty deed within a limited period of time, must bear the entire cost and expense of the transaction.

instructions to permit the grantor, if it desired, by suitable amendments, to put in issue the validity of the 1905 lease and 1906 contract, "in so far as it may be affected by the mental condition of" Mrs. Christian (R. 327).

The grantor accordingly amended the pleadings challenging the lease and contract, and issue was joined with Waialua denying that Mrs. Christian was incompetent when they were executed. At the trial Waialua offered oral and documentary evidence on this issue, but on the objection of Mrs. Christian's attorneys the trial court excluded such evidence, ruling that this issue was no longer open (R. 1466). The trial court made its decision on remand cancelling the 1905 lease and 1906 contract, in 1932.

On appeal, the Supreme Court of Hawaii in 1934 held that the trial court in excluding evidence as to Mrs. Christian's mental condition in 1905 and 1906 had correctly construed its order of remand but that such evidence should have been admitted, stating:

> "As expressly held in the former opinion, neither the lease of 1905 nor the instrument of 1906 was a subject of contention between the parties at the original trial. * * * both parties expressly represented to the court and to each other in their pleadings that that lease was not in issue. * * * There may be, on the part of the members of the court who examined the evidence on the original trial, a temptation to believe that in spite of any new evidence to be adduced their conclusion concerning the degree of Eliza's imbecility would not be affected thereby. Nevertheless

the court should not venture any such surmise" (R. 553-554).

The Supreme Court of Hawaii, however, held that this error was not prejudicial because, assuming that Mrs. Christian was incompetent when the 1905 lease and 1906 contract were made, for the reasons stated in the court's opinion, they nevertheless should not be cancelled (R. 555, et seq.) and so decreed.

In short, the Supreme Court of Hawaii considered the question at great length, and after pointing out that Waialua was entitled to show a change in Mrs. Christian's condition between 1905 and 1910, held that if her incompetency in 1905 was relevant that issue would have to be tried.

The Circuit Court of Appeals agreed (R. 1609) and having held that an incompetent's conveyance is void, held that the question whether Mrs. Christian was incompetent in 1905 and 1906 must be tried; and remanded the case for this purpose.

Counsel invoke the doctrine of the law of the case. Obviously it has no bearing for the decree of the Supreme Court of Hawaii on the first appeal was interlocutory only, as the Circuit Court of Appeals held when it dismissed an appeal therefrom (52 F.(2d) 847). The Supreme Court of Hawaii therefore retained full jurisdiction of the cause when it heard it on the second appeal and if it wished could have entirely reversed its decision on the first appeal. There can be no question of its power to correct the error made by it in its first order of remand.

The Supreme Court of Hawaii in this case, was an intermediate appellate court, since the amount in controversy brought the cause within the jurisdiction of the Circuit Court of Appeals. Being an intermediate appellate court the Supreme Court of Hawaii could at any time prior to the entry of final decree, correct any error in any interlocutory order. The doctrine of the law of the case has no application whatsoever, as the Supreme Court of Hawaii itself has held.

Rosenbledt v. Wodehouse, 25 Haw. 561;
Sumitomo Bank v. Hawaii Nosan, 26 Haw. 517, 535:

"The effect of the foregoing is to overrule the former opinion in this case. It would also seem to disregard the rule of 'the law of the case' * * * The rule of the law of the case at best is not applicable in cases such as this where the amount involved, exclusive of costs, exceeds $5,000."

Indeed, this Court itself has ruled that the Supreme Court of Hawaii, as an intermediate appellate court, is free to reverse or modify its former opinions at any time prior to final decree.

Kapiolani Estate v. Atcherley, 238 U. S. 119, 136;
Lewers & Cooke v. Atcherley, 222 U. S. 283, 295.

THE FACTS HAVE BEEN FULLY FOUND BELOW. THIS COURT MAY DISPOSE FINALLY OF THE CASE BY ORDERING THAT THE BILL BE DISMISSED.

This suit was first tried in 1929. It has been heard five times in three courts. The facts and their significance have been dealt with to the point of exhaustion, in five lengthy opinions.

It clearly appears, we submit, that Mrs. Christian has not made out a case; that on the contrary, it has been shown, on several independent grounds, that the titles sought to be annulled should not be disturbed.

We respectfully urge, therefore, that on reversal, this Court should order that the bill be dismissed, thus putting an end to the proceeding.

The Lease of 1905 and the Assignment of 1906.

The court below clearly erred in reversing the judgment of the Supreme Court of Hawaii that the lease of 1905 and the assignment of 1906 should not be disturbed. The reasoning and decision of the Supreme Court of Hawaii on this question sustains itself without argument. For convenience, we again quote briefly from that court's opinion:

> "This lease was for an adequate consideration. All its terms were fair and reasonable * * * It has been fully performed. It was in the best interests of Eliza and beneficial to her * * * The imbecility of the lessor did not enter into the transaction. Under these circumstances we can see no equity or justice in canceling the lease (R. 558) * * * even though the lessee can be restored to the status quo ante." (R. 560)

The vital part of the discussion by the Supreme Court of Hawaii of the assignment of 1906 appears in the record, at pages 572 to 575. The court said in part:

> "When the W. A. Co. received the deed of Annie Kentwell, of May 2, 1910, it did so, as we have already held, without knowledge of the incompetency of Eliza. In our opinion the deed from Annie Kentwell, a competent person, to the W. A. Co., did operate transfer to the company the right which Annie had secured from Eliza by the assignment of 1906." (R. 575)

The Circuit Court of Appeals in decreeing that the 1905 lease be cancelled if Mrs. Christian was incompetent when she executed it, overruled the Supreme Court of Hawaii without so much as discussing or considering the grounds or reasoning upon which that court based its decision. This action seems unsupportable on any view of the law or the facts, save the adoption by the court below of the so-called "Federal Rule" that the deed of an incompetent is a nullity, which rule the Supreme Court of Hawaii rejected[1] as a rule for the Territory.

It is apparent, we submit, that no imaginable ground would justify disturbance of the judgment of the Supreme Court of Hawaii that the lease of 1905 and the assignment of 1906 are valid and unassailable.

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1. Compare: *Kapiolani Estate v. Atcherely*, 238 U. S. 119, 136;
Compañia General De Tobacos v. Collector, 273 U. S. 306, 310.

The Deed of 1910.

It is shown, we submit, beyond question that as found by the Supreme Court of Hawaii and the court below, Waialua received the deed of May 2, 1910 in good faith, without knowledge of the grantor's alleged incompetence, for an adequate consideration.

And we have demonstrated, we believe, that in the many years that intervened between the execution of the deed and the commencement of this suit, Waialua has so irrevocably changed its position in reliance on its title that restoration of Waialua to *status quo* is wholly impossible, so that cancellation of the deed, in an action brought 18 years after its execution, would work a grave and wholly inexcusable injustice upon the innocent grantee.

To be sure, the Supreme Court of Hawaii held that the deed should be cancelled; but this decision, we submit, rests upon two errors of law, both of which were, in the court's opinion, necessary to the decision:

1. That court held that Waialua was restored to status quo by the provisions of its decree designed to give Waialua the continued use of its physical improvements.[1] The utter inadequacy of this attempt to

1. Under the decree which the Supreme Court of Hawaii believed restored Waialua to status quo, (1) the lease of 1905 was held valid, (2) the contract of 1906 was held valid as an assignment of rent for Mrs. Christian's life, (3) Waialua was given all the improvements, and (4) the purchase price was returned. Waialua thus received the purchase price, the improvements, and the use of the property for Mrs. Christian's life, without rental. All of these,

restore status quo has, we believe, been abundantly shown. It utterly ignores and does not mention, that Waialua purchased a contingent interest, bore the risk for 12 years, improved the property as its owner for years thereafter, and is now being called upon to convey to Mrs. Christian a vested fee. In addition it takes no account of the many intangible changes of position made and suffered by Waialua during the many years that intervened; of the countless decisions that have been made in reliance on the title, the many steps that have been taken once and for all which would have been very different except for the grantee's justified belief that the deed in question was valid; of the countless changes of external events which make it now wholly impossible to go back to the state of affairs in 1910; of the numerous risks assumed by Waialua in the purchase of the various interests and the development of its large and unified enterprise; in short, it fails to take account of anything except the physical improvements made by Waialua. And indeed, it ignores many of these, e.g. the conversion by Waialua of a desert waste into a profitable plantation. This whole matter has been adequately dealt with in our opening brief and in our petition and supporting brief. The Supreme Court of Hawaii expressly held that unless Waialua could be restored to status quo, the deed should not be cancelled (R. 293-294).

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together, (the court thought) restored status quo. The Circuit Court of Appeals, while adopting the Supreme Court of Hawaii's findings that status quo could be restored, entirely abandoned the basis of its decision.

2. The second error of the Supreme Court of Hawaii was its holding that the deed of 1910 was not beneficial to Mrs. Christian.

As we have seen, the Supreme Court of Hawaii held that the deed of an incompetent will not be set aside (even though status quo can be restored), as against a purchaser without knowledge of the incompetence for adequate consideration, if it can also be said that the execution of the deed was "beneficial" to the incompetent. And although the court found that Waialua purchased in good faith, without knowledge of the incompetence for an adequate consideration, it concluded that the 1910 transaction was not "beneficial" to Mrs. Christian. The court stated this conclusion as follows:

> "She was then living with her father and the Kentwells at the home of the latter in Oxford. Her life, because of her imbecile condition, was very restricted and her wants were accordingly simple. There was no necessity for her to have more than enough money to supply them. Annie Kentwell, by the instrument of August 31, 1906, to which we have already referred, had undertaken to support Eliza during her life. She was in no danger, therefore, of becoming a public charge or of not being supplied with the things necessary to her sustenance and comfort. In her circumstances it would clearly be the part of wisdom to hold on to her contingent interest when by doing so she might eventually become owner of a vested and more valuable interest." (R. 303)

The ultimate basis of the court's decision to cancel the 1910 deed was therefore its belief that under the contract of 1906 she was assured of support for life. The Circuit Court of Appeals, not only construed the contract of 1906 to be nothing more than an assignment of the rentals under the 1905 lease, which expired in 1930 (as contrasted from the Supreme Court of Hawaii's holding that it assigned all rentals to become due her during her life), but it also decreed that the 1906 contract should be cancelled if Mrs. Christian was incompetent when she executed it. The Circuit Court of Appeals thus destroyed the very basis of the Supreme Court of Hawaii's decision. That court pointed out in the second appeal that its decision in the first appeal cancelling the 1910 deed had been based on the support guaranteed Mrs. Christian by the 1906 contract, and in upholding the validity of that contract as an assignment of rentals for life pointed out:

> "But if she had not had those assurances of money and support from her lease of 1905 and her assignment of 1906, the effect on the deed of 1910 might conceivably have been different. That cannot be decided now." (R. 572)

This is to say, in effect, that if the court believed the 1905 lease and 1906 contract not to be binding, it would not have cancelled the 1910 deed. And yet the Circuit Court of Appeals has directed the cancellation of both of these instruments.

The surrounding circumstances clearly show, we submit, that the sale by Mrs. Christian of her con-

tingent interest was an entirely prudent and business-like transaction, for the following reasons:

1. It must be remembered that Mrs. Christian's interest was a contingent remainder, dependent upon her surviving her father (who in fact lived for twelve years thereafter), and upon her surviving him as his sole heir. The substantial nature of the risk attending these contingencies is adequately described by the Supreme Court of Hawaii (R. 304-5) in the part of its opinion wherein the court holds that the consideration was adequate. It is, we submit, apparent that it was not only prudent but eminently wise for a woman in her position to exchange this future contingency for a present and certain sum, expressly found to be equal to its full value.

2. The court's reasoning amounts to the proposition that since her daily wants were provided for, she should have chosen to speculate on the happening of the contingencies; that if she had had $30,000 at the time, it would have been unwise not to invest it in this speculative future contingency.

3. The court's statement that in 1910 she did not have any need or use of $30,000 is purely gratuitous. Although her living was provided for life, we have no knowledge whatever on the question whether she then had reasons for wanting to realize on her contingent remainder; and, if so, what those reasons were.

4. The wisdom of the sale by Mrs. Christian of her contingent remainder in 1910 is attested by the fact that contemporaneously, James L. Holt, whose busi-

of good faith, adequacy of consideration, and restoration to status quo, and because its application would deprive Waialua as an innocent purchaser of the restoration of the money it paid in good faith and the hundreds of thousands of dollars which it spent in reliance on the integrity of the instruments. Carried to its logical conclusion, it would mean that the grantor need not have resorted to a court of equity at all but could have recovered the property by an action in ejectment.

The Circuit Court of Appeals, sitting as an appellate court for Hawaii, had not only the right but the duty to declare the law. This does not mean, however, that that court may fasten on the Territory of Hawaii a rule of law contrary to the unanimous authority of common law jurisdictions. Nor does it mean that the court may ignore a local statute,[1] which makes "the common law of England, as ascertained by English and American decisions * * *" the law of Hawaii.

(C) COUNSEL'S CLAIM THAT THE DECISION OF THE SUPREME COURT OF HAWAII ON INCOMPETENCE IN THE FIRST APPEAL IS THE LAW OF THE CASE IS WITHOUT MERIT.

Counsel, having urged that an incompetent's conveyance is void, argue that the cause should not be remanded for trial of the issue of competence in 1905 and 1906 on the ground that on the first appeal, the Supreme Court of Hawaii held that no trial of

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1. *Revised Laws of Hawaii*, 1935, Sec. 1.

that issue was necessary; and that ruling (counsel argue) is the law of the case.

In view of the fact that the argument is both clearly unsound and (in our view of the case) irrelevant, we would not discuss it except that it necessarily implies the further argument that the court's decision on the first appeal is the law of the case on all points there decided. In these circumstances we are impelled to point out its unsoundness, and in this behalf to trace the history of the issues involved.

Preliminarily, we point out that this litigation has been prolonged over a period of ten years, primarily because of the grantor's failure to present all of the issues to the court when the cause was first tried.

This suit was filed in 1928. It attacked only the 1910 deed. When the Supreme Court of Hawaii decided the first appeal in 1931, while it decreed the cancellation of the 1910 deed, it pointed out that "by the pleadings in this case the validity of the lease was expressly excluded from the issues and therefore could not properly have been adjudicated by the court below and cannot be adjudicated by this court" (R. 312) and pointing out that "if the deed fell the Waialua Company had a perfect right to claim that its possession was justified by the lease" (R. 314) and the deed of 1910 being invalid "the Waialua Company's rights under the lease remain unaffected until it is cancelled" (R. 318). It also held that whether the 1906 contract should be set aside "is not within the issues presented by the pleadings" (R. 323). The court therefore remanded the cause to the trial court with

ness acumen is not questioned, was in the process of selling a similar[1] contingent remainder owned by him; and by the further fact that Mrs. Kentwell, by the very deed here in question, sold her contingent right to future rents, which depended upon the same contingencies that governed Mrs. Christian's remainder.

5. Mrs. Christian could not receive any benefit from her ownership of the contingent remainder for at least twenty years after 1910, even though it should vest within that time, for, even under the narrow construction of the 1906 contract adopted by the court below, she had assigned her contingent right to receive rents under the lease of 1905, which lease was not to expire until 1930.

6. Either before or very shortly after the deed of 1910, numerous relatives of Mrs. Christian sold their various interests in the same property.

7. It is not disputed that the deed of 1910 was executed by Mrs. Christian after consultation with her father, her cousin Annie Kentwell, and the latter's husband, Lawrence Kentwell, a sale having been contemplated and under discussion for more than a year. (R. 1018) The only one of these three who testified in this case is Mrs. Kentwell. Mrs. Christian's father was

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1. James L. Holt had a contingent remainder in 1/4 (his brother's interest which he had purchased, and his own), which depended on two lives instead of one, and was therefore more valuable than Mrs. Christian's interest. Holt's father died in 1916, while Mrs. Christian's father lived until 1922.

dead, and Lawrence Kentwell was not called. Although Mrs. Kentwell (the "guardian") now protests that she acted in bad faith, her testimony is discredited by both the trial court and the Supreme Court of Hawaii; and there is no intimation in the record that either of the other two were faithless advisors.

Lawrence Kentwell had for many years managed not only his own business affairs but those of his wife, Mrs. Christian's father, and Mrs. Christian herself. He was a man of considerable business experience, and a trained lawyer, as noted by the Supreme Court of Hawaii (R. 302). There is not a word of evidence in the record which even suggests that his advice to Mrs. Christian concerning the deed of 1910 did not represent his best judgment.

In the face of these circumstances, we submit that there is no ground whatever for concluding, even in retrospect, that the conveyance by Mrs. Christian in 1910 was not beneficial to her.

We submit, moreover, that there is no justification for holding that in order to be immune against attack, the transaction must, upon a delicate weighing of all aspects of the grantor's circumstances, be found in retrospect to have been "beneficial" to the grantor.

Finally, we submit that in any event, the finding that the consideration was adequate, namely, that what Mrs. Christian got was equal in value to what she gave, is alone conclusive of the question.

This leaves only the proposition that in retrospect, Mrs. Christian would have profited more by retaining

her future contingent interest, and that this alone is a sufficient ground upon which to set aside the deed, notwithstanding the great and irreparable harm that will thereby be inflicted on the innocent grantee.

We do not believe that this Court will accept and approve this proposition either as a matter of fact or a matter of law. It must do so in order to hold that it was not error for the court to place its decision upon this ground.

CONCLUSION

The grantor has shown no basis for the cancellation of the 1905 lease and the 1906 contract; and these instruments, which were upheld by the Supreme Court of Hawaii, should not be cancelled under any view of the law or facts. The real issue here is the error of the Circuit Court of Appeals in cancelling the deed of 1910. We submit that, for the reasons stated, this court should reverse the decree of the court below and direct the dismissal of the bill.

Respectfully submitted,

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Dated, San Francisco, California,
September 30, 1938.

FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1937

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No. [redacted] 15

WAIALUA AGRICULTURAL COMPANY, LIMITED (an Hawaiian corporation),

Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, etc.,

Respondents.

OPPOSING BRIEF OF ELIZA R. P. CHRISTIAN, BY HERMAN V. VON HOLT, HER GUARDIAN, IN RESPONSE TO THE PETITION OF WAIALUA AGRICULTURAL COMPANY, LIMITED, FOR WRIT OF CERTIORARI.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1937

No. 904

WAIALUA AGRICULTURAL COMPANY, LIMITED (an Hawaiian corporation),
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, etc.,
Respondents.

OPPOSING BRIEF OF ELIZA R. P. CHRISTIAN, BY HERMAN V. VON HOLT, HER GUARDIAN, IN RESPONSE TO THE PETITION OF WAIALUA AGRICULTURAL COMPANY, LIMITED, FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The respondent, Eliza R. P. Christian (hereinafter called the "ward"), respectfully submits that the petition

of Waialua Agricultural Company, Limited (hereinafter called "Waialua"), should not be granted. By way of precaution, in order to save her rights in the event that Certiorari should be granted, the ward has filed a cross-petition for a Writ of Certiorari. The present brief seeks to set forth the reasons why Waialua's petition should be denied.

STATEMENT OF THE CASE.

A more complete statement is set out in the ward's cross-petition at pages 2 to 5. In accordance with Subdivision 3 of Rule 27 of the Rules of the Supreme Court, we limit ourselves, in this portion of the brief, to a correction of inaccuracies and omissions in the statement contained in Waialua's petition.

(a) The summary of the findings of the trial Court relative to the mental condition of the ward, found at pages 2-3 of Waialua's petition, gives an incomplete and misleading picture of the facts found. Filling in the omitted portions, represented in Waialua's petition by asterisks (Pet. top of p. 3), the finding reads (R. 132-3):

> "1. Eliza (Holt) Christian, petitioner, neither was, nor is, an idiot, a lunatic or utterly imbecile.
>
> 2. She was and is, however, a person of undeveloped intellect, incapable of forming a reasoned judgment or understanding; incapable of comprehending her own right to an independent status, the extent or nature of property or of her property interests, the value of money, or the ordinary matters of life essential to a reasonable degree of independent living.

3. She had insufficient mental capacity to comprehend the difference between $100.00 and $1000.00; between $30,000.00 or $60,000.00, for her individual rights; or to comprehend the difference between payment to her individually, for her sole disposition, of any such sum or sums and payment to her circle of relatives and under their control; or whether $30,000.00 or any sum was for her rights as distinct from the rights of others involved in the deal; or the difference between present payment of income and future payment of principal; or to understand that she had rights distinct and independent of her father or of Annie Kentwell.

4. She could not possibly have comprehended, even with advice worthy of trust, the elements necessary to form an independent judgment or to exercise a reasonable measure of choice or of will relative to the value of cane land, pineapple land, ranch land or any kind of land in any quantity; or of postponed rights therein as opposed to present interests; or even the elementary character of her rights and direct the disposition of what she owned.

5. The court is convinced that Eliza did not have the most elementary capacity to understand and judge her rights and protect herself from undue influence and fraud; and that at no time was she an independent actor with a knowledge of her rights.

6. In short, she was mentally incompetent to execute a conveyance in 1910 or at any other time within the scope of the evidence and the law in this case."

The Supreme Court of Hawaii on the first appeal, after an exhaustive review of the evidence, found that: "She was feeble-minded. Born in 1885, in May, 1910, she has the mentality of a child of not more than five or six. * * *

In short, we find that at the date of the deed she was a congenital imbecile" (R. 272-3); the trial Court on the remand said "* * * the congenital imbecility of petitioner has been found heretofore both by this court and the supreme court * * *" (R. 476) and the Supreme Court on the second appeal reaffirmed "the finding that on May 2, 1910 Eliza was a congenital imbecile and incompetent to execute the deed of that day". (R. 552.)[1]

(b) We challenge the statement in the petition (p. 5) that the decisions below establish that "Waialua had no knowledge of the incompetence and paid an adequate consideration".

As to knowledge, the finding of the trial Court was merely that "the evidence does not clearly show that the respondent, Waialua Company, knew of such mental incompetency". (R. 158.) The Supreme Court of Hawaii found (R. 555) or, as the Circuit Court of Appeals said in its opinion, "assumed" (R. 1593), or, as the latter Court said in its opinion on denying rehearing, "made an implied finding" (R. 1637)[2] that Waialua did not have notice of the incompetency. We shall show hereafter that the record compels, as a matter of law, a finding that Waialua did have notice.

1. The brief, in a footnote at page 23, states that "the ward had executed other conveyances, and had been accepted as a party to various transactions. Examination of those portions of the record to which the footnote of the Petition refers will show that the "conveyances" and "transactions" were for the most part those now in question or others with the same group of relatives of the ward as were involved in the instant "conveyance" and "transaction". In its decision in the first appeal, the Supreme Court of Hawaii in the course of its discussion of the evidence relating to the ward's mental competency said of these instruments, "None of these instruments, of course, bears any internal evidence of Eliza's mentality. She did not prepare them nor was she, so far as the evidence shows, a participant in the negotiations to which they related." (R. 265-6.)

2. Since the filing of Waialua's petition and the ward's cross-petition, this opinion has been reported in 94 Fed. (2d), page 805.

As to adequacy of consideration, the trial Court found "that the price paid by Waialua was clearly a bargain, and not adequate". (R. 159.)

(c) While the petition states (p. 3) that the property involved is a 1/3rd interest in 14,000 acres of land, known as the Holt tract, the further statements in the petition and the supporting brief (Pet. pp. 3-6; 36-42) would give the impression that the entire Holt tract was incorporated in Waialua's plantation and extensive improvements made on and off the tract, because of Waialua's reliance upon the ward's execution of the lease of 1905 and of the deed of 1910. The petition further implies that the effect of the decree of the Circuit Court of Appeals will be to take the entire Holt tract of 14,000 acres out of the possession of Waialua, to make continued unified operation impossible and to destroy, in large part, the benefit of Waialua's expenditures for improvements.

In fact, without regard to the instruments in question and through other conveyances, Waialua acquired and still owns title to an undivided 16/27ths of the Holt tract and is in possession as lessee of an additional 2/27ths under a lease other than the one from the ward. All of these rights are independent of the claim of the ward in this litigation; all of them stand unassailed or unquestioned. The record shows without conflict that Waialua acquired 2/27ths interest in the Holt tract prior to the date of the lease (March 17, 1905) and 5 additional 27ths in various transactions before the date of the deed (May 2, 1910) and 9/27ths on May 28, 1910. (R. 1259-1260; 849-50 Subs. 3, 4; 894 Subs. 12, 13, 14; 899 Sub. 16; 960.)

The cancellation of the deed, and the 1905 lease, as to the ward, would leave Waialua the owner of 16/27ths of the tract, and the lessee of 2/7ths thereof.

As owner of an undivided 16/27ths interest in the tract, and lessee of 2/27ths, Waialua will not be ousted from possession or from enjoyment of its improvements by the decree of the Circuit Court of Appeals or any proceedings under that decree. If there should be a partition suit, which alone could affect Waialua's possession of any part of the tract, the Court having jurisdiction of such suit would have ample power, under the Hawaiian law, to fully protect the equities of Waialua. (Revised Laws of Hawaii, 1935, Sec. 4746.) The trial Court did not consider that the improvements would present any difficulty in partitioning the interests of the contestants. (R. 500.) In this connection we point out that the improvements were all made on or for use on sugar cane land, the pineapple land being leased to Hawaiian Pineapple Company which operated and still operates it and which lease the ward has ratified. (R. 536, Sub. 5.) Only 1623 acres of the Holt tract are cane land, while 6476 acres are pineapple land. (R. 1423 and see map attached to Waialua's Pet., opposite p. 48.) In a partition suit, the Court could readily allot to the ward her entire 1/3rd interest out of the pineapple lands. This would leave Waialua all the cane lands and give it the continued use of these lands and of the improvements as a part of its unified plantation operation.

The failure of Waialua to accurately and candidly present the facts and the issues in its petition is alone ample ground for refusing to grant the Writ.

Erie v. Kirkendall (1924) 266 U. S. 185, 69 L. Ed. 236;

Sutter v. Midland etc. (1929) 280 U. S. 521, 74 L. Ed. 590;
Davis v. Currie (1924) 266 U. S. 182, 69 L. Ed. 234;
Southern Power Co. v. North Carolina etc. (1924) 263 U. S. 508, 68 L. Ed. 413.

In the light of the inaccuracies pointed out, how can it be said that Waialua has presented "clear definite and complete disclosures concerning the controversy" which is the requirement laid down by this Court in *Southern Power Co. v. North Carolina*, supra?

THE REASONS RELIED UPON FOR THE WRIT DO NOT BRING THE PETITION WITHIN THE SCOPE OF RULE 38, SUBDIVISION 5.

(a) Waialua misconceives the basis of the decision.

Although repeated in five different ways (Pet. p. 13), in fact the one reason counted upon to support the application for the writ is that the Circuit Court of Appeals determined that the contract of an incompetent made with one who had no knowledge of the incompetency and for an adequate consideration is void in the sense of being a nullity,[3] whereas Waialua contends the correct rule is

3. It seems clear that the reason stated under heading 4 (Pet. p. 13) is simply another way of saying that the Circuit Court of Appeals erroneously adopted the rule that an incompetent's contract is a nullity. Should, however, this be construed as a separate reason for granting the writ, we wish to point out briefly that the reason is wholly without merit. The petitioner states under this heading that the Court below has laid down the rule "that in a bill in equity for cancellation of a deed upon the ground of incompetence of the grantor, it is error for the trial Court to balance the equities of the parties". This we submit is a palpable misinterpretation of the opinion of the Circuit Court of Appeals. The claim is based upon a single sentence of the opinion. It is a part of the discussion of the various conditions under which an incompetent may or may not be entitled to relief against "some act he has done". (R. 1600.) The opinion says: "The courts should not be concerned with his (the incompetent's) reason, but, after proof of incompetency, with the status of the parties, as shown hereinafter by the various factual situations." Then follows the sentence upon

that such a contract is not a nullity but is voidable, i. e., subject to being set aside upon application to a Court of Equity upon such conditions as may be considered just in the premises.

It is only necessary to read the opinion in this case, and to consider the result it reaches, to find a complete answer to Waialua's major premise and consequently to destroy the point upon which it relies in seeking the writ. The Circuit Court of Appeals did not decide that such a contract of an incompetent is a nullity, but, on the contrary, declared such a contract would be set aside only if the situation of the parties so dictates. (R. 1598.) We quote from the opinion (R. 1603):

> "The great majority of the courts, however, take the view, in the case of the innocent party without knowledge, that relief will not be granted unless the parties can be placed in statu quo * * *. The court below took this view on the first appeal in regard to the deed. We believe that the law thus declared in its first decision is correct."

In denying Waialua's petition for a rehearing, the Court repeated that it was not deciding that the contract of the incompetent ward was a nullity, saying (R. 1635):

> "The company says great harm will result from the rule as announced by us. There are, however, two fallacies in its reasoning. In the first place, it fails

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which petitioner bases its claim, which reads as follows: "This, as will appear, does not mean that the court should balance all equities of the parties, as was done by the trial court." 'This is not a statement that it is error for the trial court to balance the equities of the parties". When read in connection with what precedes and follows it means at most that the balancing of the equities is not the sole determining factor—as might be the case if the ground for rescission were mistake as opposed to incapacity,—but that the contract of an incompetent may be set aside if, upon a consideration of all the circumstances, it appears that the parties can be restored substantially to status quo.

to recognize what the rule is. It assumes that relief will be granted upon a showing of incompetency. Such is not the case. The record of land titles can be disturbed only upon proof of incompetency and of a position of parties which authorizes relief. Both are required."

The Circuit Court of Appeals considered Waialua to be an innocent purchaser for an adequate consideration and required as a condition to cancellation that the status quo be restored. It required the ward to pay, or credit, to Waialua the purchase price of the property with interest at 6% from May 2, 1910, and also that an allowance be made to Waialua in the amount by which the land had been enhanced in value by the addition of improvements, not to exceed their cost. The opinion stated (R. 1603):

"The rule as stated means that if the parties can be placed in statu quo the relief will be granted * * *. It is no legal hardship on the party dealing with the incompetent if he receives back what he gave in the bargain."

And again (R. 1605):

"Both courts found * * * that the company could be placed in statu quo * * *. These conclusions were reached after careful consideration of the evidence. * * * We accept them * * *."

The imposition of a condition that status quo be restored is completely inconsistent with the view that the contract is void in the sense of being a nullity and consistent only with the view that the contract is voidable upon the aggrieved party doing equity. This proposition is, in truth, recognized by Waialua in its brief attached to its petition. (Pet. pp. 44-47.)

A judicial opinion, like any other writing, should be interpreted as a whole. (15 C. J. 970.) Waialua's contention that when the Court used the word "void" (R. 1597) it meant the instrument had no validity whatsoever, a contention based on the selection of isolated passages, fails completely when the result directed by the decision is considered. How can it be said that the Circuit Court of Appeals has held the deed of an incompetent to be a nullity when it states in its opinion on denying rehearing:

> "It (referring to Waialua) assumes that relief will be granted upon a showing of incompetency. Such is not the case. The record of land titles can be disturbed only upon proof of incompetency and a position of parties which authorizes relief. Both are required." (R. 1635.)

The basis of the decision is that the contract of an incompetent will be set aside regardless of the good faith of the other contracting party when status quo can be restored.

Waialua's failure to "adequately and fairly disclose the * * * the grounds upon which the * * * Court rested its decision" warrants this Court's denial of the application.

Sutter v. Midland Valley Railroad Co. (1929) 280 U. S. 521, 74 L. Ed. 590.

(b) Of the two rules, (1) that the contract of an incompetent is void and a nullity, and (2) that it is voidable upon condition that restoration be effected, the instant decision adopts the rule more favorable to Waialua.

Inasmuch as the harsher rule—that a contract of an incompetent is void in the sense of being a nullity—was not

followed by the Circuit Court of Appeals, Waialua is, under the decision, receiving the consideration which it paid for the deed, plus interest thereon from the date of payment (R. 1629), and the value of the improvements placed upon the land not to exceed their cost. (R. 1616-1618.) Far from being injured by the rule followed by the Circuit Court of Appeals, Waialua is better off than it would have been had the Court followed the alternative rule which Waialua argues in its petition was followed. Waialua cannot complain of those parts of the decision which are in its favor, and accordingly the conflict of authority to which it points is not available to Waialua as a reason for the issuance of the writ.

Alexander v. Cosden Pipe Line Co. (1934) 290 U. S. 484 at 487, 78 L. Ed. 452 at 456.

(c) There is no such conflict in the decisions as to warrant this Court in granting certiorari.

Waialua argues that the Circuit Court of Appeals in this case determined that the contract of an incompetent was void in the sense of being a nullity, and cites Federal cases which it contends establishes a contrary and conflicting rule. If we assume, for purposes of argument, that Waialua's analysis of the opinion is correct, it does not follow that a conflict warranting certiorari exists.

The cases to which Waialua points (Pet. p. 12) are, with one exception, those of the District Courts, and three of the four turn on the rule prevailing in the state whose laws the Court was administering.

Kevan v. John Hancock etc. Ins. Co. (Dist. C. Mo. 1933) 3 Fed. Supp. 288;

Safe Deposit & Trust Co. v. Tait (Dist. C. Md. 1931) 54 Fed. (2d) 383;

Levine v. Whitney (Dist. C. Rhd. Isl.-1934) 9 Fed. Supp. 161;

Beale v. Gibaud (Dist. C. N. Y.-1936) 15 Fed. Supp. 1020,

are all District Court cases. The first one turns upon the law of Missouri, the second one upon the law of Maryland and the third one upon the law of Massachusetts. In the fourth one, it was found that the one seeking cancellation was in fact competent. If we assume that these cases are in conflict with the instant decision as interpreted by Waialua still a conflict arising from decisions of District Courts is not one warranting this Court in granting certiorari. (*Jurisdiction of the Supreme Court of the United States*, Robertson and Kirkham, Sec. 295.)

The result reached in *Luhrs v. Hancock* (1900) 181 U. S. 566, 45 L. Ed. 1005, was no doubt correct under the facts of the case; but the sentence in the opinion quoted by petitioner was not necessary to the decision.

ARGUMENT IN OPPOSITION TO POINTS RAISED IN PETITIONER'S BRIEF.

INTRODUCTION.

We believe that we have disposed of Waialua's point made in support of its petition, but lest we be deemed to agree with its "Brief in Support of the Petition for Writ of Certiorari", we discuss that document.

The brief is divided into what are called six points. Only one of them, Point 1, is in support of the actual reason assigned by Waialua in its petition as entitling it to a writ of certiorari. One other, Point VI, argues the conse-

quence of what Waialua conceives to be the purport of the decision. The other four points really admit that the Circuit Court of Appeals has decided the case upon the voidable rule (and consequently confess the error in the reason relied upon in support of the petition) and argue that Waialua has not been given enough in the order for restoration. Stated more simply, the four points are devoted to a question of fact and to the discretion of the lower Courts—three of them—as to just what should be done to restore status quo in this case. We doubt that this Court is sufficiently concerned with the degree of restoration already passed upon by three inferior Courts with substantially the same result to predicate a writ upon any such complaint. Beyond that Waialua is limited to the ground relied upon in its petition. (*Gunning v. Cooley* (1930), 281 U. S. 90, 74 L. Ed. 720.)

REPLY TO POINT 1, THAT "THE RULE THAT THE CONTRACT OF INCOMPETENTS ARE AT MOST VOIDABLE IS NOW ALMOST UNIVERSALLY ACCEPTED."

Waialua is correct that, considering all the cases both State and Federal in the United States and those in England, the majority of them hold that the contract of an incompetent is not void in the sense of being a nullity, but is only voidable in the sense of being subject to avoidance at the suit of the incompetent upon equitable terms. It is in error, however, as to the law when it argues that the rule applicable in this suit, arising in Hawaii, is any more favorable to it than that administered by the Circuit Court of Appeals.

Whatever may be the law of England,[4] it is the law of every state that has spoken upon the subject in the United States,[5] and the law announced and followed in the Federal Courts,[6] that the contract of an incompetent will be set aside at the instance of the incompetent regardless of the good faith of the other party if status quo can be restored. In truth, many of the Federal cases and the decisions from the Courts of various states do not require restoration to be effected. (46 A. L. R. 416; 95 A. L. R. 1143.) In this suit, the trial Court, the Supreme Court of Hawaii, and the United States Circuit Court of Appeals, have each found that the ward was incompetent, namely, a congenital imbecile, and all three Courts have

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4. *Molton* v. *Camroux* (1848), 2 Exch. 487, 4 Exch. 17; *Imperial Loan Co. v. Stone*, L. R. (1892), 1 Q. B. 599; *York Glass Co. Ltd.* v. *Jubb* (1925), 134 Law Times Reps. 36, 42 T. L. R. 1, C. A.

5. *Wooley* v. *Gaines* (1901), 114 Ga. 122, 39 S. E. 892; *Nutter* v. *Des Moines Life Ins. Co.* (1912), 156 Iowa 539, 136 N. W. 891; *Merry* v. *Berfeld* (1914), 264 Ill. 84, 105 N. E. 758; *McKenzie* v. *Donnell* (1899), 151 Mo. 431, 52 S. W. 214; *Fulwider* v. *Ingels* (1882), 87 Ind. 414; *Hays* v. *Spangenberg* (Texas Civ. App. 1936), 94 S. W. (2d) 899; *Loomis & Hayden* v. *Spencer & Rolph* (1830), 2 Paige (N.Y.) 153; *Edwards* v. *Miller* (1924), 102 Okla. 189, 228 Pac. 1105; *Cash* v. *Bank of Lowes* (1922), 196 Ky. 570, 245 S. W. 137; *Woolbert* v. *Lee Lumber Co.* (1928), 151 Miss. 56, 117 So. 354; *Hancock* v. *Haley* (Texas Civ. App. 1914), 171 S. W. 1053; *Ipock* v. *Atlantic & N. C. R. Co.* (1912), 158 N. C. 445, 74 S. E. 352; *Wireback's Ex'r* v. *Eastern First National Bank* (1891), 97 Pa. St. 543, 39 Amer. Reps. 821; *Crawford* v. *Scovell* (1880), 94 Pa. 48, 39 Am. Rep. 766; *Eaton* v. *Eaton* (1874), 37 N. J. L. 108, 18 Am. Rep. 716; *Sparrowhawk* v. *Ervin* (1926), 30 Ariz. 238, 246 Pac. 541; *Walsh* v. *Feustel* (1919), 93 Conn. 336, 105 Atl. 696; *Brown* v. *Cory* (1900), 9 Kan. App. 702, 59 Pac. 1097; *Flack* v. *Gottschalk Co.* (1898), 88 Md. 368, 41 Atl. 908; *Schaps* v. *Lehner* (1893), 54 Minn. 208, 55 N. W. 911; *Anderson* v. *Nelson* (1929), 248 Mich. 100, 226 N. W. 830; *Bell* v. *Smith* (1929), 155 Miss. 227, 124 So. 331; *Miller* v. *Barber* (1905), 73 N. J. L. 38, 62 Atl. 276; *Hosler* v. *Beard* (1896), 54 Ohio St. 398, 43 N. E. 1040; *Pritchett* v. *Thomas Plater & Co.* (1921), 144 Tenn. 406, 232 S. W. 961; *National Metal Edge Box Co.* v. *Vandervoer* (1912), 85 Vt. 488, 82 Atl. 837; *Morris* v. *Hall* (1921), 89 W. Va. 460, 109 S. E. 493.

6. *Dexter* v. *Hall* (1873), 82 U. S. 9, 21 L. Ed. 73; *Kendall* v. *Ewert* (1922), 259 U. S. 139, 66 L. Ed. 862; *Plaster* v. *Rigney* (C.C.A. 8, 1899), 97 Fed. 12; *Edwards* v. *Davenport* (1883), 20 Fed. 756; *Anglo-Californian Bank* v. *Ames* (1886), 27 Fed. 727; *German Savings & Loan Society* v. *DeLashmutt* (1895), 67 Fed. 399; *Clark Car Co. of New Jersey* v. *Clark et al.* (D.C. Pa. 1925), 11 Fed. (2d) 814; *Sothern* v. *United States* (D.C. Ark., 1926), 12 Fed. (2d) 936; *Farmers Bank & Trust Co.* v. *Public Service Co. of Ind.* (1936), 13 Fed. Supp. 548; *Beale* v. *Gibaud*, 15 Fed. Supp. 1020; *Safe Deposit & Trust Co.* v. *Tait*, 54 Fed. (2d) 383; *Kevan* v. *John Hancock Mutual Life Ins. Co.*, 3 Fed. Supp. 288; *Levine* v. *Whitney*, 9 Fed. Supp. 161.

found that status quo can be restored. (R. trial Court 526, Supreme Court 579, C. C. A. 1605.) If we were to admit that Waialua was a bona fide purchaser for an adequate consideration—which we most emphatically do not—then, under the rule prevailing throughout America, the decision in this suit treats Waialua with every consideration to which it is entitled. In fact, as outlined in our cross-petition, it gives Waialua more than it would be entitled to receive under the application of well settled principles to facts found in this case. However, we are willing to abide by the decision and offer our arguments merely in defense thereof.

Replying to Waialua's specific contentions under this Point 1, the first of which is (Pet. p. 24) that the proper rule is that contracts of incompetents are valid and will not be set aside if made in good faith and for an adequate consideration, we concede that such is the rule in England. In addition to the cases cited by Waialua, we have added (supra, fn. 4, p. 14) *York Glass Co. Ltd. v. Jubb*, which is a better example that the ability of the incompetent to restore the status quo is not involved under the English rule. That, however, is not the rule either in the state Courts or the Federal Courts in the United States.[7] Such a rule does not prevail in any state or in any Federal Court in America, either District, Circuit, or the Supreme Court.

Waialua claims that the rule for which it contends prevails in New York, Iowa, North Carolina, Missouri, Pennsylvania, New Hampshire and New Jersey. (Pet.

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7. The difference between the English and American rule is recognized in an elaborate footnote in the earlier edition of Pollock on Contracts cited by Waialua. See Wald's Pollock on Contracts, 3rd Ed. page 100, footnote 52.

pp. 25-26.) It cites no Federal case to support such a proposition. We know of none. We challenge its statement with respect to each state it claims, and review them:

1. *New York*—Waialua cites *Goldberg v. McCord* (1925), 251 N. Y. 28, 166 N. E. 793. In that case the Court found that there was no evidence of incompetency when the deed was made. The statement quoted from the case is mere dictum and certainly does not overrule the flat holding of *Loomis & Hayden v. Spencer & Rolph* (1830), 2 Paige N. Y. 153, and *Riggs v. American Tract Society* (1881), 84 N. Y. 330, each of which decisions permitted cancellation upon restoration to *status quo*. A further and conclusive answer to the authority of the Goldberg case is that given by Mr. Justice Cardozo in the opinion written by him in *Hoadley v. Hoadley* (1927), 244 N. Y. 424, 155 N. E. 728, wherein he pointed out (at p. 431) that it is the general rule that "the right to avoid is for the personal protection of the one who is disabled".

2. *North Carolina*—Waialua cites *West v. Seaboard Airline Railroad* (1909), 151 N. C. 231, 65 S. E. 979. This case would appear to turn upon the failure of the incompetent to offer restoration.

The law of North Carolina is that the incompetent may set aside the transaction if status quo is restored. (*Ipock v. Atlantic & N. C. R. Co.*, supra. (fn. 4, p. 14).) Moreover, as pointed out in the *Ipock* case, the burden of showing good faith and lack of knowledge of incompetency, and that status quo cannot be restored, is, if cancellation is to be avoided, upon the party dealing with the incompetent.

3. *Iowa*—Waialua cites *Ashcraft v. DeArmand* (1876), 44 Iowa 229. This case turns on the inability of the incompetent to restore *status quo* or to offer so to do.

The law of Iowa is that when *status quo* can be restored cancellation will be decreed.

Nutter v. Des Moines Life Ins. Co. (1912), 156 Ia. 539, 139 N. W. 891.

4. *Missouri*—Waialua cites *Rhoades v. Fuller* (1897), 139 Mo. 179, 40 S. W. 760. This case turns on the lack of evidence of incompetency.

The rule in Missouri is clearly set out in *McKenzie v. Donnell* (1899), 151 Mo. 431, 52 S. W. 214; where the contract of the incompetent was set aside and in which the *Rhoades* case is considered.

5. *Pennsylvania*—Waialua cites *Beals v. See* (1848), 10 Pa. 56, 49 Amer. Dec. 573, and *Rubins v. Hamnett* (1929), 294 Pa. 295, 144 Atl. 72. The *Beals* case may be said to support Waialua's contention, but the real ground of the *Rubins* case is that the party in whose behalf relief was sought was in fact competent. We submit that in view of the decisions in *Wirebach's Ex'r v. Eastern First Nat'l Bank* (1891), 97 Pa. 543, 39 Am. Rep. 821, and *Crawford v. Scovell* (1880), 94 Pa. 48, it is the rule in Pennsylvania that, in any event, if restoration can be restored the incompetent is entitled to have his contract set aside.

6. *New Jersey*—Waialua cites *Eaton v. Eaton* (1874), 37 N. J. L. 108, 18 Am. Rep. 716, and *Mattheissen v. McMann*, 38 N. J. L. 536. The incompetent prevailed in both of these cases, and in the *Matthcissen* case the Appellate Court affirmed the trial Court's refusal to give an

instruction offered by the defendant that "nothing but imposition on an insane person will avoid his contract". These two cases declare the law of New Jersey; that the incompetent may set aside his bargain upon restoring *status quo*.

7. *New Hampshire*—Waialua cites *Young v. Stevens* (1868), 48 N. H. 143, 2 Am. Rep. 202, 97 Am. Dec. 592. This case does not support Waialua's contention, but holds rather that in that instance restoration could not be made.

Even though controlling decisions in the instant suit were those of the several state Courts, we submit that the finding of incompetency and that status quo can be restored entitles the incompetent to set aside the questioned instruments, as has been directed by the Circuit Court of Appeals. When, however, we recognize, as we must,[8] that the rule of decision in this suit arising in the Territory of Hawaii is the rule prevailing in the Federal Courts, then it is beyond question that such a showing is sufficient; in fact, in many of the Federal cases restoration is not a condition to cancellation, it being enough merely to prove incompetency.[9]

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8. *Kapiolani Estate v. Atherley* (1913), 21 Haw. 441; *Territory v. Ho Me* (1922), 26 Haw. 331; *Colburn v. U. S. F. & G. Co.* (1929), 25 Haw. 536; *Hill v. Carter* (C.C.A. 9, 1931), 47 Fed. (2d) 869 (cert. den. 248 U. S. 625); *Pyeatt v. Powell* (C.C.A. 8, 1892), 51 Fed. 551; *Successors of Fantanzzie v. Municipal Assembly* (C.C.A. 1, 1924), 295 Fed. 803.

9. See supra, page 14, footnote 6.

REPLY TO POINTS II TO V, INCLUSIVE, WHICH, IN SUBSTANCE, ARE THAT THE RESTORATION DECREED WAS NOT SUFFICIENT.

The portion of the brief commencing at page 29 and extending through page 44 argues that, in directing the incompetent to restore Waialua to status quo as a condition to cancellation, Waialua has not been given a sufficient allowance—that status quo within the meaning of the rule has not been restored. This argument in no way supports the petition, (and therefore might well be dismissed, *Gunning v. Cooley*, supra) but, on the contrary, must necessarily concede that the Circuit Court of Appeals did not decide that the instruments were void in the sense of being nullities, for if that were so no restoration of any description would have been compelled. Once it is determined that the Circuit Court of Appeals did not apply the rule that contracts of incompetents are a nullity, the *only reason* assigned in the petition for the allowance of the writ fails in its entirety.[10]

(a) The meaning of the term "status quo".

We will not analyze each case cited in support of Waialua's conception of the meaning of the term "status quo" as used in defining the condition upon which one having a ground for rescission may obtain relief in a court of equity. We do, however, invite their close inspection. Of those cited in support of Point II[11] (Petition pp. 29-37), only one, *Riggan v. Green*, can be said to

10. The contention that the Circuit Court of Appeals held that it is error for the trial Court to balance the equities of the parties has been dealt with in footnote 3, page 7, herein.

11. *Yauger v. Skinner* (1862), 14 N. J. Eq. 389; *Veblett v. McFarland* (1876), 92 U. S. 101, 23 L. Ed. 471; *Holly v. Missionary Society* (1901), 180 U. S. 284, 45 L. Ed. 531; *Grimes v. Sanders* (1876), 93 U. S. 55, 23 L. Ed. 798; *Riggan v. Green* (1879), 80 N. C. 236, 30 Am. Rep. 77; *Rickman v. Houck* (1921), 192 Ia. 340, 184 N. W. 657.

touch the question of the meaning of the term. The rest are decided on other grounds entirely, and the quotations made therefrom are purest dicta. We maintain that the instant decision makes ample provision for Waialua, in complete conformity with the requirements of the rule making restoration to status quo a condition precedent to cancellation, and we refer the Court to the authorities cited by us to the Circuit Court of Appeals, which are directly in point.[12] The rule only requires substantial restoration consistent with the practical considerations of the case. Mathematical exactness is not necessary.

Mather v. Barnes, (1906) 146 F. 1000;

McKenzie v. Donnell, (1899) 151 Mo. 461; 52 S. W. 222.

12. *Black on Rescission and Cancellation*, 2d Ed., Vol. III, Sec. 616, at pp. 1484-5; *Thompson on Real Property*, Vol. III, Sec. 2846; *Tiffany on Real Property*, 2d Ed., Vol. III, Sec. 595, at p. 2345; *Burnham, Administrator, v. Mitchell* (1874), 34 Wis. 117; *Dermott Land & Lbr. Co. v. Zelnicker* (C.C.A. 8, 1921), 271 F. 918 (cert. den. 257 U. S. 648, 66 L. Ed. 415); *Hale v. Kobbert* (1899), 109 Iowa 128, 80 N. W. 308; *Kruger v. Block* (1926), 114 Neb. 839, 211 N. W. 173; *Wright v. Dickinson* (1887), 67 Mich. 580, 35 N. W. 164; *Bank Savings Life Ins. Co. v. Steiner* (Tex. Civ. Apps. 1935), 81 S. W. (2d) 225; *Duson v. Pacific Improvement Co.* (C.C.A. 5, 1927), 18 F. (2d) 5; *Neblett v. Macfarland* (1876), 92 U. S. 101, 23 L. Ed. 471; *American Wine Co. v. Brasher Bros.* (Cir. Crt. Colo. 1882), 13 F. 595; *Hammond v. Pennock* (1874), 61 N. Y. 145; *Cohen v. Ellis* (1885 N. Y.), 16 Abbott's N. C. 320; *Maupin v. Missouri State Life Ins. Co.* (Kansas City Crt. Apps., Mo., 1919), 214 S. W. 398; *Green v. Security Mutual Life Ins. Co.* (1911), 159 Mo. App. 277, 140 S. W. 325; *Felt v. Bell* (1903), 102 Ill. App. 218, 68 N. E. 794; *Green v. Hopper* (Tex. Civ. Apps. 1925), 278 S. W. 286 (rehearing denied 1925); *McDonald v. Simons* (1926), 280 S. W. 573; *Burgess v. Burgess* (1925), 130 S. C. 265, 126 S. E. 34; *Wilks v. McGovern-Place Oil Co.* (1926), 189 Wis. 420, 207 N. W. 692; *Ring v. Ring* (1908), 111 N. Y. S. 713, 127 App. Div. 411; *Mather v. Barnes* (C.C. W.D. Penn. 1906), 146 F. 1000; *Jones v. Galbraith* (1900), 59 S. W. 350; *Cheves-Green & Co. v. Horton* (1933), 177 Ga. 525, 170 S. E. 491, 492; *Fields v. Union Central Life Ins. Co.* (1930), 170 Ga. 239, 152 S. E. 237; *Hamilton Ridge L. Corp. v. Boston Ins. Co.* (1925), 133 S. C. 472, 131 S. E. 22, 26; *Whiteley v. Downs* (1932), 174 Ga. 839, 164 S. E. 318, 320; *Williams v. Sapieha* (1901), 94 Tex. 430, 61 S. W. 115, 118; *Rea v. Bishop* (1894), 41 Neb. 202, 59 N. W. 555, 556; *Brown v. Brenner* (Tex. Civ. Apps. 1913), 161 S. W. 14, 16-17.

(b) The improvements and the incorporation of the land as an integral part of the plantation.

Waialua did not, as it implies (Pet. p. 36), incorporate the ward's land as an integral part of its plantation in reliance upon the deed or title cancelled in this suit. (Supra page 5c.) Beyond that it is clear that a large part of its expenditures for improvements were made before it took the deed from the ward, and consequently Waialua could not have been relying on this purchase in so doing. The Brief states (p. 36) that $630,722 was spent on the Holt tract. Waialua's own testimony shows that before it took the deed it spent $182,525 of this sum. (R. 1507, Exh. S-5.) The land—Waialua's 2/3rd as well as the ward's one-third—had to be cleared and made ready for cultivation by Waialua to permit of its use contemplated under the lease. (R. 498.) This use proved very profitable to Waialua. (R. 1278.) The lease term has expired, and accordingly Waialua has had the complete benefit of these improvements. Waialua states (Pet. p. 36) that it spent $504,652 off the Holt land. This item relates to the Wahiawa Reservoir, and its own testimony (R. 1242) was that this reservoir was originally built in 1906. The deed was taken in 1910. It is true that after the date of the deed repairs were made on this reservoir. The decree, however, in no way disturbs Waialua's title or use of this reservoir. It serves the whole plantation.

It is clear that of the $1,000,000 Waialua speaks of as having spent on its whole plantation of 49,000 acres, $451,206 was spent before the ward's interest was purchased (R. 1507, Exh. S-5 and R. 1515, Exh. S-7), and of the balance $454,223 was spent before the lease of

1905 expired, and while independent of the ward's interest Waialua owned an undivided 16/27ths of the Holt area and leased the whole thereof. The Holt area was 14,000 acres out of the whole plantation of 49,000 acres. The ward's undivided one-third interest in 14,000 acres represents about 9½% of Waialua's total holding. It borders on ridiculousness to claim that these improvements were made on the strength of the interest acquired from the ward.

Beyond this, the decision sought to be reviewed provides that Waialua should be repaid for the value of the improvements on the land. (R. 1616-18.) It will, moreover, still retain their use, together with the land, as a part of its plantation (supra, p. 6), for even after the ward's interest is reconveyed to her Waialua will own outright, or control by lease, an undivided two-thirds of the property and be a co-tenant in possession.

The effect of the decree on the lease of 1905 is only to require Waialua to pay the reasonable rental value of the ward's interest as opposed to the amount called for therein, against which the ward is required to reimburse Waialua for the value of the improvements it has placed on the land during the term of the lease and since it took the deed, which improvements, by the provisions of the lease (R. 486), were to become the ward's property without cost at its expiration in 1930.

(c) The vesting of the contingent interest—the assumption of risk.

Waialua continues to argue (Pet. pp. 38-40) that because the incompetent's father died after Waialua took

the deed, and accordingly the incompetent's interest ripened from a contingent remainder into a fee, a court of equity is powerless to grant relief against the deed. In substance, it says that since the death of a third party has increased the value of the incompetent's interest that it (Waialua) should have this unearned increment rather than the incompetent. It should be remembered that if Waialua had never made the purchase the incompetent's father would nevertheless have died, and her interest would have been increased to the same extent. Waialua's purchase in no way contributed to this improvement in the incompetent's title.

The fact that after the degree the incompetent has more than she had before the bargain was made, that improvement in condition not, however, being due to anything taken away from Waialua, but an additional value created without any participation by Waialua, does not prevent restoration to status quo within the meaning of the rule. This is the principle controlling the decision by the Circuit Court of Appeals of the Eighth Circuit in *Dermott Land & Lbr. Co. v. Zelnicker* (supra, fn. 12, p. 20), in which certiorari was denied.

The argument that since in purchasing a contingent remainder from the incompetent ward Waialua ran the risk that the contingency might never occur and the title vest is no obstacle to setting aside the bargain. The interposition of a risk upon the one against whom grounds for cancellation exist does not prevent relief being granted. This is true in the sale of any expectancy as illustrated by cases holding that the death of the party upon whose life the expectancy is dependent does

not foreclose the seller of such expectancy from setting aside the sale if grounds exist therefor:

McKinney v. Pinckard (1830), 2 Leigh. (Va.) 150; 21 Am. Dec. 601;

Boynton v. Hubbard (1810), 7 Mass. 112;

and by the cases in which, although the defendant insurance companies have taken a risk which has turned out to their advantage, rescission is allowed to the insured.

Maupin et al. v. Missouri State Life Ins. Co. (Kansas City Ct. Apps., Mo., 1919), 214 S. W. 398;

Green v. Security Mut. Life Ins. Co. (1911), 158 Mo. App. 277, 140 S. W. 325;

Bank Savings Life Ins. Co. v. Steiner (Texas Civ. Apps. 1935), 81 S. W. (2d) 225;

McCarty v. N. Y. Life Ins. Co. (1898), 74 Minn. 530, 77 N. W. 426.

It is also demonstrated by the cases in which the insurance companies are permitted, on the ground of misrepresentation, to cancel the policies or defend against an action to recover thereon after the risk has turned out to the advantage of the insured or his beneficiaries. *Enelow v. N. Y. Life Ins. Co.* (1935), 293 U. S. 379, 79 L. Ed. 440, wherein the Court declared that the affirmative equitable defense that the policy had been obtained by the misrepresentations of the insured was open to the insurer after the death of the insured in an action at law brought upon the policy.

American Life Ins. Co. v. Stewart, (1937) 300 U. S. 203; 81 L. Ed. 605, in which the Court declared that the insurer might, after the death of the insured, maintain a bill in equity to cancel the policy upon the ground that

it had been obtained through the misrepresentations of the insured.

Waialua cites (Pet. p. 39) *Molton v. Camroux* (1848), 2 Exch. 487; 4 Exch. 17; *Mutual Life Insurance Co. v. Smith* (1911), 184 Fed. 1, and *Williams v. Penn Mutual Insurance Co.* (1925), 6 Fed. (2d) 332, 27 Fed. (2d) 1, in support of its proposition that restoration is impossible in this case. The *Molton* case was previously cited in support of the contention that under the English rule a fair contract will not be set aside regardless of the ability to restore the status quo. That is the English rule and it is recognized as being such by the Circuit Court of Appeals in the instant opinion. (R. 1602.) The *Molton* case, along with *Imperial Loan v. Stone*, L. R. 1892, 1 Q. B. 599, and *York Glass Co. Ltd. v. Jubb* (1925), 134 Law Times Rep. 36, 42 T. L. R. 1, C. A., turned upon that proposition. The *Molton* case has nothing to do with what or what is not restoration to status quo within the meaning of the rule obtaining in the State and Federal Courts in America. *Mutual Life Insurance Co. v. Smith* and *Williams v. Penn Mutual* rest upon the determination that no ground of cancellation existed—not upon the proposition that restoration could not be effected.

The death of the ward's father does not add any equity to Waialua's position. It in no way prevents putting Waialua back where it was when the bargain was made.

Waialua argues, under its Point V (Petition pp. 42 to 44), that innocent purchasers should not be injured by permitting incompetents to set aside their transactions, and cites *Coburn v. Raymond* (1904), 76 Conn. 484, 57 Atl. 116, and *Edwards v. Miller* (1924), 102 Okla. 189,

228 Fac. 1105. The decision of the Circuit Court of Appeals in this suit has, as a condition to cancellation, required the incompetent to restore the status quo. That fact eliminates any injury to Waialua, for, as the opinion points out (R. 1603), "It is no legal hardship on the party dealing with the incompetent if it receives back what it gave in the bargain". What Waialua is really attempting to say, is that it should be entitled to the benefit of its bargain. But one who enters into a transaction voidable at the instance of the other party never retains the benefit of the bargain. The Court here has balanced the equities. Waialua has no equity calling for its retention of all the benefit of the bargain. That it must lose, in part, so that the incompetent may get back her property. It still will have the profits of its operation of the ward's land. (R. 518-19; 1278.) There is nothing in either the *Coburn* or the *Edwards* case even suggesting that Waialua has not been adequately treated in this case. In fact, in the *Edwards* case cancellation was ordered without requiring restoration.

REPLY TO POINT VI, WHICH IS "THAT THE DOCTRINES ANNOUNCED BY THE COURTS BELOW HAVE INNUMERABLE UNDESIRABLE CONSEQUENCES".

We have already pointed out that Waialua's fears that the decision will disrupt land titles is unfounded, because the Circuit Court of Appeals has not decided that the deed of an incompetent is a nullity, but, on the contrary, has obviated every consequence imagined by Waialua through holding that incompetency alone is not enough but must be coupled with an ability to restore the status quo. We may add that if the decision had been that the

deed was a nullity it would have abundant support in the decisions. One of them[13] has stood since 1873, and, so far as we know, there has been no unwarranted assault upon the titles of innocent persons.

We submit that the decision of the Circuit Court of Appeals in this case is amply supported by the authorities and is sound upon the grounds therein set forth. The petitioner has wholly failed to establish any of the reasons outlined in Rule 38, subdivision 5, which would support a writ of certiorari. Beyond the grounds, however, upon which the decision rests, there are other and additional grounds upon which the decision might have been placed and which were urged by the incompetent before the Circuit Court of Appeals. We will now outline them.

GROUNDS IN SUPPORT OF THE DECISION IN ADDITION TO THOSE UPON WHICH IT IS PLACED.

The decision herein assumes that Waialua is a bona fide purchaser for an adequate consideration and rests upon the ground that a contract of an incompetent will be set aside at the instance of the incompetent, even though the bargain is fair, where as here status quo can be restored. Thus far, in meeting the petition for certiorari, we have assumed these facts to be true. In fact, however, the record compels the conclusion that (a) Waialua had knowledge of the incompetency, and the transaction was not fair and open; (b) the price paid for the land was not adequate, and (c) the incompetent never received the consideration. Beyond that the rule of decision in this case arising in the Territory of Hawaii

13. *Dexter v. Hall*, supra, fn. 6, page 14.

is that the questioned instruments are void and a nullity regardless of the assumed good faith of Waialua. We shall discuss these propositions in the order named.

If any of the points is well taken, the decision reaches a correct result and accordingly the writ should not issue.

Alpha S. S. Corp v. Cain (1930), 281 U. S. 642, 74 L. Ed. 1086;

Stelos Co. v. Hosiery Motor-Mend Corp. (1935), 295 U. S. 237, 79 L. Ed. 1414;

Indiana Farmers Guide Publishing Co. v. Prairie F. P. Co. (1934), 293 U. S. 268, 79 L. Ed. 356;

Erwin v. Lowry (1849), 7 How. 172, 12 L. Ed. 655.

(a) Waialua had knowledge of the incompetency.

(1) The burden was upon Waialua to prove that it was an innocent purchaser and it failed so to do.

Curtis v. U. S. (1923), 262 U. S. 215, 67 L. Ed. 956;

Wright-Blodgett Co. v. U. S. (1915), 236 U. S. 397, 59 L. Ed. 637;

Treat v. Rogers (C. C. A. 8, 1929), 35 Fed. (2d) 77.

In its first and second answers filed in 1928 and 1929, respectively (R. 64, 101), Waialua did not plead that it was an innocent purchaser. In its third answer (R. 409) filed in 1931, after the trial in which the invalidity of the deed was decided and before the trial on the remand from the Supreme Court of Hawaii with respect to the lease and assignment, it did so plead, but it did not offer any proof thereof. The finding of the trial Court was "that it is not clearly shown that Waialua Company had actual notice of the incompetency" (R. 154); the Court

stated that it "proceeded on the assumption that Waialua was ignorant of her real mental status. But this fact does not justify the conclusion that the Company was a 'subsequent grantee' or an 'innocent purchaser'. (R. 154.) The Supreme Court of Hawaii, in its second opinion, stated that Waialua did not have knowledge of the incompetency. (R. 555.) The United States Circuit Court of Appeals assumed for the purpose of its decision that Waialua did not have knowledge of the incompetency. (R. 1637.) There is no evidence in the record from which a finding that Waialua did not have knowledge of the incompetency throughout its dealings with the incompetent can be made. Waialua failed to sustain its burden of proof and the finding on the issue should have been against it.

Golson v. Dunlap (1887), 73 Cal. 157, 14 Pac. 576;
Campbell v. Buchman (1874), 49 Cal. 362;
64 *C. J.* 1258.

Because of Waialua's failure to sustain its burden of proof it is deprived of any benefit which under the rules may be claimed by a bona fide purchaser.

(2) Aside, however, from Waialua's failure to sustain its burden of proof, the record shows affirmatively that it had knowledge of the incompetency. Waialua would have this Court believe that it made a direct purchase from an apparently competent person to whom it paid an adequate consideration, having no idea that the seller was anything but a normal individual. Nothing could be further from the fact. In truth, Waialua had for years been striving to acquire the Holt property (R. 1259-1260), in which the incompetent had an undivided one-third contingent remainder interest. In eight separate transactions

over a period of eleven years it acquired from the various Holt heirs, other than the incompetent, a total of 16/27ths undivided interest in the Holt property (R. 1259-1260; 849-50, subdivisions 3, 4; 894, subdivision 12; 894, subdivision 13; 894, subdivision 14; 899, subdivision 16; 960), each time taking title in the name of a dummy. The Holt property had been acquired originally by the incompetent's grandfather, who died in 1862. (R. 843.) The incompetent is a native of Hawaii. (R. 210, 1587.) Her father was profligate. (R. 121.) As the trial Court stated, there was no one to whom the incompetent could look for disinterested information or advice. (R. 155-6.) Over 100 witnesses, drawn from the comparatively small community of Honolulu, in which the Holt family had lived for three generations (and in which the incompetent lived until 1906 when she was taken by her cousins, the Kentwells, to live with them in Oxford, England), testified on the issue of her competency. From this testimony the trial Court concluded, and the Supreme Court of Hawaii and the United States Circuit Court of Appeals have agreed in the conclusion, that she was a congenital imbecile possessing a most limited mental development.[14]

These facts cast light on the probability of Waialua's ignorance of the capacity of the incompetent, particularly when it is realized that its counsel, D. L. Withington, went to Oxford, England, and obtained her signature. However, we need not predicate our statement that Waialua had knowledge of the incompetency on surmises. It follows as a matter of law from the facts found.

In order to acquire the incompetent's interest in the property, Waialua engaged the services of her cousin.

14. Supra, pages 2-4.

James L. Holt. This Waialua admits in its answer. (R. 65-66.) He proceeded, upon the direction of Mr. Castle, Waialua's attorney, "to go ahead and negotiate with the parties in England" (R. 1010), to correspond with Lawrence Kentwell, with whom the incompetent was living. The communications between Waialua, acting through Holt, and Kentwell (*not, we point out, with the incompetent ward*) consist of a series of writings which are most illuminating. Whatever was done by Holt was done with the knowledge and supervision of Waialua. (R. 147.) In substance, these communications shows that Holt (who incidentally is in no way related to the guardian Herman V. Von Holt) wrote to Kentwell suggesting the sale of the incompetent's interest, as well as his (Holt's) own, to Waialua. (R. 906, Exh. D-1.) Upon obtaining a reply, Holt immediately transmitted it to Castle, Waialua's attorney. (R. 908-9, Exh. D-2.) Holt then wrote to Kentwell (R. 913-15, Exh. D-5), telling him, no doubt at the direction of Castle, that "the Waialua people have intimated strongly that should this attempt upon their part to buy fail they will resort to a suit in partition for a sale of the land at public auction * * * they will acquire the same at any old price they feel like paying; who can oppose them successfully, we all have not got the money". (R. 915.) Kentwell replied that the incompetent would sell at the suggested price if Mrs. Kentwell were given $5000. (R. 915-16, Exh. D-6,) Mrs. Kentwell claimed an interest. Kentwell wrote again, twenty-two days later (R. 919-20, Exh. D-8), urging Waialua to hurry because he states another prospective purchaser, Mr. L. McCandless, had made a better offer.

Waialua's delay was apparently due to the necessity of obtaining the signature of the ward's husband. He, from whom she had been separated for many years, was eliminated when Castle obtained an agreement from him to sign a consent to any transfer Castle should approve. (R. 902, subd. 19.) Thereupon Castle cabled his partner, Withington, who was in Boston that he should go to Oxford, England, where the incompetent was living, and close the deal. (R. 922, Exh. D-10.) Three days later Castle again cabled Withington to hurry because another prospective purchaser was sending an agent to London. (R. 922, Exh. D-11.) The following day Castle again urged Withington to hurry, and his communication clearly exhibits Waialua's knowledge of the straitened condition of the incompetent. The cable in part states (R. 925, Exh. D-13): "HAVE EVERY REASON TO BELIEVE LINK (McCandless) WILL KEEP THEM SUPPLIED WITH MONEY PROVIDED THEY CAN COME AMERICA WHERE EXPECT TO MEET TRENT WHY DO YOU NOT COMMUNICATE WITH KENTWELL BY CABLE TRY TO ASCERTAIN MOVEMENTS". On April 16th Castle cabled Withington (R. 934, Exh. D-21): "ELIZA AND JOHN D ACCEPT THIRTY THOUSAND MUST BE INCLUSIVE OF PROSPECTIVE INTEREST ANNIE KENTWELL WANTS FIVE THOUSAND HER INTEREST MAKE LESS IF POSSIBLE MUST NOT EXCEED THIRTY FIVE THOUSAND PRICE TO WAIALUA MUST BE KEPT SECRET". Of course, Waialua wanted to hide the real bargain because their agent, Holt, was getting a substantial sum for his services, while the impression was being created that he and the incompetent were being treated in the same way. As the trial Court found, James L. Holt imposed "upon his position" to obtain a secret profit and the

facts were known to Waialua. (R. 158.) This in itself constituted overreaching.

Felt v. Bell (1903), 102 Ill. App. 218, 68 N. E. 794;

Halsbury's Laws of England, 2d Ed., p. 283, Sec. 505;

Pomeroy's Equity Jurisprudence (Fourth Edition), Vol. 2, Sec. 953, p. 2031.

On April 19th, three days later, Castle cabled Withington (R. 935, Exh. D-22): "KENTWELL SENDS FOLLOWING MESSAGE TO HOLT WILL AGREE TO ABIDE BY YOU THOUGH LINK OFFERS A BETTER PROPOSITION". Withington sailed for London, arriving about April 26th. (R. 934, Exh. D-25.) On April 28th, in Honolulu, a letter was sent over Holt's signature, after conferring with Castle (R. 1011), warning McCandless not to interfere with the pending transaction (R. 939, Exh. D-26), and the same day, Castle, in Honolulu, cabled Withington in London (R. 940, Exh. D-27): "A DELAY IS DANGEROUS WE CONSIDER IT ADVISABLE CLOSE IMMEDIATELY BEFORE ARRIVAL TRENT EXCLUDING INSURANCE CLAUSE HAVE DEED EXECUTED AT ONCE AND FORWARD IT AUTHORIZE YOU TO PAY ELIZA THIRTY THOUSAND DOLLARS ANNIE FIVE THOUSAND DOLLARS ON TERMS SPECIFIED THEIR LETTER OF MARCH EIGHTH MUST HAVE A DEFINITE REPLY MCCANDLESS HAVE BEEN NOTIFIED OUR RIGHTS MUST BE UPHELD". Castle, it will be noticed, referred to Holt's letter to McCandless as a warning that "our", meaning Waialua's, rights must be upheld. Waialua, of course, was the real party in interest. Two days later, on April 30th, Withington, in London, cabled to Castle in Honolulu to inquire to whom the deed should run (R. 943, Exh. D-33), and Castle re-

plied "JAMES LAWRENCE HOLT". (R. 943, Exh. D-34.) Two days later, on May 2, 1910, the deed was signed. This is the deed which the trial Court, the Supreme Court of Hawaii and the Circuit Court of Appeals have each directed should be cancelled.

The findings are clear that Holt was the agent, and Waialua the real party in interest, in the 1910 transaction with the incompetent (R. 112, 148, 155, 473, 482; in fact, Waialua so stipulated (1061):

> "(Counsel for Waialua then admitted that the purchase of May 2, 1910, was made originally for the benefit of Waialua Company and that the series of transactions subsequent thereto gave the respondent no different status than it had by virtue of the deed of May 2, 1910 (Ex. A-21), * * *."

The finding is that Holt knew of the incompetency. (R. 133, 481, 482, 492.) Holt's knowledge of the incompetency when he acted as agent for Waialua in acquiring the incompetent's property is imputed to Waialua.

Curtis v. U. S. (1923), 262 U. S. 215, 67 L. Ed. 956;

Harrington v. U. S. (1871), 78 U. S. 356, 20 L. Ed. 167;

McCaskill Co. v. U. S. (1910), 216 U. S. 504, 54 L. Ed. 590;

U. S. v. Cooksey (C. C. A. 9, 1921), 275 Fed. 670;

Veazie v. Williams (1849), 8 How. 134, 12 L. Ed. 1018.

No other construction can be placed upon this transaction than that Waialua overreached the incompetent. Through an agent who knew of the incompetency, it drove a hard and shrewd bargain with her. The trial

Court's view of the transaction is set out in its opinion (R. 139-157), and we refer to it to support our contention. It is unquestionably the rule that one who deals with an incompetent with knowledge of the incompetency is guilty of fraud, and the contract will be set aside at the instance of the incompetent.[15] Indeed, it has been held by this Court to be an absolute nullity. (*Kendall v. Ewert* (1922), 259 U. S. 139, 66 L. Ed. 862.)

(b) The price was not adequate—the incompetent never received it.

The trial Court was of the view that the price, namely, $30,000, paid by Waialua was not adequate. (R. 159.) This, we submit, was a correct finding. It is true that the Supreme Court said that it could not agree that $30,000 was an inadequate price (R. 304), but that Court also found that the incompetent never received the consideration (R. 294, 301), and set the deed aside because it was not beneficial to her—accordingly its view of the value of the interest is of no importance. One further circumstance should be pointed out, and that is that the Supreme Court held that, when sold, the incompetent's interest was burdened by the instrument of 1906, which it construed to be a transfer by the incompetent of the

15. *Story Equity Jurisprudence* (14th Ed.) Vol. I, Sec. 317; *Williston on Contracts* (Rev. Ed. 1936), Vol. I, Sec. 250; *Kaliikea v. Hapa* (1901), 13 Haw. 459; *Brewster v. Weston* (1920), 235 Mass. 14, 126 N.E. 271; *Atkinson v. McCulloh* (1926), 149 Md. 662, 132 Atl. 148; *Barkley v. Barkley* (1914), 182 Ind. 322, 106 N.E. 609; *Cochran v. Norris* (1935), 175 Okla. 26, 51 Pac. (2d) 736; *Wells v. Wells* (1926), 197 Ind. 286, 150 N.E. 361; *Stewart v. Stewart* (1915), 85 Wash. 202, 147 Pac. 1157; *Curtis v. Brownell* (1879), 42 Mich. 165, 3 N.W. 936; *Kent v. Larue* (1907), 136 Iowa 113, 113 N.W. 547; *Jefferson v. Rust* (1910), 149 Iowa 594, 128 N.W. 954; *Elder v. Schumacher* (1893), 18 Colo. 33, 33 Pac. 175; *Studebaker v. Taylor* (1917), 68 Ind. 747, 80 N.E. 861, 170 Ind. 498, 83 N.E. 747; *Ames v. American Trust & S. Bank* (1906), 224 Ill. 100, 77 N.E. 462; *Fecht v. Freeman* (1911), 251 Ill. 84, 95 N.E. 1043; *Beckwith v. Cowles* (1912), 85 Conn. 567, 83 Atl. 1113; *Shindler v. Parzoo* (1908), 52 Ore. 452, 97 Pac. 755; *Bethany Hospital Ass'n v. Philippi* (1910), 82 Kan. 64, 107 Pac. 530; *Thrash v. Starbuck* (1896), 145 Ind. 673, 44 N.E. 543; 9 C. J. 1216, Sec. 108, footnote 94.

rents, issues and profits of the land for the term of her natural life. (R. 655, para. VIII.) Such a burden, of course, would greatly reduce the value of the incompetent's interest. It has now been determined by the Circuit Court of Appeals that the correct interpretation of the instrument of 1906 is that it is only an assignment of rent to accrue under the 1905 lease (R. 1614), which lease expired in 1930. Waialua does not question this construction before this Court. It is apparent that the interest which the Supreme Court considered not to be unfairly valued at $30,000 is not the interest which the incompetent sold. What she did sell was a much more valuable interest, one in fact which has now been held to have a reasonable rental value for each of the years from 1922, when the ward's title vested, to 1932, when the trial Court entered its decree, in excess of $40,000 per year. (R. 505-523.) Waialua did not pay an adequate consideration: the incompetent did not receive the money: the bargain was not fair: Waialua had knowledge of the incompetency. If any of these propositions is correct, the incompetent is clearly entitled to cancellation of the deed (in addition to the grounds therefor stated in the opinion now attacked), and the decision of the Circuit Court of Appeals is abundantly supported.

(c) The questioned instruments are nullities.

Even though we assume that the bargain was fair, the consideration adequate, that Waialua did not have knowledge of the incompetency, and that *status quo* cannot be restored, nevertheless, all of the questioned instruments must be cancelled because the rule of decision in the

Federal Courts is that a contract of an incompetent is void in the sense of being a nullity.

Derter v. Hall (1873), 82 U. S. 9, 21 L. Ed. 73;

Kendall v. Ewert (1922), 259 U. S. 139, 66 L. Ed. 862;

Plaster v. Rigney (C. C. A. 8, 1899), 97 Fed. 12.

The rule prevailing in the Federal Court is the rule of decision in this case arising in the Territory of Hawaii. (Supra, fn. 8, p. 18.)

CONCLUSION.

None of the grounds of the decision is open to attack by Waialua. Beyond that it is supported by the additional grounds which we have outlined. This is not a case falling within those enumerated in Rule 38 as being one in which certiorari will lie.

Dated, San Francisco, California,
April 15, 1938.

Respectfully submitted,

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an Incompetent Person.

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Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this _____ *day of April, 1938.*

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1938

No. 15

WAIALUA AGRICULTURAL COMPANY, LIMITED,
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, et al.

No. 17

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian,
Petitioner,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

OPENING BRIEF OF ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON.

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REFERENCE TO THE OFFICIAL REPORT OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

Decision on first appeal to the Supreme Court of Hawaii—31 Haw. 817;

Decision on second appeal to the Supreme Court of Hawaii—33 Haw. 34;

Decision on first appeal to the United States Circuit Court of Appeals—52 Fed. (2d) 847;

Decision on second appeal to the United States Circuit Court of Appeals—93 Fed. (2d) 603;

Supplemental decision denying rehearing—C. C. A. 94 Fed. (2d) 806.

JURISDICTION.

The jurisdiction of this Court is invoked under Judicial Code Section 240, U. S. C., Title 28, Sec. 347. The date of the decree of the United States Circuit Court of Appeals which is being reviewed is December 9, 1937 and the date of the denial of the petition for rehearing in that Court is February 1, 1938. Certiorari was granted herein by this Court on May 2, 1938 upon petition filed March 30, 1938 and cross-petition filed March 31, 1938.

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WAIALUA AGRICULTURAL COMPANY, LIMITED.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

OPENING BRIEF OF ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON.

STATEMENT OF THE CASE.

The case, which is one in equity, comes to this Court on certiorari (granted on petition and cross petition) to the Circuit Court of Appeals for the Ninth Circuit, to which

appeals by both parties had been taken from a decree of the Supreme Court of Hawaii, affirming in part and reversing in part a decree of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. It involves an undivided one-third interest in a tract of land situate on the Island of Oahu, Territory of Hawaii, and having an area of some 14,000 acres. The tract will hereinafter be referred to as the "Holt land".

Robert W. Holt, an Englishman, came to Hawaii in the early part of the nineteenth century (R. 842) and there married a native Hawaiian woman. He accumulated a substantial estate, which included the Holt land, and died testate in 1862 (R. 113). His wife had predeceased him. He left surviving three sons, and a daughter by an earlier marriage, Elizabeth M. Aldrich. Omitting further reference to Mrs. Aldrich, who has no interest in the property here involved, the family relationships of R. W. Holt and his descendants are illustrated by the following diagram (R. 843):

R. W. HOLT
Died 1862

OWEN J. HOLT	JAMES R. HOLT		JOHN DOMINIS HOLT
Born Dec. 10, 1842 Died June 10, 1891	Born Oct. 17, 1838 Died Apr. 18, 1916		Born Dec. 17, 1839 Died Apr. 10, 1922
	ROBERT HOLT	JAMES L. HOLT	ELIZA CHRISTIAN
Robert W. Holt Edward S. Holt Chris Holt George H. Holt James R. Holt, Jr. John D. Holt, Jr. Owen J. Holt, Jr. Elizabeth H. Richardson Annie Holt Kentwell	Born ——— Died 1918	Born Nov., 1873	Born Dec. 30, 1885

Under the terms of R. W. Holt's will, each of the three sons took a life estate in one-third of the Holt land, the remainder as to each one-third being in the heirs of the respective sons (R. 843). Eliza R. P. Christian (who by her guardian was the petitioner or complainant in the Circuit Court of Hawaii, and who will hereinafter be referred to as the "incompetent") is the only heir of one of the sons, John D. Holt, and upon his death in 1922, except as her rights may be affected by the instruments assailed in this suit, she became the owner in fee of an undivided one-third interest in the Holt land.

The incompetent was born December 30, 1885, at Makaha, Waianae, on the Island of Oahu, about thirty miles from the City of Honolulu (R. 120). Her mother, a native Hawaiian woman (R. 844), died when the incompetent was about seven years of age, after which her father brought her to Honolulu to live (R. 844). Her father was a shiftless and profligate man (R. 121), and apparently made no permanent home for her, but drifted from place to place, living with different relatives in Honolulu (R. 120). She was placed in various convents during her early life, without, as the trial Court said (R. 121), "leaving a record of accomplishment beyond the most elementary character". She was taken out of school in 1902, when she was approximately sixteen years of age, because she gave birth to an illegitimate child (R. 845), and since that time has, as the trial Court said (R. 121), been "the family drudge and charge of Annie Holt Kentwell and her husband Lawrence Kentwell".[1] In 1906, the Kentwells took the incompetent and her father, who was

1. Annie Holt Kentwell was one of the nine children of Owen J. Holt, and a first cousin of the incompetent.

then sixty-six years of age from Honolulu and, after stopping at several places in the United States, lived in New Jersey until 1909. While in New Jersey, the incompetent gave birth, on a railroad platform, to a second illegitimate child (R. 846). Shortly thereafter they all moved to Oxford, England (R. 121). A third illegitimate child was born to the incompetent in London in 1915 and is now living in England (R. 846-7). Lawrence Kentwell abandoned his family in 1919 (R. 847). John D. Holt died in 1922 (R. 847). The incompetent has continued to live in Oxford, England, with Annie Kentwell.

In 1905, during John D. Holt's lifetime, and when the incompetent was nineteen years of age, a lease of the Holt tract was made by those then having a present vested interest, to Waialua Agricultural Company, Ltd. (the corporation against which the instant suit is brought and which will hereafter be referred to as "Waialua") as lessee, for a term of twenty-five years (R. 874). The incompetent, with respect to her contingent remainder in one-third of the property, assented to the lease, as did others. In 1906, during John D. Holt's lifetime, the incompetent executed an agreement with her cousin, Annie Holt Kentwell, assigning the rents to accrue to the incompetent under the 1905 lease[2] to Annie Kentwell, in consideration of the latter's undertaking to support the incompetent

2. One of the questions presented to and decided by the United States Circuit Court of Appeals was the proper construction of this instrument of 1906, and that Court determined it to be an assignment of rents under the 1905 lease. Waialua has not attacked that construction in its petition for certiorari, and accordingly it is not open to dispute in this hearing. (*General Talking Pictures Corp. v. Western Electric Co.*, (1938), 82 L. Ed. (Ad. Op.) 843.) Furthermore, no broader construction is possible, for if the instrument were construed as attempting to transfer all rents during the incompetent's life it would be invalid for want of the written consent of the incompetent's husband. (Revised Laws of Hawaii, 1925 §2993; opn. of Wilbur, J. in the Circuit Court of Appeals (R. 1621-3).)

for her lifetime (R. 895). In 1910, the incompetent executed a deed, in which Annie Kentwell joined and which deed transferred to a nominee of Waialua the interest of the incompetent and of Annie Kentwell in the Holt tract. It is by virtue of this conveyance that Waialua claims to have succeeded to Annie Kentwell's rights under the instrument of 1906, which, as stated above, was held by the Circuit Court of Appeals to be no more than an assignment of rents under the lease of 1905. In 1922, the incompetent's father, John D. Holt, died, leaving surviving him as his only heir the incompetent, who thereupon became, unless her rights are affected by the lease, the agreement and deed hereinabove described, the owner in fee of an undivided one-third interest in the Holt tract. In 1926 a guardian was appointed for the incompetent in England (R. 847). In 1927, a guardian was appointed in Hawaii, and in 1928 this suit was commenced in the Circuit Court of Hawaii, at Chambers. The petition, as amended (R. 339) sought:

(a) To set aside as to the incompetent

(1) the lease of 1905;

(2) the instrument of 1906;

(3) the deed of 1910; and

(b) To recover the reasonable rental value of the land covered by the deed since the vesting of the petitioner's title in 1922.

All these documents, as outlined, relate to the incompetent's undivided one-third interest in the Holt tract. The ground upon which the suit was founded was that at the date of the execution of each of the instruments, Eliza Christian was mentally incompetent. She offered to make

such restitution as the Court might deem just (R. 357-8 and 365-6). The beneficial ownership of the lease has been in Waialua since its execution in 1905, the beneficial ownership of the assignment of 1906 and the deed have been in Waialua since the date of the deed, May 2, 1910, although legal title has been transferred to different nominees in the interim (R. 1061). In 1921, after the provision of the Hawaiian Organic Act preventing a corporation from holding more than 1,000 acres of land (Apr. 30, 1900, C. 339 §55, 31 Stat. 150 (U.S.C. Tit. 48 §562), was repealed (amendment of July 9, 1921, 42 Stat. 116), title was taken directly by Waialua (R. 1589).

The trial Court, in 1929, entered a decree in favor of the incompetent (R. 186) restoring to her an undivided one-third interest in the Holt land and awarding her the reasonable rental value of the lands from April 10, 1922, when her father died and her title vested, to the date of the decree, less the purchase price of $30,000 paid by Waialua, with interest thereon. Waialua, as hereafter pointed out (infra, p. 32) was the owner of other undivided interests in the Holt lands, and the cancellation of the deed from the incompetent resulted in Waialua and the incompetent becoming tenants in common of the land. Accordingly, the decree also provided that it was without prejudice to an accounting, in the event of partition between the incompetent and Waialua, for permanent improvements which may have been made by Waialua upon the lands covered by the decree (R. 189-190).

Waialua then took an appeal to the Supreme Court of Hawaii, which Court, on a full review of the evidence, affirmed the finding of incompetency, declaring that "on May 2, 1910 Eliza Christian was and is and at all times

has been mentally incompetent to execute a deed or to understand its purpose or effect or to engage in any business transaction of consequence * * * That at the date of the deed she was a congenital imbecile" (R. 272, 273). That Court further held, as had the trial Court, that the deed of May 2, 1910, so far as it affects the incompetent's interest in the land described, should be cancelled (R. 323), and that status quo could be restored (R. 297-300). It considered that Waialua's rights with respect to improvements could be fully protected on partition which might thereafter be brought (R. 297-300). The Supreme Court further determined, however, that the lease of 1905 and the instrument of 1906 had not been in issue on the trial in the Circuit Court, ordered that the incompetent have leave to amend her petition and remanded the cause for such additional evidence as the trial Court might deem proper, touching the circumstances of the execution of the 1905 lease and the 1906 instrument by the incompetent, *other than her incompetency* (R. 326).

Waialua then took an appeal to the United States Circuit Court of Appeals, which was dismissed as premature (52 Fed. (2d) 847). In accordance with the remand order the trial Court then proceeded to take additional evidence and entered a second decree in 1932 in favor of the incompetent (R. 533). The trial Court found that Eliza Christian was incompetent at the time each of the documents was executed; that she was a "congenital imbecile" (R. 476), and gave judgment for the incompetent, cancelling the lease of 1905, the assignment of 1906, and the deed of 1910, and awarded the petitioner a money judgment as of September 6, 1932, in the net sum of $606,785.75, for the use and occupation of her property by Waialua to that date.

after deducting the consideration paid for the deed with interest thereon at 6% per annum. The trial Court found that status quo could be restored (R. 526) and by its decree (R. 533) gave to Waialua, until partition or other severance be sought and decreed, the right to continue in the exclusive use and occupation of the permanent improvements which it had placed on the land, and decreed that upon partition between the incompetent and Waialua, Waialua be insured the right of an election to have allocated to it all of the sites of such improvements, the adjustment with the incompetent to be solely on an equivalent area basis without reference to the value of such improvements.

Waialua took a second appeal to the Supreme Court of Hawaii, which in 1934 rendered an opinion (R. 550, 33 Haw. 34) affirming the trial Court's judgment cancelling the deed of 1910, but—one of the three Justices dissenting (R. 589)—reversing it as to the cancellation of the lease of 1905, the cancellation of the assignment of 1906, and the money judgment for rents, and entered a decree accordingly (R. 631). The Supreme Court found that status quo could be restored (R. 579) and, by its decree, in addition to providing for the repayment by the incompetent of the purchase price of $30,000, with interest, required her to convey to Waialua all her interest in those parts of the Holt land occupied by permanent improvements placed thereon by Waialua. The reversal of the money judgment was based upon the determination by the Supreme Court of Hawaii that the lease of 1905 and the instrument of 1906 were valid despite the incompetency of Eliza Christian, and that the 1906 instrument was an assignment or conveyance of the rents, issues and profits of the property

for the entire lifetime of the incompetent.[3] The finding of the trial Court that the petitioner was incompetent during the whole of her life, a "congenital imbecile", was not disturbed by the Supreme Court of Hawaii; it was confirmed (R. 552). Both parties thereupon appealed to the United States Circuit Court of Appeals for the Ninth Circuit (R. 778, 806). That Court, on December 9, 1937, rendered its decision upon the two appeals (R. 1586, 93 Fed. (2d) 603; supplemental opinion denying a rehearing R. 1633, 94 Fed. (2d) 806), in which it

(a) confirmed the finding of congenital imbecility in 1910;

(b) affirmed the cancellation of the deed of 1910 on the ground of incompetency, coupled with the ability of the petitioner to restore Waialua to status quo;

(c) directed a remand to the trial Court to take such evidence as it deemed appropriate to enable it to make a finding on the issue of competency in 1905 and 1906, and also to fix the amount of the allowance for improvements as hereinafter discussed;

(d) ordered the entry of a judgment cancelling both the lease of 1905 and the instrument of 1906 if the trial Court should find upon said remand that the petitioner was incompetent at both of those dates;

(e) directed that the petitioner recover the reasonable rental value of her interest from 1922, when her title vested, in the event the lease of 1905 and the instrument of 1906 were cancelled, or from 1930 if neither of them was cancelled;

3. As previously stated (Fn. 2 p. 4), if the instrument of 1906 is valid at all, it is only an assignment of rents to accrue under the 1905 lease, which expired in 1930.

(f) directed, as a condition to the cancellation of the deed, the return of the consideration paid by Waialua therefor, with interest, and also (in the event of the cancellation of the lease, which contains a provision that upon its termination in 1930 the improvements placed on the land should become the property of the landlord) that an allowance be made to Waialua in an amount by which the land has been enhanced in value by the addition of improvements, not, however, to exceed their cost. A decree was entered accordingly (R. 1628).

Waialua filed a petition for certiorari before this Court, and the incompetent thereafter filed a cross-petition. Writs were granted upon both petitions.

The case has now been before the trial Court twice, the Supreme Court of Hawaii twice, and the United States Circuit Court of Appeals twice, and each Court has (a) concluded that Eliza Christian is a "congenital imbecile", (b) cancelled the deed of 1910, and (c) determined that an appropriate restoration could be made to Waialua to compensate it for the purchase price paid and the improvements it placed upon the land. In addition, both the trial Court and the United States Circuit Court of Appeals have decided that the lease of 1905 and the instrument of 1906 should be cancelled, the Circuit Court of Appeals, as outlined above, conditioning the cancellation of the 1905 lease and the 1906 instrument upon another finding of incompetency, by the trial Court, at the time of the execution of such instruments. We shall hereafter consider the necessity of this additional finding.

The findings of congenital imbecility, and that restoration can be effected are, under the well settled rule of this

Court, that it will accept findings of the trial Court concurred in by an intermediate appellate Court, now not open to question. Similarly, the construction of the 1906 instrument as being an assignment of rents under the 1905 lease is settled because Waialua's petition for certiorari in no way attacks that determination. We start with these premises.

SPECIFICATION OF ERRORS.

The errors which we intend to urge are those set forth in the cross-petition for certiorari herein, namely:

1. The United States Circuit Court of Appeals erred in requiring as a condition to cancellation that the incompetent restore the consideration and make an allowance for improvements, since

(a) the burden was upon Waialua to prove that it was an innocent purchaser and it failed so to do. Unless it was an innocent purchaser restoration is not required as a condition to cancellation;

(b) it affirmatively appears that Waialua, through its agent James L. Holt, had knowledge of the incompetency, and accordingly restoration is not a requisite to cancellation;

(c) the rule of decision in the Federal Courts, which is the rule of decision in cases arising in the Territory of Hawaii, is that a contract of an incompetent is a nullity without regard to the good faith of the other contracting party, and accordingly restoration is not a requisite to relief therefrom;

(d) the finding is that the incompetent never received the consideration paid by Waialua for the

deed. Restoration of the consideration is not a condition to cancellation when the incompetent has not received the same.

2. The United States Circuit Court of Appeals erred in remanding the suit for a determination of the issue of competency in 1905 and 1906, when the lease and assignment, respectively, were executed, since there is already a finding by the trial Court, amply supported by the evidence and concurred in by the Supreme Court of Hawaii and the United States Circuit Court of Appeals, that Eliza Christian was incompetent at all times in her life—a congenital imbecile,—which necessarily includes a finding that she was incompetent in 1905 and 1906, as well as 1910.

SUMMARY OF THE ARGUMENT.

(a) The decision amply sustained.

The decision of the Circuit Court of Appeals that, even assuming the good faith of the other contracting party and the adequacy of the consideration, an incompetent may set aside her contracts when restoration to status quo can be effected is supported by the rule obtaining throughout the American decisions. The finding of the trial Court, concurred in by the Supreme Court of Hawaii and the United States Circuit Court of Appeals, is that Eliza Christian is a congenital imbecile. Likewise, all three courts concur that status quo, within the meaning of the rule, can be effected in this case. Beyond this, the finding of the trial Court here is that the consideration paid was inadequate.

Quite apart from the fact of incompetency, the transaction involves the sale of an expectancy, and in such instances, to sustain the transaction Waialua must show adequacy of consideration and fairness in dealing. Here the findings are against Waialua on both points and the purchase cannot stand.

(b) **Restoration should not be a condition to cancellation.**

An incompetent, as a condition to setting aside a deed, need not make an allowance to the purchaser for improvements placed on the land or restore the consideration unless the purchaser acted in good faith i.e., without notice of the incompetency. The burden of proving good faith is on the one claiming it, and here there is no evidence in the record to prove that Waialua was a bona fide purchaser, and the finding should have been against it on the issue. On the contrary, the findings are that Waialua purchased the property through an agent, James L. Holt, and that at all times he had knowledge of the incompetency. This being so, it follows as a matter of law that Waialua took with knowledge of the incompetency since the knowledge of the agent is imputed to the principal.

An incompetent, as a condition to cancellation of an instrument, need not restore the consideration with which the other contracting party has parted if the incompetent never received it, and the finding here is that the incompetent never received the consideration for the deed of 1910.

Even though it be assumed that Waialua acted in good faith the rule of decision here is the rule obtaining in the Federal Courts which is that the contract of an incom-

petent is void and a nullity. Accordingly restoration is not a condition to cancellation.

(c) There is no necessity for a remand.

There is no necessity for a remand on the issue of competency in 1905 and 1906. The evidence on the question of competency covered the whole of the petitioner's life (R. 116 to 134, and R. 202 to 273). The Supreme Court, in its opinion, considered the evidence by periods of the petitioner's lifetime, and one of these periods—from 1902 to 1906—covers the very time during which the lease and the assignment were executed (R. 220). There is already a finding by the trial Court that the petitioner was a "congenital imbecile" (R. 491), and this finding has been concurred in by the Supreme Court of Hawaii (R. 552), and again by the United States Circuit Court of Appeals (R. 1605). The Circuit Court of Appeals directs the deed of 1910 to be cancelled, as did both the trial Court and the Supreme Court of Hawaii, upon the ground that the petitioner was at that time a "congenital imbecile". It is beyond question that one who is a congenital imbecile in 1910 must also have been incompetent in 1905 and 1906. There is no necessity for a further finding on the competency of the petitioner in 1905 and 1906.

The lease of 1905, the instrument of 1906, and the deed of 1910, should all be cancelled, and the incompetent awarded the reasonable rental value of the property, since the vesting of her title in 1922. She should not be required to compensate Waialua for improvements which it placed upon the property or to restore the consideration paid for the deed.

THE ARGUMENT.

(A) THE DECISION OF THE CIRCUIT COURT OF APPEALS IS ABUNDANTLY SUPPORTED BY THE AUTHORITIES.

Before presenting the argument in support of the points made in the cross-petition which would, if sustained, enlarge the incompetent's rights, we will review the general propositions of law which amply sustain the recovery granted by the Circuit Court of Appeals.

(1) The general rule that incompetents are entitled to set aside their contracts upon making restoration.

The decision of the Circuit Court of Appeals follows the rule obtaining throughout the American courts, that even assuming the good faith of the other contracting party and the adequacy of the consideration, an incompetent may set aside a contract upon restoring such party to status quo.[4] In fact, many of the cases, particularly those

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4. *Wooley v. Gaines* (1901), 114 Ga. 122, 39 S.E. 892; *Nutter v. Des Moines Life Ins. Co.* (1912), 156 Iowa 539, 136 N.W. 891; *Merry v. Bergfeld* (1914), 264 Ill. 84, 105 N.E. 758; *McKenzie v. Donnell* (1899), 151 Mo. 431, 52 S.W. 214; *Fulgider v. Ingels* (1882), 87 Ind. 414; *Hays v. Spangenberg* (Texas Civ. App. 1936), 94 S.W. (2d) 899; *Loomis & Hayden v. Spencer & Rolph* (1830), 2 Paige (N. Y.) 153; *Edwards v. Miller* (1924), 102 Okla. 189, 228 Pac. 1105; *Cash. v. Bank of Lowes* (1922), 196 Ky. 570, 245 S.W. 137; *Woolbert v. Lee Lumber Co.* (1928), 151 Miss. 56, 117 So. 354; *Hancock v. Haley* (Texas Civ. App. 1914), 171 S.W. 1053; *Ipock v. Atlantic & N.C.R. Co.* (1912), 158 N.C. 445, 74 S.E. 352; *Wirebach's Ex'r. v. Eastern First National Bank* (1891), 97 Pa. St. 543, 39 Amer. Reps. 821; *Crawford v. Scovell* (1880), 94 Pa. 48, 39 Am. Rep. 766; *Eaton v. Eaton* (1874), 37 N.J.L. 108, 18 Am. Rep. 716; *Sparrowhawk v. Erwin* (1926), 30 Ariz. 238, 246 Pac. 541; *Walsh v. Feustel* (1919), 93 Conn. 336, 105 Atl. 696; *Brown v. Cory* (1900), 9 Kan. App. 702, 59 Pac. 1097; *Flach v. Gottschalk Co.* (1898), 88 Md. 368, 41 Atl. 908; *Schaps v. Lehner* (1893), 54 Minn. 208, 55 N.W. 911; *Anderson v. Nelson* (1929), 248 Mich. 160, 226 N.W. 830; *Bell v. Smith* (1929), 155 Miss. 227, 124 So. 331; *Miller v. Barber* (1905), 73 N.J.L. 38, 62 Atl. 276; *Hosker v. Beard* (1896), 54 Ohio St. 398, 43 N.E. 1040; *Pritchett v. Thomas Plater & Co.* (1921), 144 Tenn. 406, 232 S.W. 961; *National Metal Edge Box Co. v. Vanderveer* (1912), 85 Vt. 488, 82 Atl. 837; *Morris v. Hall* (1921), 89 W.Va. 460, 109 S.E. 493; *Dexter v. Hall* (1873), 82 U.S. 9, 21 L. Ed. 73; *Kendall v. Ewert* (1922), 259 U.S. 139, 66 L. Ed. 862; *Plaster v. Rigney* (C.C.A. 8, 1899), 97 Fed. 12; *Edwards v. Davenport* (1883), 20 Fed. 756; *Anglo-California Bank v. Ames* (1886), 27 Fed. 727; *German Savings & Loan Society v. DeLashmutt* (1895), 67 Fed. 399; *Clark Car Co. of New Jersey v. Clark et al.* (D.C. Pa., 1925), 11 Fed. (2d) 814; *Sothern v. United States* (D.C. Ark., 1926), 12 Fed. (2d) 936; *Farmers Bank & Trust Co. v. Public Service Co. of Ind.* (1936), 13 Fed. Supp. 548.

decided in the Federal Courts,[5] do not require any restoration to be effected, even under such circumstances (46 A.L.R. 416, at 433; 95 A.L.R. 1442, at 1447).

Eliza Christian is a congenital imbecile—Status quo can be restored.

As heretofore outlined (supra, pp. 7-10), the trial Court found, and the Supreme Court of Hawaii and the United States Circuit Court of Appeals each confirmed the finding, that Eliza Christian is a congenital imbecile. Similarly, all three courts have concluded that status quo, within the meaning of the rule, can be restored (R. trial Court 526; Supreme Court 297-300 and 579; Circuit Court of Appeals 1605). The term "status quo" means substantially the position occupied before the transaction. It is an equitable concept and is not subject to any ironclad definition. The rule requires only that the one enti-

5. *Dexter v. Hall, Kendall v. Ewert, Plaster v. Rigney, Edwards v. Davenport, Anglo-California Bank v. Ames, German Savings & Loan Society v. DeLashmutt, Clark Car Co. of New Jersey v. Clark, et al., Sothern v. United States, Farmers Bank & Trust Co. v. Public Service Co. of Indiana*—supra note 4.

NOTE: In view of the decision in *Tompkins v. Erie R. R.* (1938), 82 L. Ed. (ad. op.) 787, and of the fact that *Swift v. Tyson* (1842), 16 Pet. 1, 10 L. Ed. 865, is cited in the opinion of the Circuit Court of Appeals in the instant case, we wish to point out that the doctrine of *Swift v. Tyson* (overruled by the *Tompkins* case) has no bearing upon the questions to be decided here. *Swift v. Tyson* turned on the rule of decision to be applied in cases cognizable in the courts of a state but instituted in, or transferred to, a federal court because the parties are citizens of different states (Cons. U. S. Art. III, Sec. 2; Jud. Act 1789, Sec. 34). The question was how far a federal court, in such cases, was bound by the rules declared by the courts of the state in which the controversy arose even though the federal court itself might entertain a different view. In the present case no such question is involved. The controversy did not arise in any state, but in the Territory of Hawaii. The law to be applied is the law of Hawaii. The rule of decision in Hawaii is the rule prevailing in the Circuit Court of Appeals for the Ninth Circuit and the United States Supreme Court, because those courts are the highest courts of appeal for cases arising in the territorial courts. (U. S. Jud. Code, Sec. 128, Subd. Fourth, U.S.C. Tit. 28 §225.) The territorial courts are a part of the federal judiciary system. The rule of decision of the courts, territorial and federal, must be the rules laid down and applied by the courts to which appeals lie—here the Circuit Court of Appeals for the Ninth Circuit and the Supreme Court of the United States. (*Successors of Fantanzzie v. Municipal Assembly* (C.C.A. 1, 1924), 295 Fed. 803; *Kapiolani v. Atcherley* (1913), 21 Haw. 441; *Territory v. Ho Me* (1922), 26 Haw. 331; *Colburn v. U. S. F. & G. Co.* (1920), 25 Haw. 536; *Hill v. Carter* (C.C.A. 9, 1931), 47 Fed. (2d) 869 (cert. den. 284 U.S. 625).)

tled to cancellation shall make such restoration as is consistent with the practical considerations of the case.[6] Mathematical exactness is not necessary.[7] It has been held

(1) That the fact that certain horses have died, and wagons and harness have worn out, and accordingly cannot be restored, does not preclude the cancellation of a settlement in which they were given as consideration. *Burnham Admnstr. v. Mitchell* (1874), 34 Wis. 117, wherein the Court said:

> "But we do not think there is any inflexible rule of law which requires, in a case like the present, that restitution should be made of everything paid and delivered by the defendant in pursuance of the settlement, as a condition to avoiding it, and of a recovery of the amount due upon the note."

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6. *Black on Rescission and Cancellation*, 2d Ed., Vol. III, Sec. 616, at pp. 1484-5; *Thompson on Real Property*, Vol. III, Sec. 2846; *Burnham, Administrator v. Mitchell* (1874), 34 Wis. 117; *Dermott Land & Lbr. Co. v. Zelbicker* (C.C.A. 8, 1921), 271 F. 918 (cert. den. 257 U.S. 648, 66 L. Ed. 415); *Hale v. Kobbert* (1899), 109 Iowa 128, 80 N.W. 308; *Kruger v. Block* (1926), 114 Neb. 839, 211 N.W. 173; *Wright v. Dickinson* (1887), 67 Mich. 580, 35 N.W. 164; *Bank Savings Life Ins. Co. v. Steiner* (Tex. Civ. Apps. 1935), 81 S.W. (2d) 225; *Duson v. Pacific Improvement Co.* (C.C.A. 5, 1927), 18 F. (2d) 5; *Neblett v. Macfarland* (1876), 92 U.S. 101, 23 L. Ed. 471; *American Wine Co. v. Brasher Bros.* (Cir. Crt. Colo., 1882), 13 F. 595; *Hammond v. Pennock* (1874), 61 N.Y. 145; *Cohen v. Ellis* (1885, N.Y.), 16 Abbott's N.C. 320; *Waupin v. Missouri State Life Ins. Co.* (Kansas City Crt. Apps., Mo., 1919), 214 S.W. 398; *Green v. Security Mutual Life Ins. Co.* (1911), 159 Mo. App. 277, 140 S.W. 325; *Felt v. Bell* (1903), 102 Ill. App. 218, 68 N.E. 794; *Green v. Hopper* (Tex. Civ. Apps., 1925), 278 S.W. 286 (rehearing denied 1925); *McDonald v. Simons* (Tex. Com. App. 1926), 280 S.W. 571; *Burgess v. Burgess* (1925), 130 S.C. 265, 126 S.E. 34; *Wilks v. McGovern-Place Oil Co.* (1926), 189 Wis. 420, 207 N.W. 692; *King v. King* (1908), 111 N.Y.S. 713, 127 App. Div. 411; *Mather v. Barnes* (C.C. W.D. Penn., 1906), 146 F. 1000; *Jones v. Galbraith* (1900), 59 S.W. 350; *Cheves-Green & Co. v. Horton* (1933), 177 Ga. 525, 170 S.E. 491, 492; *Fields v. Union Central Life Ins. Co.* (1930), 170 Ga. 239, 152 S.E. 237; *Hamilton Ridge L. Corp. v. Boston Ins. Co.* (1925), 133 S.C. 472, 131 S.E. 22, 26; *Whiteley v. Downs* (1932), 174 Ga. 839, 164 S.E. 318, 320; *Williams v. Sapicha* (1901), 94 Tex. 430, 61 S.W. 115, 118; *Rea v. Bishop* (1894), 41 Neb. 202, 59 N.W. 555, 556; *Brown v. Brenner* (Tex. Civ. Apps., 1913), 161 S.W. 14, 16-17.

7. *Mather v. Barnes* (1906), 146 Fed. 1000; *McKenzie v. Donnell* (1899), 151 Mo. 431, 52 S.W. 214; 9 *C. J.* 1212, Sec. 100.

(2) That the resale at a profit of certain materials purchased under a contract calling for periodic deliveries was no impairment to restoration in cancelling the contract. *Dermott Land & Lbr. Co. v. Zelnicker* (C.C.A. 8, 1921), 271 Fed. 918, wherein the Court said, at p. 920:

> "The rule that the party who seeks to rescind a contract shall return whatever he has received thereunder, like other rules of justice, must be so applied in the practical administration of justice as shall best subserve in each particular case the undoing of wrong and the vindication of right."

(3) That the return of what was left of a farm, about one-half of which had been washed away by a change in the bed of the river, was sufficient. (*Hale v. Kobbert* (1899) 109 Iowa 128, 80 N.W. 308.)

(4) That no compensation need be made to a purchaser for improvements placed on the property because he did not prove that they enhanced the value thereof. (*Kruger v. Block* (1926), 114 Neb. 839; 211 N.W. 173).

(5) That the return of land was sufficient restoration, although timber had been cut therefrom, and it had been encumbered with a lease and a right of way for a railroad had been granted. (*Wright v. Dickinson* (1887), 67 Mich. 580; 35 N.W. 164.)

(6) That in cancelling an insurance policy and ordering the return of the premiums to the insured, the company although it had been subject to a risk during the period the policy was outstanding was being placed in substantially the same position as before the policy was issued. (*Bank Savings Life Ins. Co. v. Steiner*, (Tex. Civ. Apps., 1935) 81 S.W. (2d) 225.)

(7) That the return of the land purchased, less 80 acres resold to another, together with the sales price thereof was sufficient restoration. (*Duson v. Pacific Improvement Co.*, (C.C.A. 5, 1927), 18 F. (2d) 5.)

(8) That the return of a bond received as consideration was sufficient whether or not it had become less valuable or even unenforceable by the running of the statute of limitations. (*Neblett v. Macfarland* (1876), 92 U.S. 101, 23 L. Ed. 471.)

(9) That the return of 80 out of 100 cases of wine and the reasonable value of the 20 resold was sufficient. (*American Wine Co. v. Brasher Bros.* (Cir. Crt. Colo. 1882) 13 F. 595.)

(10) That in setting aside a deed the indemnification of the purchaser (a) for his warranty under another deed made by him in a resale of part of the property, and (b) for a mortgage assumed by him, was sufficient. (*Hammond v. Pennock* (1874), 61 N.Y. 145.)

(11) That the return of bonds which since the purchase had gone into default and the issuer thereof into receivership was sufficient. (*Cohen v. Ellis* (1885 N.Y.), 16 Abbott's N.C. 320.)

(12) That the existence of a greater insurance protection under a life policy since its purchase was no impediment to its cancellation by the insured and the reinstatement of a former policy. (*Maupin v. Missouri State Life Ins. Co.* (Kansas City Crt. Apps. Mo. 1919), 214 S.W. 398. See also *Green v. Security Mutual Life Ins. Co.* (1911), 159 Mo. App. 277; 140 S.W. 325.)

(13) That the return of an undivided one-third interest in a patent which since its purchase had lapsed for

non-user in France, though apparently good elsewhere, was, sufficient notwithstanding that the defendant had sold the whole interest in a single transaction, one-third to plaintiff and two-thirds to another. (*Felt v. Bell* (1903), 102 Ill. App. 218; 68 N.E. 794.)

(14) That the fact that of the property purchased the feed had been used and 60 head of livestock sold was no impediment to setting aside the sale, the Court having the authority to adjust the equities in its decree. (*Green v. Hopper* (Tex. Civ. Apps. 1925), 278 S.W. 286.)

(15) That the indemnification of a party for his assumption of an obligation to another is sufficient. (*McDonald v. Simons* (Tex. Com. App. 1926), 280 S.W. 571.)

(16) That the sale of timber and the granting of a right of way is no impediment to the cancellation of a partition agreement between co-tenants with respect to the property in question. (*Burgess v. Burgess* (1925), 130 S. C. 265; 126 S.E. 34.)

(17) That the return of a lot the house upon which had been destroyed since the purchase was made was sufficient. (*Wilks v. McGovern-Place Oil Co.* (1926), 189 Wis. 420; 207 N.W. 692.)

(18) That the dissolution of the marriage undertaken in consideration of the transfer of land was not necessary to recover back the property. (*Ring v. Ring* (1908), 111 N.Y.S. 713; 127 App. Div. 411.)

(19) That the return of mining property was sufficient restoration in a transaction wherein the seller had sold options on the property and subsequently the purchaser had exercised the options and acquired the property, the

Court requiring that the seller repay the cost to the purchaser of exercising the options, which cost was greatly in excess of the purchase price of the options. (*Mather v. Barnes* (C.C. W.D. Penn. 1906), 146 F. 1000.)

(20) That the return of so much of the purchase price as remained in the hands of the incompetent and a mortgage upon the property sold by him for the balance of such purchase price was sufficient. (*Jones v. Galbraith* (1900), 59 S.W. 350.)

In our cross-petition for certiorari we urged, and it will be the burden of this brief in support of the points made in that cross-petition, that no restoration whatsoever should be required in this case. If we assume, however, that the conduct of Waialua is such as to commend itself to a court of equity and to entitle it to restoration, then, we submit, that the decision of the Circuit Court of Appeals makes ample provision for Waialua.

Just before the deed of May 2, 1910 was obtained, Waialua was (a) the owner of certain undivided fractional interests in the Holt lands which it had purchased from other members of the Holt family (infra, p. 32), and (b) a lessee of all of the lands under the lease of 1905 for a term expiring April 1, 1930 (supra, p. 4) (R. 116). By the deed of May 2, 1910, Waialua acquired from the incompetent an undivided one-third remainder interest in the Holt tract and paid $30,000 therefor. Since it acquired the land, it has placed improvements thereon which have increased the value of the property. It has, of course, used these improvements to its advantage (R. 1278) in operating the land, and they may or may not now be

of as much value to the land as was their cost to Waialua. In setting aside the whole transaction the decision of the Circuit Court of Appeals requires, as a condition thereto, that the incompetent (a) repay the purchase price with interest from the date of its payment by Waialua, i.e. May 2, 1910; and (b) pay Waialua the amount by which the improvements have enhanced the value of the land being recovered, not, however, to exceed the cost of such improvements. We earnestly submit that this is restoration to status quo, within the meaning of the rule, to the fullest extent. Waialua will be in the same position in which it was before it acquired the incompetent's interest, namely a co-tenant in possession, owning all it previously did. It will until partition continue, as before, to utilize the land with all its improvements, being required only to pay a reasonable rent to its co-tenant. As the Circuit Court of Appeals points out (R. 1610-1616), Waialua paid nothing to the incompetent for or under the terms of the lease of 1905 or the instrument of 1906, and accordingly there is nothing to be restored with respect to either thereof. The term of the lease of 1905 has expired. The 1906 instrument, which as outlined was an assignment by the incompetent of her right to the rent provided for in the lease, has spent its force with the expiration of the lease. Had neither of them been made Waialua would have been required, as a co-tenant occupying the land to the exclusion of the incompetent, to pay her the reasonable rental value of her interest. The decree of the United States Circuit Court of Appeals, in effecting restoration to status quo upon a cancellation of all three instruments, provides for just that result. It places

Waialua in all respects where it would have been had it not acquired any interest in the property—either by the lease, the assignment, or the deed—from Eliza Christian.

(2) The consideration was not adequate.

While the decision of the Circuit Court of Appeals was not placed upon that ground, Waialua in fact did not pay an adequate consideration for the incompetent's interest.

The trial Court was of the view that the price, namely, $30,000, paid by Waialua was not adequate (R. 159). This, we submit, was a correct finding. It is true that in its first opinion the Supreme Court said that it could not agree that $30,000 was an inadequate price (R. 304), but that court also found that the incompetent never received the consideration (R. 294, 301), and set the deed aside because it was not beneficial to her—accordingly, its view of the value of the interest is of no importance. It should be observed that, in deciding the first appeal, the Supreme Court of Hawaii, as it explained in its second opinion (R. 371), had in mind the assignment of 1906, which it regarded as a transfer of all rents to accrue from the land during the incompetent's life. In passing on the issue of adequacy of price the Court was therefore considering the value of an interest supposedly burdened or diminished by the prior transfer of the grantor's right to all income to accrue during her entire life. But, as already pointed out (ante, p. 4, Fn. 2) the decision of the Circuit Court of Appeals, which is not, in this respect, attacked here, establishes that the 1906 instrument, if valid at all, is to be construed as transferring only the right to rents under the lease of 1905, which expired in 1930. It is apparent that

the interest which the Supreme Court considered had been transferred was not the interest which the incompetent actually sold. What she did sell was a much more valuable interest, one in fact which has now been held to have a reasonable rental value for each of the years from 1922, when the incompetent's title vested, to 1932, when the trial Court entered its decree, of approximately $40,000 per year (R. 505, 523). If we concede that the land sold by the incompetent in 1910, if subject to a burden of an instrument granting the rents, issues and profits thereof for the life of a party then twenty-five years old, was worth not more than $30,000, it by no means follows that the interest was not worth more than $30,000, when the burden was only an assignment of rents for twenty years, i. e., from 1910 when the deed was made to 1930 when the lease expired. We submit that the finding of the trial Court was correct, and refer to that Court's analysis of the facts with respect thereto (R. 149, 150), wherein the Court concludes that $71,778.20, and not $30,000.00, was the fair value of the incompetent's interest in the property in 1910. Waialua made the purchase at less than half price. Inadequacy of consideration is always recognized as a ground for setting aside incompetents' contracts.[8]

(3) Waialua was purchasing an expectancy and, regardless of the incompetency of Eliza Christian, the inadequacy of the price and the unfairness of the dealing entitle her to set aside the transaction.

Owners of expectant interests have long been the objects of protection by a Court of equity. As pointed

8. *Hull v. Louth* (1887), 109 Ind. 315, 10 N.E. 270; *McEvoy v. Tucker* (1915), 115 Ark. 430, 171 S.W. 888; *Maggini v. Pizzoni* (1888), 76 Cal. 63, 18 Pac. 687; *Potter v. Woodruff* (1892), 92 Mich. 8, 52 N.W. 83; 32 C.J. 746, Sec. 537, fns. 1 and 2.

out by Professor Pomeroy,[9] one of the foundations upon which this jurisdiction rests is the exposure of this class of persons to the temptation of sacrificing their future interests in order to meet present wants. That is what happened in this case. To sustain a transaction with one disposing of an expectancy, the buyer must prove fair dealing and adequacy of consideration.[10] Fraud is inferred from the nature of the transaction. The buyer must overcome the inference.[11] In this class of case, fraud means an unconscionable use of the powers arising out of the attendant circumstances and conditions. In the instant transaction, as already pointed out, the finding of the trial Court is that the consideration paid was not adequate (supra, p. 23). The whole course of the dealing culminating in the execution of the deed of May 2, 1910, is hereafter outlined in detail, from which it is clear that the purchase was made by Waialua through an agent, James L. Holt, who had knowledge of the incompetency (infra, p. 30). Beyond this the evidence clearly supports the trial Court's view that Waialua was not fair in the matter (R. 139-157). That Court said that in making

9. *Pomeroy's Equity Jurisprudence*, 4th Ed., Vol. II, Sec. 953, p. 2031.

10. *Story Equity Jurisprudence*, 14th Ed., Vol. I, Secs. 458-462, incl.; *Bacon v. Bonham* (1881), 33 N.J. Eq. 614; *Dixon v. Bentley* (1905), 68 N.J. Eq. 108, 59 Atl. 1036; *Nimmo v. Davis* (1851), 7 Texas 26; *Elliott v. Leslie* (1907), 124 Ky. 553, 99 S.W. 619; *McClure v. Raben* (1890), 125 Ind. 139, 25 N.E. 179; *Read v. Mosby* (1890), 87 Tenn. 759, 11 S.W. 940; *Mastin v. Marlow* (1871), 65 N.C. 695. This rule also prevails in England. *Halsbury's Laws of England*, (2d Ed., Vol. 15, p. 283, Sec. 505; *Chesterfield v. Janssen* (1750), 28 Eng. Repr. 82, 2 Ves. Sen. 125; *Gwynne v. Heaton* (1778), 28 Eng. Repr. 949, 1 Bro. C.C. 1; *Lancashire Loans Ltd. v. Black* (1934), L.R. 1 K.B. 380; *Nesbitt v. Berridge* (1863), 55 Eng. Repr. 111, 32 Beav. 282; *Earl of Portmore v. Taylor* (1831), 58 Eng. Repr. 69, 4 Sim. 182; *Newton v. Hunt* (1833), 58 Eng. Repr. 530, 5 Sim. 511; *Bromley v. Smith* (1859), 53 Eng. Repr. 1047, 26 Beav. 644; *Brenchley v. Higgins* (1900), 83 Law Times 751, 70 L.J. Ch. 788; *Aylesford v. Morris* (1873), 28 Law Times 541, 42 L.J. Ch. 6546; *Nott v. Johnson & Graham* (1687), 23 Eng. Rep. 627, 2 Vern. 26.

11. *Pomeroy's Equity Jurisprudence*, 4th Ed., Vol. II, Sec. 953, p. 2031.

the purchase Waialua "knew of the betrayal of confidence which was going on between James Lawrence Holt and Lawrence Kentwell affecting Eliza" (R. 153)—that "The company did everything in its power to prevent the question of values coming out in the open at the time" (R. 152). Far from engaging in an open and above-board transaction, directly with the seller, Waialua obtained her signature in a transaction negotiated by her cousin, James L. Holt, to whom it paid a compensation and which fact it hid from the incompetent and those dealing for her. As the trial Court found, Waialua "knew that James L. Holt was securing a secret profit to himself and Colburn * * *" (R. 148). Waialua was, nevertheless, very careful to keep this information from the seller. We quote its instructions to its attorney, Withington, who was sent to Oxford, England, to close the transaction. In a cable of April 12, 1910, it said (R. 934, Exh. D-21):

> ELIZA AND JOHN D ACCEPT THIRTY THOUSAND DOLLARS MUST BE INCLUSIVE OF PROSPECTIVE INTEREST ANNIE KENTWELL WANTS FIVE THOUSAND DOLLARS HER INTEREST MAKE LESS IF POSSIBLE MUST NOT EXCEED THIRTY-FIVE THOUSAND DOLLARS PRICE TO WAIALUA MUST BE KEPT SECRET (Underscoring ours).

One of the reasons given for the intervention of a Court of equity to relieve against sales of expectancies is the necessitous condition of the seller. In this case this very factor is present and Waialua knew it. We quote another of Waialua's cables to Withington, its attorney (R. 925, Exh. D-13):

> HAVE RECEIVED YOUR LETTER OF THE FOURTH EMPLOY ONLY IF NECESSARY LARNACH WAIALUA DEPENDS UPON YOU HAVE EVERY REASON TO BELIEVE LINK (meaning

McCandless, another prospective purchaser) WILL KEEP THEM SUPPLIED WITH MONEY PROVIDED THEY CAN COME AMERICA WHERE EXPECT TO MEET TRENT (McCandless' agent) WHY DO YOU NOT COMMUNICATE WITH KENTWELL BY CABLE TRY TO ASCERTAIN MOVEMENTS.

Waialua used its best efforts to keep the prospective purchaser, McCandless, *from negotiating for the incompetent's* interest, and pressed its advantage at every turn. We quote another of its cables to Withington sent April 28, 1910 (R. 940, Exh. D-27):

A DELAY IS DANGEROUS WE CONSIDER IT ADVISABLE CLOSE IMMEDIATELY BEFORE ARRIVAL TRENT (McCandless' agent) EXCLUDING INSURANCE CLAUSE HAVE DEEDS EXECUTED AT ONCE AND FORWARDED AETHORIZE YOU TO PAY LIZA THIRTY THOUSAND DOLLARS ANNIE FIVE THOUSAND DOLLARS ON TERMS SPECIFIED IN THEIR LETTER OF MARCH EIGHT MUST HAVE A DEFINITE REPLY McCANDLESS HAVE BEEN NOTIFIED OUR RIGHTS MUST BE UPHELD (Underscoring ours).

Its agent, Holt, wrote informing that a failure to sell would result in partition, with Waialua acquiring the property "at any old price they feel like paying; who all can oppose them successfully, we all have not got the money" (R. 915). As the trial Court pointed out, Waialua had actual knowledge of this threat (R. 143 and 147). We submit that, regardless of the incompetency, Waialua cannot sustain its purchase of an expectancy in a bargain such as this.

The recovery allowed the incompetent by the Circuit Court of Appeals is, as pointed out, amply sustained. Beyond that we earnestly contend that the recovery did not go far enough. The incompetent should not have been

required to make any restoration for the several reasons advanced in her cross-petition for certiorari, and clearly there is no need for any further finding on the issue of competency. We now turn to these points.

(B) THE DECISION SHOULD HAVE GRANTED THE INCOMPETENT GREATER RELIEF.

(1) Waialua is not entitled to be compensated for the improvements placed upon the land or to a return of the consideration paid for the deed because (a) it did not sustain its burden of proof that it was a bona fide purchaser and (b) it affirmatively appears that Waialua had knowledge of the incompetency through its agent, James L. Holt.

a. Waialua failed to sustain its burden of proof.

In order to establish its right to an allowance for improvements placed upon the property or the return of the consideration paid for the deed Waialua must have acted in good faith, it must have taken without knowledge of the incompetency of the seller.[12] The Circuit Court of Appeals recognized this rule (R. 1600), but declined to apply it because, it stated, the trial Court and the Supreme Court of Hawaii had each required restoration and "this could not have been done under any theory of the law other than that the company did not have notice. Thus, both have made an implied finding that the company did not have notice." (R. 1637). It was the gravamen of the incompetent's cross-petition for a writ of certiorari, and

12. *Elder v. Schumacher* (1893), 18 Colo. 433, 33 Pac. 175; *Studebaker v. Taylor* (1917), 83 Ind. 747, 80 N.E. 861, 170 Ind. 498, 83 N.E. 747; *Amos v. American Trust etc. Bank* (1906), 221 Ill. 100, 77 N.E. 462; *Fecht v. Freeman* (1911), 251 Ill. 84, 95 N.E. 1043; *Beckwith v. Cowles* (1913), 85 Conn. 567, 83 Atl. 1113; *Hardy v. Dyas* (1903), 203 Ill. 211, 67 N.E. 852; *Shindler v. Parzoo* (1908), 52 Ore. 452, 97 Pac. 755; *Bethany Hospital Co. v. Philippi* (1910), 82 Kan. 64, 107 Pac. 530; *Thrash v. Starbuck* (1896), 145 Ind. 673, 44 N.E. 543; 9 *C. J.*, 1216, Sec. 108, fn. 94.

will be the incompetent's position in this portion of the brief, that the Circuit Court of Appeals erred when it directed, as a condition to cancellation, that restoration be made to Waialua.

The burden of proving good faith is upon Waialua if it would seek the benefit thereof. [13] The record fails to disclose any attempt whatsoever to sustain this burden. In its first and second answers, filed in 1928 and 1929 respectively (R. 64, 101), Waialua did not plead that it was an innocent purchaser. In its third answer (R. 409), filed in 1931, which was after the trial in which the invalidity of the deed was determined, and before the trial on the remand from the Supreme Court of Hawaii with respect to the lease and the assignment, Waialua did so plead, but it did not offer any proof thereof. The finding of the trial Court was "that it is not clearly shown that Waialua Company had actual notice of the incompetency" (R. 154); the Court stated that it "proceeded on the assumption that Waialua was ignorant of her real mental status. But this fact does not justify the conclusion that the company was a 'subsequent grantee' or an 'innocent purchaser'" (R. 154). The Supreme Court of Hawaii, in its second opinion, stated that Waialua did not have knowledge of the incompetency (R. 555). The United States Circuit Court of Appeals assumed for the purpose of its decision that Waialua did not have knowledge of the incompetency (R. 1637). There is no evidence in the record from which a finding that Waialua did not have knowledge can be made.

13. *Ipock v. Atlantic etc.* (1912), 158 N.C. 445, 74 S.E. 352; *Curtis v. U. S.* (1923), 262 U.S. 215; 67 L. Ed. 956; *Wright-Blodgett & Co. v. U. S.* (1915), 236 U.S. 396, 59 L. Ed. 637; *Treat v. Rogers* (C.C.A. 8, 1929), 35 Fed. (2d) 77; *Hull v. Louth* (1887), 109 Ind. 315, 10 N.E. 270.

It was not necessary for any of the three Courts to find that Waialua had knowledge of the incompetency, and accordingly was not a bona fide purchaser, in order to grant the relief which has thus far been granted to the incompetent. It is a distasteful thing for a trial Court in a small community, such as Honolulu,[14] to find economically important people guilty of knowingly taking advantage of an incompetent. It is clear, however, from the opinion of the trial judge (R. 139-149) that he did not consider that it had been established that Waialua was an innocent purchaser. In fact, he states directly that such a conclusion is not justified (R. 154). Considered in the light of the rule placing the burden upon Waialua, the finding, in the absence of proof of such fact, should have been against Waialua on the issue,[15] and accordingly Waialua is not entitled to an allowance for the improvements placed on the property or a return of the consideration paid for the deed as directed by the Circuit Court of Appeals.

b. It affirmatively appears that Waialua had knowledge of the incompetency through its agent, James L. Holt, when it took the deed of 1910.

With all the earnestness at our command we advance what we deem is an unanswerable point in this case. Both the facts and the law are clear upon it and by virtue thereof not only is the recovery already awarded the incompetent sustained but in addition its application eliminates the requirement that restoration be directed as a

14. The population of Honolulu in 1910, including all nationalities, was only 52,183. (Fifteenth Census of the U. S., 1930 Population, Vol. I. Dept. of Com. Bureau of Census, p. 1237.)

15. *Golson v. Dunlop* (1887), 73 Cal. 157, 14 Pac. 576; *Campbell v. Buchman* (1874), 49 Cal. 362; 64 *C. J.* 1258.

condition to cancellation. The circumstances surrounding the 1910 purchase are replete with over-zealousness on Waialua's part. Every advantage was taken of the incompetent's condition and necessities to make a purchase at a price which the trial Court did not consider adequate (R. 139, 157). One of these circumstances was that Waialua made the bargain through its agent, James L. Holt, who, as the trial Court found, had knowledge of the incompetency. It follows as a matter of law from the facts so found that Waialua, the principal, had knowledge of the incompetency.

As outlined in the statement of the case, the incompetent acquired her interest in the land in question under the will of her grandfather, who died in 1862. She had a number of cousins, children of her father's two brothers, who also had undivided interests in the land. Upon the death in 1891 of one of these uncles, each of his nine children (R. 113) became the owner of a 1/27th undivided interest. It was shortly thereafter that Waialua evidenced a desire to acquire the Holt lands. Mr. Goodale, Waialua's General Manager, testified that "it would be fair to say that Waialua Plantation from the very outset (referring to 1898, R. 1238) planned if it could to acquire these Holt lands, and that the various negotiations and transactions that I undertook from the inception there, were taken with a view of ultimately securing those lands" (R. 1259-1260). In 1899 Waialua purchased its first 1/27th interest and became a tenant in common with the various heirs of the Holt tract (R. 1260). In 1900 Waialua purchased another 1/27th interest (R. 850, subd. 4). In 1905 Waialua leased the whole of the property from various parties in interest (R. 874). Later in the same year it purchased another

1/27th interest (R. 894 subd. 12), acting through and taking title in the name of J. R. Galt. Again in the same year it purchased another 1/27th interest (R. 894, subd. 13), acting through and taking title in the name of J. R. Galt.[16] In 1906 it purchased another 1/27th interest (R. 894, subd. 14), acting through and taking title in the name of J. R. Galt. In 1907 it purchased two 1/27th interests (R. 899, subd. 16), acting through and taking title in the name of D. L. Withington.

In 1910, therefore, prior to the bargain which is involved in this suit, Waialua owned an undivided 7/27ths interest in the Holt lands and held a lease on the whole thereof for a period ending in 1930. It then set out to acquire the incompetent's share. As the petition filed in the trial Court alleges (R. 8-10), and Waialua's answer admits (R. 65-66) in 1910 Waialua "entered into an arrangement" with Holt "for the acquiring of a two-thirds interest * * * including the share and expectancy of Eliza and the interest owned by said James L. Holt and understood that said James L. Holt would and did * * * secure the conveyance of the interest of said Eliza * * * so that said interest might be united with those which he had acquired from his father * * *."

Although this transaction for the purchase of the incompetent's property involved Waialua's advancing for the incompetent's interest some $30,000 before it received a conveyance from Holt of the title which was taken in his name, and although the complete transaction wherein Waialua would acquire a two-thirds interest in fee in the property called for an expenditure by it of $120,000, the

16. This was the interest which vested in Annie Kentwell on the death of her father, Owen J. Holt.

document evidencing the agreed relationship between Holt and Waialua in this "arrangement" was not produced by Waialua. There was such a document executed in 1910 (R. 1013). It was demanded by the plaintiff (R. 1011), but although a great many papers having to do with this rather involved transaction were available and introduced in evidence, somehow this very important document could not be located, and we must rely therefore upon secondary evidence of its contents to determine the real relationship between Waialua and Holt. Fortunately, we do have in evidence the testimony of one of the parties thereto—Holt—that the final agreement was substantially in accordance with a draft thereof (R. 1013, and see Exh. D-37, R. 948) which was prepared by Waialua's attorneys (R. 1011). Since the defendant did not offer testimony to contradict that of Holt, we must assume that the arrangement was as outlined in the draft. Furthermore, the transaction followed the provisions of the draft with such minuteness of detail that it would seem beyond question that the draft accurately outlined what was to be done. For the convenience of the Court, the document is set out in the Appendix to this brief, beginning at page 1. It provides that Holt should procure the incompetent's interest in the property, along with other outstanding interests, and convey it forthwith to Castle, who was admittedly the nominee of Waialua. Holt was to pay up to $40,000 for this interest, which Waialua was to advance. It was contemplated that Mr. Withington, of the firm of Castle & Withington, which the answer admits were Waialua's attorneys in the transaction (R. 412), might go to England, where the incompetent was living, to close the purchase.

An examination of the undisputed evidence will show that the agreement was followed to the letter, and consequently, whether we look to what they agreed to do or what they actually did, the conclusion is the same—that Waialua, through the agency of Holt, purchased the incompetent's interest as it had theretofore, through the agency of others, acquired several of the other undivided interests.

The record discloses that after discussing the matter with Mr. Castle and being instructed by him "to go ahead and negotiate with the parties in England" (R. 1010) Holt wrote to Lawrence Kentwell suggesting the possibility of a sale of the interest to Waialua. It appears from Kentwell's reply (R. 906, Exh. D-1) of April 19, 1909, that Holt had previously made a proposal, and Kentwell then makes a counter-proposal on behalf of the incompetent and her father who was then seventy years of age. Upon obtaining an expression from Kentwell of his willingness to dispose of the incompetent's property Holt transmitted the letter to Castle (R. 908-9, Exh. D-2). We next find Holt again writing to Kentwell on February 17, 1910 (R. 913-15, Exh. D-5), telling him that Waialua had definitely decided upon the conditions under which it would make the purchase of the two interests, the incompetent's one-third and Holt's one-third, concluding with the statement that "the Waialua people have intimated strongly that should his attempt upon their part to buy fail, they will resort to a suit in partition for the sale of the land at public auction * * * they will acquire the same on any old price they feel like paying; who can oppose them successfully, we all have not got the money" (R. 915). On March 18, 1910, Kentwell wrote to Holt stating

that the incompetent would sell for $30,000, and in addition that his wife, Annie Kentwell, who claimed some right through the incompetent's father, would join in the conveyance for an additional $5,000 (R. 915-16, Exh. D-6). On March 30, 1910, Kentwell again wrote to Holt (R. 919-20, Exh. D-8), urging haste if Waialua wished to acquire the property because another purchaser, Mr. McCandless, had made a better offer. This letter refers to a cable from Holt which had arrived the same day and another letter from Kentwell to Holt, but neither of these documents is in evidence and their contents do not appear. Quite evidently, however, they do not modify the tentative terms since Kentwell again refers to the total consideration of $35,000. The delay in consummating the purchase appears to have been Waialua's concern over obtaining the consent of the incompetent's husband, Albert Christian. This consent was necessary under the Hawaiian statute then in effect requiring a husband's consent to the sale of real estate by the wife (Revised Laws of Hawaii, 1925, Sec. 2993).

The difficulty regarding the consent of the incompetent's husband was overcome on April 7, 1910, when Castle, who admittedly was acting for Waialua (R. 412), obtained an agreement from Christian that he, Christian, would, for a further consideration, at Castle's direction, give his consent to the purchase of the incompetent's interest (R. 902, subd. 19). It is of interest to note that this agreement in no way provides a minimum price at which the purchase is to be made. Christian apparently was not concerned with protecting the incompetent. As the trial Court stated, there was no one to whom she could look for disinterested information or advice (R. 155-6). The incompetent was

married to Christian in 1903, when she was seventeen years of age, and lived with him only a few months (R. 845). He died in 1919.

On April 8, 1910, Castle & Withington advised Mr. Goodale, Waialua's General Manager, that the Christian agreement had been procured, that Waialua had paid for it, and that Holt had cabled Kentwell that Christian had been settled with, and Withington would soon be in England (R. 920-21, Exh. D-9).

It is to be observed that Waialua's admitted representative, Castle, and not Holt, was the one to whom this agreement of Christian ran, and that Waialua, not Holt, paid for it. On the same day, April 8, 1910, Castle & Withington cabled Withington, in Boston, that "John" (meaning Holt) had cabled Kentwell to await his (Withington's) arrival, and urged Withington to go to London (R. 922, Exh. D-10). On the 11th of April, 1910, Castle & Withington again cabled Withington to hurry, since McCandless, another prospective purchaser, was also sending an agent to London (R. 922, Exh. D-11).

On April 12, 1910, Mr. Colburn, an associate of Holt, addressed a letter to Mr. Castle, outlining the terms of the transaction which was being consummated (R. 923-4, Exh. D-12). There is no question whom Mr. Colburn considers to be the real purchaser of the incompetent's interest. He makes his views clear when he states that in the event "that the said company (referring to Waialua) has acquired from Mrs. Eliza Christian her anticipatory interest in said lands" (R. 923) that it pay him and Holt the difference between the amount which it was required to pay to the incompetent, not to exceed

$30,000, and the sum of $60,000. The final agreement between the parties differed somewhat from that outlined in this letter, but it is of interest to note whom one of the persons acting thereunder considered to be the real purchaser.

On April 12, 1910, Castle & Withington in Honolulu cabled Withington, in Boston, as follows: "HAVE RECEIVED YOUR LETTER OF THE FOURTH EMPLOY ONLY IF NECESSARY LARNACK WAIALUA DEPENDS UPON YOU HAVE EVERY REASON TO BELIEVE LINK (meaning McCandless) WILL KEEP THEM SUPPLIED WITH MONEY PROVIDED THEY CAN COME AMERICA WHERE EXPECT TO MEET TRENT (McCandless' agent) WHY DO YOU NOT COMMUNICATE WITH KENTWELL BY CABLE TRY TO ASCERTAIN MOVEMENTS" (R. 925, Exh. D-13).

On April 13, 1910, Mr. Colburn wrote to Mr. Castle (R. 925-7, Exh. D-14), setting out the contents of a cable sent by Holt to Kentwell, and a copy of Kentwell's reply. The former was "AWAIT WITHINGTON'S ARRIVAL WITH CASH TERMS YOUR LETTER EIGHTH ACCEPTED CABLE IMMEDIATE ACCEPTANCE", and the latter was "ACCEPT WHEN DID WITHINGTON SAIL". Colburn states further, "Therefore the matter is up to you to instruct Withington to advise Kenwtell when he can sail for England and, if possible, to proceed forthwith, and you should make your financial arrangements whereby Mr. Withington will get the requisite amount, $30,000, to pay Mrs. Christian and the Kentwells and secure their deed. I take this to be exceedingly good prospects for the W. A. Co. to clinch this matter if there are no further delays upon the part of your principals."

On the same day, April 13, 1910, Castle & Withington in Honolulu cabled Withington, in Boston, that Kentwell had cabled his acceptance and that Withington's credit had been increased to $40,000 (R. 927, Exh. D-15).

On April 14, 1910, Withington, from Boston, advised Castle & Withington, in Honolulu, that he would sail on the 20th, that he wished more definite instructions, and asked if he might consult Professor Gray (R. 928, Exh. D-16).

On April 15, 1910, Castle & Withington, in Honolulu, cabled Withington, in Boston, to obtain Professor Gray's opinion (R. 933, Exh. D-19), and the same day Mr. Withington, in Boston, addressed a letter to Professor Gray (R. 928-30, Exh. D-17), asking Professor Gray's opinion, among other things, as to the nature of the incompetent's interest, and what type of conveyance was necessary in acquiring it.

On April 16, 1910, Professor Gray gave his opinion to Mr. Withington (R. 931-33, Exh. D-18), advising that the incompetent's interest was a contingent remainder, that any ordinary form of deed was sufficient to convey it, and that children that might be adopted by the incompetent's father would not take under the terms of the will.

On the 16th of April, 1910, Castle & Withington, in Honolulu, cabled Withington, in Boston, as follows: "ELIZA AND JOHN D ACCEPT THIRTY THOUSAND MUST BE INCLUSIVE OF PROSPECTIVE INTEREST ANNIE KENTWELL WANTS FIVE THOUSAND HER INTEREST MAKE LESS IF POSSIBLE MUST NOT EXCEED THIRTY FIVE THOUSAND PRICE TO WAIALUA MUST BE KEPT SECRET" (R. 934, Exh. D-21).

On April 19, 1910, Castle & Withington, in Honolulu, cabled Withington, in Boston, as follows: "KENTWELL SENDS FOLLOWING MESSAGE TO HOLT QUOTE WILL AGREE TO ABIDE BY YOU THOUGH LINK (meaning McCandless) OFFERS A BETTER PROPOSITION" (R. 935, Exh. D-22).

Withington sailed for London and we find under date of April 25, 1910, a letter from Kentwell to Withington, addressed to the steamer, welcoming Withington, and stating that he is expected in Oxford where the incompetent and her father are living with the Kentwells (R. 935-6, Exh. D-23).

On April 26, 1910, Withington, in London, cabled Castle & Withington, in Honolulu, as follows: "DEMAND PAYMENT IN CASH ARE NOW OBJECTING INSURANCE WE DO NOT CONSIDER IT ADVISABLE WITHOUT TRENT (McCandless' agent) WILL NOT ARRIVE UNTIL MONDAY" (R. 938, Exh. D-25).

On April 28, 1910, in Honolulu a letter was apparently sent over Holt's signature, after conferring with Castle (Holt's testimony, R. 1011), warning McCandless not to interfere with the pending transaction with the incompetent (R. 939, Exh. D-26).

The same day Castle & Withington, in Honolulu, cabled Withington, in London, "A DELAY IS DANGEROUS WE CONSIDER IT ADVISABLE CLOSE IMMEDIATELY BEFORE ARRIVAL TRENT (McCandless' agent) EXCLUDING INSURANCE CLAUSE HAVE DEEDS EXECUTED AT ONCE AND FORWARDED AUTHORIZE YOU TO PAY LIZA THIRTY THOUSAND ANNIE FIVE THOUSAND ON TERMS SPECIFIED THEIR LETTER MARCH EIGHTH MUST HAVE DEFINITE REPLY MCCANDLESS HAVE BEEN NOTIFIED OUR RIGHTS MUST BE UPHELD" (R. 940, Exh. D-27). It will be

observed that Castle & Withington referred to Holt's letter of the same day to McCandless as a notification that "our" (quite evidently meaning Waialua's) rights must be upheld. The office of Castle & Withington also apparently considered Waialua the real party in interest and that a notification by Holt was equivalent to a notification by Waialua.

On April 29, 1910, Withington, in London, cabled Castle & Withington, in Honolulu, as follows: "DEEDS WILL BE EXECUTED MONDAY AS FAR AS WE UNDERSTAND HAVE INSTRUCTIONS TO PAY WITHOUT THE SIGNATURE OF HUSBAND" (R. 941, Exh. D-29). On the same day Castle & Withington replied as follows: "YOUR UNDERSTANDING IS CORRECT" (R. 943, Exh. D-32).

A detail had apparently been overlooked for on the next day, April 30, from London, Mr. Withington cabled Castle & Withington, in Honolulu, inquiring who was to be named as the grantee in the deed (R. 943, Exh. D-33), and on the same day Castle & Withington replied by cable "JAMES LAWRENCE HOLT" (R. 943, Exh. D-34).

This is the documentary evidence showing the progress of the negotiations leading up to the execution of the deed of May 2, 1910, cancellation of which is sought in this action, and through which Waialua now claims. The chain of events follows with the minutest detail the provisions of the agreement between Holt and Waialua, testified to by Holt and set out in the memorandum dated April 15th (Exh. D-37, R. 948-52). From the time when the first discussions were initiated with Kentwell by Holt, to the execution of the deed and the payment of the consideration, we submit it is clear that

the real purchaser was Waialua, and that Holt was acting merely as its agent in procuring the property. We have, first, Castle's direction to Holt to negotiate with Kentwell; then Holt's letters to Kentwell in which he continuously mentions Waialua as the purchasing party; Kentwell's letters to Holt concerning the transaction in which he again refers to Waialua as the purchaser; Colburn's letter to Castle in which it is clear that he considers Waialua as the purchaser; Castle obtaining an agreement from Christian to consent to the purchase of the incompetent's interest; the cablegrams from Castle & Withington in Honolulu to Withington in Boston, directing him in great detail on the manner in which the transaction is to proceed, telling him that the price to Waialua must be kept secret—that McCandless has been notified that "our" rights must be upheld—directing him to whom the deed should run; and we have Waialua paying the purchase price and then settling with Holt and Colburn in accordance with the agreement, the draft of which is dated April 15th and set out as Exhibit D-37 (R. 948 to 952). In this very agreement, which Holt testifies was prepared by Castle, Castle, who admittedly is acting throughout on behalf of Waialua, is named as the buyer. Waialua, not Holt, was the purchaser of Eliza's interest. Holt was only the "dummy" grantee.

The events transpiring subsequent to the execution of the deed of May 2, 1910, throw further light on the relative position of Holt and Waialua in the transaction.

Holt testified (R. 1015-16), and his testimony is uncontradicted, that he never saw the deed of May 2, 1910 until the day he gave his testimony in 1929. Waialua's representatives offered no testimony as to what happened

to the deed. The record shows, however, that Albert Christian acknowledged his signature to the deed in San Francisco on May 16, 1910, whereas the signatures of the other parties thereto were obtained and acknowledged in London. Apparently the deed was sent to San Francisco by some one other than Holt for signature by Christian, just as some one other than Holt procured the signature of the incompetent. From the Deputy Registrar of Deeds in Hawaii (R. 1124) we learn that the deed was offered for record by Mr. Castle's office on June 23, 1910, and later returned to him, and that before this date, and on May 31, 1910, Mr. Castle offered for recordation a deed of May 28, 1910, from Holt to Castle as trustee, conveying all of the interest acquired by him under the May 2nd deed from the incompetent. So we find that Holt, before he had even seen the deed from the incompetent to him, had conveyed to Waialua's admitted representative all of the interest which he had acquired thereunder, and this second deed was a matter of record before the first one.

The bargain is now complete; the incompetent has conveyed away her property; Waialua has acquired it, having paid Kentwell $30,000 therefor; and Holt has performed his function as the intermediary, having passed along to Waialua all he acquired from the incompetent. Since there were several interests transferred together, it is difficult to ascribe any definite amount to Holt's undivided one-third remainder, although he placed it at $60,000 (R. 1014 and 852). Suffice it to say it was a condition precedent to Waialua's commitment to purchase Holt's interest that he get the incompetent's for them, and they paid in all $120,000 of which $30,000 went to Kentwell for the incom-

petent, $5,000 to Annie Kentwell for her good offices, and the balance of $85,000, less expenses, to Holt and Colburn as his trustee. (Ans. paragraphs 10 and 11, R. 68). It is clear that Holt was paid, and well paid, for his services, whether we view his reward as a commission for obtaining the incompetent's interest, or as an increased price for his own interest. We submit that Holt acted as Waialua's agent in acquiring the incompetent's interest in the property; that Waialua was the real party in interest and Holt its dummy.

The finding of the trial Court, which is not disturbed by the Supreme Court or the Circuit Court of Appeals, is that Holt acted for Waialua in this deal. It stated (R. 112):

> "Stripped of verbiage and incidental issues • • • the amended petition, in the light of admissions made during the trial, alleges that on May 2, 1910, respondent Waialua Agricultural Company, Limited, • • • *procured a conveyance to be executed for its benefit* by the petitioner • • •." (Italics ours.)

The trial Court referred to Holt as the "dummy grantee" (R. 148); that he was "simply an instrument in the securing of title by Waialua" (R. 473); that Waialua "took over and completed, as their own, the negotiations of James Lawrence Holt" (R. 482).

As the trial Court said (R. 147):

> "What the situation would now be if Waialua Company had been content to deal with James L. Holt at arms length, only, after he, Holt, had acquired the rights of Eliza is not the question before this Court."

and again (R. 155):

> "The fact is that Waialua Company in its haste to close the purchase, took direct charge of the transaction; and, while attempting to preserve the form of a secondary position, it in substance became the purchaser in fact. It does not qualify as a 'subsequent grantee'."

Indeed, we need not speculate upon the question, for the record contains a stipulation which removes all doubt. It is as follows:

> "Counsel for Waialua then admitted that the purchase of May 2, 1910 was made originally for the benefit of Waialua Company and that the series of transactions subsequent thereto gave the respondent no different status than it had by virtue of the deed of May 2, 1910 (Exh. A-21)." (R. 1061).

The conclusion of law which flows from the fact that Holt was Waialua's agent is that Waialua is charged with his knowledge with respect to all matters touching his agency, including his knowledge of Eliza's mental condition. The knowledge of an agent existent at the time of the transaction, no matter when acquired, is imputed to his principal. The record is clear that Holt, at the time he negotiated the purchase, knew that Eliza was incompetent. He so testified (R. 1014). He further testified that he had known of her incompetency since her birth (R. 1009), which, of course, included her condition in 1906 when she entered into the instrument of that date, through which Waialua now claims and which is also in question. The trial Court found that he had knowledge of Eliza's incompetency (R. 133; R. 481, 482, 492). This finding is undisturbed either by the Supreme Court or the Circuit Court of Appeals.

The authorities are abundant upon the proposition that the agent's knowledge, existing at the time of the transaction, is imputed to the principal.[17]

The underlying agreement, which was held in *Curtis v. United States* (Fn. 17, p. 45) to render the nominal purchaser of the property the agent of the real buyer, with the result that the real buyer was charged with the nominal purchaser's knowledge, is in so many respects similar to the one in the instant case (R. 948, Exh. D-37) that we include it in the Appendix, at page vi. The *Curtis* case in the Circuit Court of Appeals is reported as *United States v. Cooksey* (C. C. A. 9, 1921) 275 Fed. 670, and we have procured the agreement in question from the record in that case. We earnestly submit that the two cases are parallel upon their facts, and the rule applied in the *Curtis* case should be applied here. Holt's knowledge of the incompetency is imputed to Waialua, his principal; accordingly, Waialua is not a bona fide purchaser, and in setting aside the transaction it is not entitled to an allowance for improvements which it placed upon the property or a return of the consideration paid for the deed. In fact, it has been held by this Court that the contract of an incompetent with one who has knowledge of the incompetency is absolutely void and a nullity. *(Kendall v. Ewert* (1922), 259 U. S. 139, 66 L. Ed. 862. This is also the view of the Supreme Court of

17. *Veazie v. Williams* (1849), 8 How. 134, 12 L. Ed. 1018; *Harrington v. U. S.* (1871), 78 U.S. 356, 20 L. Ed. 167, 170; *J. J. McCaskill Co. v. U. S.* (1910), 216 U.S. 504, 54 L. Ed. 590; *Armstrong v. Ashley* (1907), 204 U.S. 272, 51 L. Ed. 482; *Curtis v. U. S.* (1923), 262 U.S. 215, 67 L. Ed. 956; *Pollman v. Curtice* (C.C.A. 8, 1919), 255 Fed. 628; *Kean v. National City Bank* (C.C.A. 6, 1923), 294 Fed. 214; *U. S. v. Cooksey* (C.C.A. 9, 1921), 275 Fed. 670; *Connecticut Fire Insurance Co. v. Commercial National Bank of San Antonio* (C.C.A. 8, 1937), 87 Fed. (2d) 968; *Brown v. Cranberry Iron & Coal Co.* (C.C.A. 4, 1896), 72 Fed. 103.

Hawaii. *Kailikia v. Hapa* (1901), 13 Haw. 459.) A person dealing with an incompetent, knowing of the incompetency, is guilty of fraud. *Story Equity Jurisprudence* (14th Ed.) Vol. I, Sec. 317:

> "Such persons being incapable in point of capacity to enter into any valid contract or to do any valid act, every person dealing with them, knowing these incapacities, is deemed to perpetrate a meditated fraud upon them and their rights. And surely if there is a single case in which all the ingredients proper to constitute a genuine fraud are to be found it must be a case where these unfortunate persons are the victims of cunning, the avarice, and corrupt influence of those who would make an inhuman profit from their calamities."

Not only, therefore, did Waialua fail to sustain its burden of proof that it was a bona fide purchaser, but beyond that it affirmatively appears that Waialua had knowledge of the incompetency through its agent Holt. Waialua then is not entitled to any allowance for improvements placed on the land or to a return of the consideration paid for the deed.

Regardless of the fact of Holt's agency and Waialua's consequent knowledge of the incompetency, the tactics used by Waialua in obtaining the incompetent's signature, we submit, do not commend themselves to a Court of Equity. The trial Court's view of Waialua's conduct is expressed in no uncertain terms in its opinion (R. 139-157). Measured by the rule of fairness required of one dealing with the owner of an expectancy (supra, p. 24), this transaction clearly can not stand even if Eliza Christian were not incompetent.

(2) Waialua is not entitled to recover the amount paid by it for the deed because the incompetent never received the same.

The basis of the rule requiring restoration as a condition to cancellation where the incompetency is not known to the other contracting party is that the incompetent seeking the aid of equity must do equity, and to retain benefits flowing to him in the transaction and at the same time to set aside the transaction and recover back what he had parted with would not be doing equity. (9 C. J. 1216, fn. 108). The measure of restoration, where it is decreed, is the amount received by the incompetent—not the sum with which the other party may have parted.[18] If the incompetent did not receive the consideration given for his property he is not required to reimburse the purchaser for what the purchaser may have parted with.[19] Here Waialua paid $30,000 for the interest of the incompetent, but the finding is that the incompetent never received that sum or any part thereof (R. 294, 301). Under these circumstances restoration of this sum should not have been made a condition to cancellation of the deed.

18. *McKenzie v. Donnell* (1899), 151 Mo. 431, 52 S.W. 214; *Hull v. Louth* (1887), 109 Ind. 315, 10 N.E. 270.

19. *Jordan v. Kirkpatrick* (1911), 251 Ill. 116, 95 N.W. 1079; *Hughes v. Cream* (1929), 178 Minn. 545, 227 N.W. 654.

(3) Waialua is not entitled to be compensated for the improvements placed upon the property or to receive back the amount paid by it for the deed, even though it be assumed that it acted in good faith, because the rule of decision in the Federal Courts, which is the rule of decision in this case arising in the Territory of Hawaii, is that contracts of incompetents are void in the sense of being nullities, and accordingly restoration is not a requisite to relief therefrom.

The rule of decision in this suit must necessarily be the rule prevailing in the Ninth Circuit Court of Appeals and the Supreme Court of the United States because those Courts are the ones to which appeals lie from the judgments and decrees of the Hawaiian Courts. (*Judicial Code* §128, U.S.C. Tit. 28, §225, Subd. 4.) As heretofore pointed out,[20] this proposition has nothing whatsoever to do with the rule laid down in *Swift v. Tyson* (1842), 16 Pet. 1, 10 L. Ed. 865, which was overruled by *Tompkins v. Erie R. R. Co.* (1938), 82 L. Ed., (Ad. Op.) 787. It has long been recognized and followed by both the Hawaiian Courts and the Circuit Courts of Appeal, in dealing with appeals from territorial Courts.[21] This proposition is of substantial importance in this case since, we submit, that the prevailing rule in this Court and in the Circuit Courts of Appeal is that the contracts of an incompetent are void in the sense of being absolute nullities, and accordingly, the incompetent is not required to make any restoration or allowance for improvements to obtain judicial relief therefrom. (*Dexter v. Hall* (1873), 82 U. S. 9, 21 L. Ed. 73; *Kendall v. Ewert* (1922), 259 U. S. 139.

20. See note, page 16.

21. *Kapiolani Estate v. Atcherley* (1913), 21 Haw. 441; *Territory v. Ho Mc* (1922), 26 Haw. 331; *Colburn v. U. S. F. & G. Co.* (1920), 25 Haw. 536; *Hill v. Carter* (C.C.A. 9, 1931), 47 Fed. (2d) 869 (Cert. den., 284 U.S. 625); *Successors of Fantanzzie v. Municipal Assembly* (C.C.A. 1, 1924), 295 Fed. 803.

66 L. Ed. 862; *Plaster v. Rigney* (C. C. A. 8, 1899), 97 Fed. 12.)

(C) THE CIRCUIT COURT OF APPEALS IS IN ERROR IN REMANDING THE CAUSE FOR A DETERMINATION OF COMPETENCY IN 1905, WHEN THE LEASE WAS EXECUTED, AND IN 1906, WHEN THE ASSIGNMENT OF RENTS WAS EXECUTED, BECAUSE (1) THERE HAS ALREADY BEEN A FINDING BY THE TRIAL COURT OF INCOMPETENCY ON THOSE DATES, WHICH FINDING HAS BEEN CONFIRMED BY THE SUPREME COURT OF HAWAII AND THE CIRCUIT COURT OF APPEALS, AND (2) THE EVIDENCE IN THE RECORD COVERS THE WHOLE OF THE LIFETIME OF THE INCOMPETENT, AND IF THERE HAD BEEN NO FINDING ON THE QUESTION, THIS EVIDENCE COMPELS A FINDING OF INCOMPETENCY NOW BY THIS COURT.

In remanding the suit for a determination of the issue of incompetency in 1905 and 1906, when the lease and assignment, respectively, were executed, the United States Circuit Court of Appeals has, we submit, fallen into error. There have been two trials (R. 111, 163, 472), two appeals to the Supreme Court of Hawaii (R. 202, 547), and two appeals to the United States Circuit Court of Appeals (52 F. (2d) 847) and (93 Fed. (2d) 603, 94 Fed. (2d) 806—R. 1586 and 1633) in this suit. The trial Court, on the first trial, found that the incompetent was "both before and at the time of the conveyance * * * and ever since has been and still is incompetent to the extent of having been incapable of understanding and acting in the ordinary affairs of life * * *." (R. 136); that she "has never been competent mentally to execute a conveyance of property" (R. 157); that she "was incompetent during the entire period from and before 1910 to date." (R. 157). The Supreme Court of Hawaii, on the first appeal, confirmed this finding, saying (R. 272-3):

> "The overwhelming weight of the evidence requires us to find, and we do find, that on May 2, 1910, Elia Christian was and at all times has been mentally incompetent to execute a deed or to understand its purpose or effect, or to engage in any business transaction of consequence. She was feeble-minded. Born in 1885, in May, 1910 she had the mentality of a child of not more than five or six. * * * In short, we find that at the date of the deed she was a congenital imbecile."

The Supreme Court of Hawaii was of the view that the validity of the lease and assignment had not been at issue in the first trial (R. 323, 324) and remanded the cause (R. 326) to the trial Court for the taking of additional testimony, touching the circumstances surrounding the execution of these documents, excluding, however, the question of competency. The evidence on the question of competency at the first trial had covered the whole of the incompetent's life. It is reviewed at length by the trial Court (R. 116 to 134) and by the Supreme Court on the first appeal (R. 202 to 273). The latter Court, in its opinion, considered the evidence by periods of the incompetent's lifetime, and one of these periods, from 1902 to 1906, covers the very time during which the lease and the assignment were executed (R. 220). That Court concluded from all of the evidence that she was a "congenital imbecile" (R. 273).

In limiting the remand the Supreme Court clearly believed the evidence and the findings adequate on the question of competency in 1905 and in 1906, for otherwise it would have directed a determination of that issue. At the trial on the remand the trial Court followed the

direction of the Supreme Court and refused to hear additional testimony on the question of competency (R. 1477). The trial Court said, in its opinion on the remand, "Hearings were had in which it was ruled that the congenital imbecility of petitioner had been found heretofore both by this Court and the Supreme Court and would not be reopened" (R. 476), and again, in discussing the lease of 1905, "Eliza Christian was at all times a congenital imbecile, incompetent to enter into a contract of such a character * * *" (R. 491). The Supreme Court on the second appeal confirmed the trial Court's interpretation of the remand order (R. 552), and again concluded that she was a "congenital imbecile" (R. 552). The Supreme Court then proceeded to deny relief against the assignment of 1906 and the lease of 1905, *regardless of the incompetency* of Eliza Christian (R. 555). As the opinion of the Circuit Court of Appeals declares (R. 1618), 116 witnesses have already testified on the issue of competency, touching the whole of the petitioner's life. It is beyond question that one who is a congenital imbecile in 1910 cannot have been competent in 1905 or 1906, and all three Courts concur on the finding of congenital imbecility.

The limitation in the order of remand by the Supreme Court of Hawaii to exclude further evidence on the issue of competency was well within its power. (Revised Laws of Hawaii 1935, Sec. 3503.) Having once made that order, it became the law of the case in so far as that Court was concerned. (*Thompson v. Maxwell etc.* (1897), 168 U. S. 451, 42 L. Ed. 539.)

The statement of the Supreme Court of Hawaii, on the second appeal, that it thought it erred in restricting the

evidence (R. 553) does not lessen the finality of its first order. The Circuit Court of Appeals was, and this Court is, of course, in no way bound by the limitation of the remand order if it is believed that the Supreme Court of Hawaii abused its discretion in so limiting the evidence. A reading of the opinion of the Circuit Court of Appeals directing a remand on this issue is, we believe, most convincing that that Court does not believe that there is any deficiency in the evidence on the question of competency in 1905 and 1906. The Circuit Court of Appeals, we submit, fell into error in concluding that there was no finding on that issue. There was, as we have quoted from the record, an adequate finding, but if there were not, the record is sufficiently complete and convincing to warrant a finding by this Honorable Court that the petitioner, having been found to be a "congenital imbecile" in 1910, was also incompetent in 1905 and 1906.

If, in truth, the Supreme Court of Hawaii was in error in limiting the order of remand, we respectfully submit that it was harmless error and should not necessitate a reversal of the trial Court's decree that the lease and assignment are both invalid. (*Judicial Code* §269, U.S.C. Tit. 28, §391.) Any new evidence will be merely cumulative. 116 witnesses on an issue resulting in a finding of congenital imbecility should be enough.[22]

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22. *Drumm-Flato Com. Co. v. Edmission* (1908), 208 U.S. 534, 52 L. Ed. 606, 609; *Berio v. Gay* (C.C.A. 1, 1921), 272 Fed. 404, 409; *Johnsonburg Vitrified Brick Co. v. Yates* (C.C.A. 3, 1910), 177 Fed. 389, 391; *Pocahontas C. C. Co. v. Johnson* (C.C.A. 4, 1917), 244 Fed. 368, 374 (Cert. den. 245 U.S. 658, 62 L. Ed. 535); *Mounts v. Apt.* (1911), 51 Colo. 491, 119 Pac. 150, 151-2.

CONCLUSION.

We respectfully submit that the incompetent should not be required to make any restoration to Waialua as a condition to cancelling these instruments, and that there is clearly no necessity for a further finding by the trial Court on the issue of competency in 1905 and 1906.

Dated, San Francisco, California,
September 12, 1938.

M. C. SLOSS,
CHARLES M. HITE,
Attorneys for Eliza R. P. Christian,
An Incompetent Person.

E. D. TURNER, JR.,
CHARLES E. FINNEY,
SLOSS, TURNER & FINNEY,
Of Counsel.

(Appendix Follows.)



Appendix

D-37. Original unsigned draft of agreement dated April 15, 1910, between James L. Holt, John F. Colburn and William R. Castle, Trustee, regarding sale of two-thirds interest in Holt lands for $120,000.

(This original exhibit, being impossible to describe accurately, is by order of the Supreme Court of Hawaii made a part of this record and incorporated herein by reference.)

THIS AGREEMENT, made this 15th day of April, A. D. 1910, between JAMES L. HOLT, of the City and County of Honolulu, Territory of Hawaii, of the first part, hereinafter referred to as "Holt" or "J. L. Holt", JOHN F. COLBURN, of said Honolulu, of the second part, hereinafter referred to as "Colburn" or "John F. Colburn", and WILLIAM R. CASTLE, TRUSTEE, of said Honolulu, of the third part, hereinafter referred to as the "Buyer",

WITNESSETH THAT:

Whereas, upon an understanding and agreement that said Holt should acquire all of the rights, interests or shares of Eliza Christian, John D. Holt and Annie Kentwell, present or prospective, in and to the lands of the Estate of R. W. Holt, Deceased, situate in the District of Waialua, in said City and County of Honolulu, and should convey such rights, interests and shares to such person or persons, association or associations, corporation or corporations as the said Buyer should direct; and that said Holt and Colburn (the latter acting under a trust deed) should convey all of the right, share or interest, present or prospective, of said Holt in and to said lands of said Estate

of R. W. Holt, Deceased, in said District of Waialua, which interests, shares and estates shall not be less than two (2) full thirds of said property, free from all life or other intermediary estates or encumbrances; and said Buyer has already expended and will hereafter expend large sums of money to secure the said shares and interests as aforesaid, or part of them, and to perfect all titles thus acquired or to be acquired which are to be sold and conveyed as upon the above understanding and agreement:

NOW, THEREFORE,

Said Holt and Colburn, in consideration of such expenditure so made and to be made hereafter at their or either of their requests, and of One Dollar to each of them paid by said Buyer, the receipt whereof is acknowledged, do hereby promise, covenant and agree to and with said Buyer:

1st. To proceed without delay and as rapidly as possible with all and every negotiation and proceeding necessary to secure such shares, titles and interests of said Eliza Christian, John D. Holt, Annie Kentwell, and all and every intermediate estate and other title necessary to be acquired, secured or extinguished in order to vest a full two-third (⅔) share or interest, free from all incumbrances, in said James L. Holt, either personally or as trustee; and *to expend if necessary up to $40,000 in so doing and

2nd. That, when so secured, all of said shares or interests, or, if not so fully secured, then such part or portions

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*Beginning with "to" and to end of paragraph written in ink in longhand.

thereof as may be possible to secure and to be conveyed to said Holt personally or as Trustee, to sell and convey
2. by good and sufficient deed or deeds of conveyance, with full releases of dower, at the expense of said Buyer, to such person or persons, association or associations, corporation or corporations, as said Buyer shall direct, for the consideration of One Hundred Twenty Thousand Dollars ($120,000) for such full two-thirds (⅔) unincumbered interest, at and after said rate for any part thereof which may be secured.

From the consideration to be paid by such persons, associations or corporations as aforesaid the said Buyer may first deduct all moneys by him paid, or paid on his account, or to be paid hereafter, including the legal interest, on
1 account of these proceedings from the inception thereof until every title shall be secured as aforesaid, and also all moneys due to him, the said Buyer, for loans and advances made to or on account of either said Holt or Colburn; excepting, however, the expense of the trip of David L. Withington to England in this behalf, such trip to be made in or about the month of April, 1910.

And the Said Buyer agrees that upon notice by him received that said shares or interests in said lands in said Waialua have been secured by said James L. Holt, either personally or as trustee, or in any way in his behalf, he will then and thereupon give notice to said parties of the first and second part to what persons, associations or corporations the said property and interests in property shall be conveyed, and will then present a deed or deeds containing full warrants of title, free from incumbrances and other matters, to convey a complete title, which the said parties of the first and second parts agree shall be duly

executed, in accordance with this agreement *~~a copy of a draft of which deed is thereto attached, and the original~~ upon the execution thereof will pay over or cause to be paid over all moneys which may be due hereunder to the persons entitled to receive the same.

IT IS AGREED that the term of this agreement shall be ONE YEAR from date hereof, and that if said parties of the first and second part cannot then be prepared to make conveyances hereinbefore agreed to be made, they shall, upon the request of the said Buyer, refund to the Buyer all moneys advanced upon the consideration of this agreement, together with legal interest, as well as refund all amounts due by either of said parties to or on account of said Buyer, with interest.

(BUT THIS AGREEMENT shall not be enforceable
OUT (against the said Buyer unless he shall be fully satis-
(fied with the title offered to be conveyed to him by
(said parties of the first and second part.

IN WITNESS WHEREOF, the said parties of the first, ~~and second part~~ second and third part have hereunto set their hands, the day and year first aforesaid.

.....

.....

.....

(NOTES In paragraph "2nd" of the instrument the words "when so secured" are underscored in pencil, "at

*Interlineation written in pencil and then lined out.

the expense of the Buyer" in red ink over pencil, and "until every title shall be secured as aforesaid" in pencil; and the numbers "2" and "1" in the margin are in red ink over pencil. Against the next to last paragraph appears a bracket with "OUT" written in longhand, both in blue pencil.)

DEFENDANTS' EXHIBIT "B".

THIS AGREEMENT, made and entered into this 19th day of December, A. D. 1901, by and between Charles H. Holbrook of the City and County of San Francisco, State of California, the party of the first part and T. D. Collins and J. G. Curtis of the Counties of Forest and McKean, State of Pennsylvania, the parties of the second part.

WITNESSETH: That for and in consideration of the sum of One ($1.00) Dollar from each of the parties hereto to the other paid, the receipt of which is by each of said parties hereby acknowledged, and of the stipulations and promises hereinafter contained, the parties hereto do promise and agree as follows:

Said party of the first part promises and agrees to sell to and have the title thereto vested in, the said parties of the second part, their heirs or assigns and as in the manner hereinafter set forth Forty-two thousand three hundred and eighty (42380) acres of timber lands situated and being in the Counties of Tehama and Plumas, State of California, for the sum and cost to the said parties of the second part of Seven and 50/100 ($7.50) Dollars, per acre, making the aggregate or total cost of the whole of said land to the said parties of the second part, less Two thousand two hundred and fifty ($2250.00) Dollars, interest, the sum of Three hundred and fifteen thousand six hundred ($315,600.00) Dollars, which sum and price the said parties of the second part hereby agree to pay for said lands as and in the manner and at the times in this agreement provided.

Said party of the first part agrees to and shall purchase and properly secure from parties owning the same, Forest

Reserve to the amount of Forty-two thousand three hundred and eighty (42380) acres and in exchange for the said Forest Reserve obtain the said Forty-two thousand three hundred and eighty (42380) acres of timber lands in said Counties of Tehama and Plumas, as per schedule attached, the title to the same to be secured to said parties of the second part, their heirs or assigns in the manner hereinafter set forth.

It is agreed between the parties hereto that the whole of said Forest Reserve shall be properly conveyed and "Trustee" deeded to G. Howard Thompson of San Francisco, hereinafter referred to as "Trustee", to be held by him in trust for the purposes and upon the terms in this agreement expressed.

Said parties of the second part promise and agree to deposit in and with the Bank of California, of San Francisco, on or before the 31st day of December, 1901, the sum of Two hundred thousand ($200,000.00) Dollars in lawful money of the United States, said sum to be used and applied by said bank in the payment at the rate of not to exceed Five ($5.00) Dollars per acre for all Forest Reserve not exceeding Forty-two thousand three hundred and eighty (42380) acres, which may be deeded or otherwise properly transferred to and in the name of said trustee by parties owning the same, and having good title thereto, (said title to be certified as hereinafter set forth) and who shall accompany their deeds or other instruments of transfer with a written statement to said Bank of California, signed by said party of the first part, that the person or persons deeding the same to said trustee, are

entitled to be paid out of said deposit for the lands described in their deed or deeds and with the written certificate of Charles A. Shurtleff, an attorney of San Francisco, that the title to the property described in the deed or deeds, is in the person or persons deeding the same, and that the lands described therein are wholly within the exterior boundaries of a Forest Reserve, and are Forest Reserve lands.

Said parties of the second part agree that when the said Two hundred thousand ($200,000.00) Dollars is exhausted, upon demand, to deposit in said bank the balance necessary to secure said Forty-two thousand three hundred and eighty (42380) acres of land at the rate of not to exceed Five ($5.00) Dollars per acre, and to be deeded to said trustee as aforesaid, said balance to be held and expended as and upon the same conditions, as said Two hundred thousand ($200,000.00) Dollars is held and expended hereunder.

It is agreed by all the parties hereto that neither the said trustee nor the said Bank of California shall be, or are, required to make any examination or inquiry whatsoever, as to the title to any lands deeded to said trustee hereunder, and to be paid for out of said deposit as aforesaid, but shall accept the said certificate of title of the said Charles A. Shurtleff as final, and that any payments made hereunder by the said bank upon any certificate of the said Charles A. Shurtleff, shall be conclusive, as to title, upon each and all of the parties hereto.

That the said trustee shall, at the written request of the said party of the first part, properly deed to the United States of America, the lands deeded to him as

aforesaid, and make application in proper and legal form for specific tracts of land mentioned in the attached schedule in lieu of the lands so deeded. All of said specific tracts of land to be placed and located, and descriptions thereof furnished to the said trustee by the said party of the first part.

That the said trustee, provided he shall have received the notice from the said party of the first part that he has been fully paid, which notice is hereinafter provided for, shall, at the request of the said parties of the second part, either before or after receipt of United States Patents therefor, deed said lieu lands by proper deeds of conveyance, to the said parties of the second part, their heirs or assigns, or to any persons or corporation they may, in writing, jointly direct.

That all papers in connection with applications for specific tracts of land in lieu of Forest Reserve, shall be prepared by said Charles A. Shurtleff, and that any application made by the said trustee upon papers so prepared by the said Charles A. Shurtleff, shall be conclusive upon each and all of the parties hereto, and that said trustee shall not in any manner or at all, be held responsible therefor, or for any errors therein; the intention of this agreement being that in all cases where the said trustee makes application for said lien lands upon papers prepared by the said Charles A. Shurtleff, the said trustee not only does not assume any responsibility, but is expressly relieved from all responsibility in the premises.

The said parties of the second part agree when the said party of the first part shall have obtained Forty-two thousand three hundred and eighty (42380) acres of Forest

Reserve, and have had the same deeded to the said trustee, as herein provided, or shall have secured the title to Forty-two thousand three hundred and eighty (42380) acres of timber lands in Plumas and Tehama counties by having Forest Reserve deeded to said trustee, or otherwise procured the title thereto, or sooner if the parties to this agreement consent thereto, to form and organize a Corporation under the laws of the State of California, having for its purposes, among other things, the purchasing and acquiring of said and other timber lands and cutting the timber thereon, and manufacturing it into lumber or other articles of commercial value, and selling the same.

That the said corporation shall have a capital stock of Five hundred thousand ($500,000.00) Dollars, divided into 5000 shares, having a par value of One hundred ($100.00) Dollars each.

That the said parties of the second part shall, upon the completion of the organization of said corporation, deed and convey, or cause to be deeded or conveyed, to said corporation, all of the said Forty-two thousand three hundred and eighty (42380) acres of land in Tehama and Plumas Counties, and receive in full payment therefor three thousand one hundred and fifty-six (3156) shares of the capital stock of the said corporation fully paid up, issued to them and in their names, and the balance of said stock being One thousand eight hundred and forty-four (1844) shares shall remain in the treasury of the corporation and shall not be sold for less than par.

That the said party of the first part shall be one of the original incorporators of said corporation, and shall serve as, and be, a director so long as he owns any stock therein.

That the By-laws and purposes of said corporation shall be mutually agreed upon by and between the parties hereto.

That when said Forty-two thousand three hundred and eighty (42380) acres of Forest Reserve shall have been deeded to the said trustee as hereinbefore provided, or the title to said Forty-two thousand three hundred and eighty (42380) acres secured to said parties of the second part by acquiring Forest Reserve or through any other method or source, the said parties of the second part shall pay to the said party of the first part the balance of the said purchase price of said lands, to wit: the sum of One hundred and fifteen thousand six hundred ($115,600.00) Dollars, such payment to be made in the manner following, to wit: They shall deliver to the said party of the first part properly endorsed and fully paid up and free from assessments, and all other liens whatsoever, 789 shares of the capital stock of the said corporation to be organized as aforesaid; from Five thousand ($5000.00) Dollars to Ten thousand ($10,000.00) in cash, and the balance in notes of the said parties of the second part, payable six months from date, with interest thereon at the rate of six (6%) per cent per annum until paid, in full payment of said balance, and said party of the first part shall give said second parties a notice to said trustee that said balance has been paid with an order to convey said lands and titles to said second parties.

It is expressly understood and agreed that the said trustee shall not deed or convey to the said parties of the second part or either of them, or their or either of their heirs, executors, administrators or assigns, any part or

portion of the said Forest Reserve, or lands which he, said trustee, may acquire and hold in lieu of said Forest Reserve, or under this agreement until the said party of the first part shall, in writing, notify said trustee that he has been fully paid the sum of One hundred and fifteen thousand six hundred ($115,600.00) Dollars.

It is further agreed that if said parties of the second part shall advance, to be applied toward the purchase of said lands, any amount in excess of said Two hundred thousand ($200,000.00) Dollars, then and in that event the principal sum or sums of said promissory notes which said parties of the second part are to execute and deliver to said party of the first part, as aforesaid, shall be reduced in an amount equal to such excess.

It is agreed that if for any reason said party of the first part is unable to secure the title to the whole of the said Forty-two thousand three hundred and eighty (42380) acres of timber lands in Plumas and Tehama Counties, through and by the use and application of Forest Reserve, he may secure such title through any other legal means or source; it being understood, however, that in no event shall he or the persons deeding the same be paid for the lands thus acquired, until the title thereto is certified to be good by the said Charles A. Shurtleff, and deeded to said trustee, and that when so certified, the said bank shall pay from said deposit for said lands, it being understood and agreed that all the provisions and stipulations of this agreement as to payment by said Bank of California for, and covering, the purchase of Forest Reserve, shall also apply to the payment for, and purchase of, lands the title to which is secured other than by the application or use of Forest Reserve.

It is agreed by and between the parties hereto that should it be found practicable, a Corporation shall be organized for the purpose of acquiring, building, owning and conducting a railroad to and from the lands acquired under this agreement, and the said party of the first part shall have and has the right and option to subscribe for and purchase the same proportion of the capital stock of said railroad corporation as, at the time of its organization, the stock he owns or is entitled to receive, in the said corporation to be organized for the purpose of buying and selling timber lands, manufacturing lumber, etc., bears to the subscribed capital stock thereof, and that said party of the first part shall be a director in said corporation so long as he owns any stock therein.

Should the purchase of all of said Forty-two thousand three hundred and eighty (42380) acres of Forest Reserve from the owners, not exhaust all of said Two Hundred thousand ($200,000.00) Dollars so deposited in the Bank of California by second parties for that purpose as aforesaid, then when the owners are paid for all of said Forty-two thousand three hundred and eighty (42380) acres of Forest Reserve lands out of said fund, the balance of such fund shall belong to said party of the first part.

This writing is executed in triplicate and shall bind the heirs, executors, administrators and assigns of the parties hereto.

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals the day and year first herein written.

CHARLES H. HOLBROOK. (Seal)
T. D. COLLINS. (Seal)
J. G. CURTIS. (Seal)

Word "Trustee" above last line on first page of this contract interlined before signing.

Witness:

D. G. CURTIS.

State of Pennsylvania,
County of Warren.—ss.

Be it remembered that on this 19th day of December, A. D. 1901, before me, the subscriber, a Justice of the Peace in and for said County, personally appeared Charles. H. Holbrook, the grantor, mentioned in the foregoing contract and agreement, and acknowledged that he executed and delivered the foregoing indenture of contract and agreement and desired the same recorded.

Witness my hand and official seal.

[Seal] H. S. PERRY, J. P.

State of Pennsylvania,
County of Warren.—ss.

Be it remembered that on this 19th day of December, A. D. 1901, before me, the subscriber, a Justice of the Peace in and for said County, personally appeared T. D. Collins, one of the covenantors, mentioned in the foregoing contract and agreement, and acknowledged that he executed and delivered the foregoing indenture of contract and agreement and desired the same recorded.

Witness my hand and official seal.

[Seal] H. S. PERRY, J. P.

DEFENDANTS' EXHIBIT "D".

"THIS AGREEMENT, made and entered into this 31st day of December A. D. 1901, by and between Charles H. Holbrook of the City and County of San Francisco, State of California, the party of the first part, and T. D. Collins and J. G. Curtis of the Counties of Forest and McKean of Pennsylvania, the parties of the second part,

"WITNESSETH: That Whereas, the said parties did heretofore, to wit: on the 19th day of December, 1901, enter into a contract for the sale by the said party of the first part to the said parties of the second part of forty-two thousand three hundred and eight (42380) acres of timber lands, situated and being in the Counties of Tehama and Plumas, State of California, and,

"WHEREAS, the said parties desire to modify said contract in the following particulars,

"NOW THEREFORE, it is mutually agreed by the parties hereto that said above mentioned contract shall be and is hereby modified and changed in the following particulars, to wit: The word 'Trustee' appearing immediately after the words 'G. Howard Thompson', in the fifth paragraph, page one of the above mentioned contract is hereby stricken out and said fifth paragraph of said agreement is hereby amended so as to read as follows, to wit:

"'It is agreed between the parties hereto that the whole of said Forest Reserve shall be properly conveyed and deeded to G. Howard Thompson, of San Francisco, hereinafter referred to as "Trustee", to be held by him in trust for the purposes and upon the terms in this agreement expressed.'

"It is further agreed that this agreement shall be annexed and attached to said agreement of December 19th, 1901.

"IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 31st day of December, A. D. 1901.

"_____ (Seal)

"_____ (Seal)

"_____ (Seal)

"State of California,

"City and County of San Francisco,—ss.

"On this 31st day of December in the year one thousand nine hundred and one, before me_____, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Charles H. Holbrook, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Office - Supreme Court, U. S.
FILED
OCT 4 1938
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1938

No. 15

WAIALUA AGRICULTURAL COMPANY, LIMITED,
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, et al.

No. 17

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian,
Petitioner,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED.

REPLY BRIEF OF ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON.

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Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1938

No. 15

WAIALUA AGRICULTURAL COMPANY, LIMITED,
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, et al.

No. 17

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian,
Petitioner,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED.

REPLY BRIEF OF ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The respondent, Eliza R. P. Christian, hereinafter called the "incompetent" presents her brief in reply to that of

the petitioner Waialua Agricultural Company, hereinafter called "Waialua", in support of its affirmative case in No. 15.

STATEMENT OF THE CASE.

Waialua's statement of the case is not entirely accurate and we refer to the opening brief of the incompetent, pages 1 to 11, for a complete recitation thereof, confining ourselves here to the correction of certain of the more important mistakes. We enumerate them:

1. The Circuit Court of Appeals did not make an independent finding, on its own review of the evidence, that Waialua took without knowledge, as is implied at page 3 of Waialua's brief. It accepted what it said was a finding by the trial and the Supreme Court that such was the fact (R. 1605) or, as it later stated, in denying a rehearing (R. 1637), it reached its opinion "on the assumption that the company did not have such notice". The trial Court did not find that Waialua did not have knowledge. What it did was to assume, as did the Circuit Court of Appeals, the want of such knowledge, basing this assumption (erroneously, as we contend[1]) on its finding that it was not "clearly shown that Waialua Company had actual notice of the incompetency of Eliza". (R. 154, 158). It is our position that it follows as a matter of law from the facts found by the trial Court, which remain undisturbed by either of the Appellate Courts, that Waialua did have knowledge of the incompetency through its

1. Op. Br. of Eliza R. P. Christian, pp. 28-30.

agent in the purchase, James L. Holt. We refer to our opening brief, pages 28 to 47.

2. The decision of the Circuit Court of Appeals was not that the contract of an incompetent is void in the sense of being a nullity, as implied by Waialua on page 4 of its brief, but, on the contrary, was based upon the proposition that the contract of an incompetent may be set aside at the instance of the incompetent upon making restoration to status quo.[2]

3. The recovery awarded the incompetent does not, as might be inferred from Waialua's statement (p. 4), mean the reconveyance to her of 28% of its entire plantation, *or any specific part thereof*. As will be pointed out in detail lafer, it means only that she recovers an undivided one-third interest in an area the whole of which comprises approximately 28% of Waialua's land holding, the other undivided two-thirds of which will still be owned or held by Waialua which will remain in possession of the whole of its plantation as a tenant in common with the incompetent. Furthermore, even a partition of the area between the incompetent and Waialua could be made so that no part of the land used by Waialua for its own plantation would be taken from it.

4. The contract of 1906 purported to assign only the rentals under the 1905 lease and nothing more (Op. Br. of Eliza R. P. Christian, p. 4, fn. 2). It did not carry any "other rentals which might thereafter accrue", as stated by Waialua (at pp. 5, 16).

2. Opposing brief of Eliza R. P. Christian to Petition of Waialua Agricultural Company, Ltd. for Writ of Certiorari, pp. 7 to 10, and Opening Brief of Eliza R. P. Christian, p. 9.

5. A guardian was appointed in Hawaii for the first time in 1927 (R. 847) and did not wait two years, as implied by Waialua (p. 6) before giving Waialua the notice which was followed by this action (R. 847). The English Receiver appointed in 1926 had authority only over the ward's property in England (R. 847).

6. The trial Court not only found that Eliza Christian was incompetent but, among other things, that status quo could be restored (R. 526). Its decision did not, as Waialua implies (p. 6), rest solely on the finding of incompetency, but was coupled with the finding that restoration could be effected.

7. The order of remand by the Supreme Court of Hawaii directed to the trial Court was limited in its scope to *exclude* any further evidence of incompetency (R. 326, 552), the Supreme Court having found that Eliza Christian was a "congenital imbecile" (R. 272, 273). The trial Court acted in accordance with the remand order when it refused to accept further evidence on incompetency (R. 552), and the error referred to on page 7 was not that of the trial Court, and, in fact, there was no error committed. (Op. Br. Eliza R. P. Christian, pp. 49-53.)

8. In reciting what the Circuit Court of Appeals did, on page 8, it should be added that that Court confirmed the finding of incompetency and the finding that status quo could be restored (R. 1605).

(NOTE): We also wish to correct two other possible points of confusion. At page 16 of Waialua's brief, it is stated that no transaction of the incompetent, other than those here involved, has ever been challenged, "so far as the record shows". Strictly construed, the statement is correct. The record contains no evidence of an attack on any transaction with persons or corporations other than Waialua not involved in this case. Obviously, any such

THE ARGUMENT.

THE QUESTIONS PRESENTED.

In view of the scope of Waialua's argument, it would seem well to first point out that the *only* questions before this Court in support of Waialua's contentions are those set forth in its petition for certiorari. (*General Talking Pictures Corporation v. Western Electric Co.* (1938), 82 L. Ed. (Ad. Op.) 843.) The application of this rule narrows the issues of law substantially. It eliminates consideration of the fifth error referred to on page 9 of Waialua's brief; i. e., that the incompetent is not entitled to recover the rental value of her land, and also the suggestion, at page 10, that laches bars the recovery. While Waialua does not dignify the laches argument by a heading or section of its brief, it cites various cases which relate only to that question.[3] At no place in Waialua's petition for certiorari, or even in its supporting brief, does it mention either point. The issue of laches was specifically decided against Waialua in the trial Court, the Supreme Court of Hawaii, and the Circuit Court of Appeals (R. 1605). Beyond that, it is the rule that an incompetent

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evidence, if offered, would have been excluded as immaterial. But if the purpose of the statement is to imply that, *in fact*, the incompetent's other transactions have all been permitted to stand unchallenged—and we can see no other purpose—we think we are justified in stating that the record of the guardianship proceedings in Hawaii shows that the Court having jurisdiction, on July 17, 1929, made an order authorizing the guardian of the incompetent to compromise a claim founded on the incompetent's alleged right to set aside her conveyance to John M. Dowsett of her contingent interest in lands at Waianae, based on a prior option executed by the incompetent to May K. Brown, these transactions being the ones described at pages 17 and 18 of Waialua's brief.

At page 20, Waialua states that Eliza Christian never appeared in court in this proceeding and has never been examined by medical experts appointed by the Court. The record discloses (R. 1234) that at the conclusion of the deposition of Annie Kentwell taken in England the incompetent's counsel advised Mr. Castle, who was present at the deposition, that the incompetent was not to be produced at the trial and invited him to have her examined by his own medical experts. This Mr. Castle declined to do.

3. Infra, fn. 41, p. 49.

cannot be guilty of laches.[4] As we pointed out in our opening brief (p. 4, fn. 2), the instrument of 1906 in no event is more than an assignment of rents under the 1905 lease, which expired in 1930, and therefore, regardless of the validity of the lease and the assignment, the incompetent is entitled to the rents from 1930.

With these eliminations, the errors subject to review upon Waialua's petition, then consist of the first four enumerated on pages 8 and 9 of Waialua's brief.

No. 1 is that the Court erred in holding the instrument to be void;

Nos. 2, 3 and 4 are, in truth, but a single point, namely, that the Court erred in holding that status quo, within the meaning of the rule, could be restored.

In fact, then, Waialua makes two points. We will frame our answer accordingly.

The Circuit Court of Appeals did not decide that the instruments were void in the sense of being nullities.

In the interest of accuracy, and in deference to the Circuit Court of Appeals, we repeat that Waialua misconceives the basis of the decision, and refer to our brief in opposition to Waialua's petition for certiorari,[5] wherein we pointed out that the real basis of the decision was that, even assuming the adequacy of the consideration and the good faith of the other contracting party, an incompetent may set aside his contracts upon restoring the status quo, and in this case that status quo can be and was restored.

4. Infra, fn. 43, p. 50.
5. Opposing brief of Eliza R. P. Christian to petition of Waialua Agricultural Company, Ltd. for certiorari, pp. 7 to 10.

Waialua's failure to fairly state the grounds upon which the lower Court rested its decision warrants this Court in dismissing the writ issued upon its petition. (*Sutter v. Midland Valley R. R. Co.* (1929), 280 U. S. 521, 74 L. Ed. 590.)

EVEN ASSUMING (WHICH WE DENY) THAT WAIALUA TOOK WITHOUT KNOWLEDGE OF THE INCOMPETENCY IN A FAIR BARGAIN AND FOR AN ADEQUATE CONSIDERATION, THE LOWER COURT CORRECTLY DECIDED THAT ALL THREE INSTRUMENTS SHOULD BE CANCELLED UPON CONDITION THAT RESTORATION BE MADE.

ANSWER TO WAIALUA'S POINT I.

The American rule.

If Waialua were correct in its contention that the decision of the Circuit Court of Appeals rested upon the proposition that the contract of an incompetent is void in the sense of being a nullity, the decision would have been followed the established rule in the Federal Courts,[6] which, as we have pointed out in our opening brief,[7] is the rule to be applied in this case arising in the Territory of Hawaii. However, it did not rest its decision on that rule, but followed the rule more favorable to Waialua, and accordingly, Waialua has no ground of complaint.[8]

The rule applied by the Circuit Court of Appeals in this case is as favorable to Waialua as the law established in

6. *Dexter v. Hall* (1873), 82 U. S. 9, 21 L. Ed. 73; *Kendall v. Ewert* (1922), 259 U. S. 139, 66 L. Ed. 862; *Plaster v. Rigney* (C.C.A. 8, 1899), 97 Fed. 12, *Edwards v. Davenport* (1883), 20 Fed. 756; *Anglo-California Bank v. Ames* (1886), 27 Fed. 727; *German Savings & Loan Society v. De Lashmutt* (1895), 67 Fed. 399; *Clark Car Co. of New Jersey v. Clark et al.* (D.C. Pa., 1925), 11 Fed. (2d) 814; *Sothern v. United States* (D.C. Ark., 1926), 12 Fed. (2d) 936; *Farmers Bank & Trust Co. v. Public Service Co. of Ind.* (1936), 13 Fed. Supp. 548.

7. Opening brief of Eliza R. P. Christian, pp. 48, 49.

8. *Alexander v. Cosden Pipe Line Co.* (1934), 290 U. S. 484, 78 L. Ed. 452.

any jurisdiction in the United States. With at most one exception,[9] Waialua has cited, and we have found, no case decided by any State or any Federal Court, in which cancellation of a contract has been denied to an incompetent where—as has been found here by the trial Court, the Supreme Court of Hawaii and the Circuit Court of Appeals—restoration has been offered and status quo can be restored. And even in the State in which the one exceptional decision to which we have referred was decided, other and later decisions justify the conclusion that the law of that State itself is in accord with the view that the incompetent has the option of disaffirmance, where status quo can be restored, even as against a bona fide purchaser for an adequate consideration. (Infra, p. 11.) There are a few cases from State Courts which have denied relief to the incompetent where either the incompetent did not choose to offer restoration, or restoration was equivalent to permitting recovery by the other party. An example of this latter type of case is one where the recovery against the incompetent is granted the holder of a promissory note evidencing a loan of money made to the incompetent. Restoration, as pointed out in one of the cases, would, in that situation, mean paying the loan, which is all the other party seeks in his action. (*Merchants National Bank v. Coyle* (1919), 143 Minn. 440, 174 N. W. 309.) Language can be found in a few of the cases from State Courts which would seem to sustain Waialua's argument, but when these cases are analyzed, we submit the decisions will not support the rule claimed for them.

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9. *Riggan v. Green* (1879), 80 N.C. 236.

Disregarding, for the moment, the decisions in the Federal Courts (including this Court), in our opening brief we cited, and rely upon, decisions of Courts in twenty-three states,[10] to which we add those from two states.[11] Waialua's brief cites cases from ten States,[12] which, it is argued, sustain the view advanced by it. We do not concede that the decisions cited by Waialua establish the law, of the several jurisdictions from which they arise, to be in accordance with Waialua's contention.

The great weight of authority supports the incompetent's position.

So far as we are able to ascertain, it is, as stated above, the rule of decision in twenty-five States[13] that an incompetent may set aside his contract, regardless of the good faith of the other party and of the adequacy of the consideration, in the event that restoration to status quo is made. In eight states the rule of decision is that the contracts of incompetents are void in the sense of being nullities.[14] One State, New Hampshire, may be doubtful. The remaining states have apparently not decided the point, or have passed statutes covering the question. With respect to those jurisdictions claimed by Waialua in its opening brief, we now proceed to review all the applicable decisions.

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10. Opening brief of Eliza R. P. Christian, p. 15, fn. 4.
11. *Langley v. Cease* (1922), 122 S.C. 203, 115 S.E. 230; *Elder v. Schumacher* (1893), 18 Colo. 433, 33 Pac. 175.
12. Waialua's opening brief, p. 48.
13. Opening brief of Eliza R. P. Christian, p. 15, fn. 4; supra, fn. 11.
14. *Thompson v. New England Mortgage Security Co.* (1895), 110 Ala. 400, 18 So. 315; *Galloway v. Hendon* (1901), 131 Ala. 289, 31 So. 603; *McEvoy v. Tucker* (1914), 115 Ark. 430, 171 S. W. 888; *Jacks v. Estee* (1866), 53 Me. 451; *Brigham v. Fayerweather* (1887), 144 Mass. 48, 10 N.E. 735; *Cleaveland v. Malden Savings Bank* (1935), 291 Mass. 295, 197 N. E. 14; *Boyd v. Mulvihill* (1901), 61 Neb. 878, 86 N. W. 922; *Farley v. Parker* (1876), 6 Ore. 105; *Campbell v. Campbell* (1913), 35 R. I. 211, 85 Atl. 930.

New York.

Waialua cites *Mutual Life Insurance Co. v. Hunt* (1880), 79 N. Y. 541, and *Goldberg v. McCord* (1929), 251 N. Y. 28, 166 N. E. 793. The *Mutual Life* case was one to recover on a promissory note and mortgage given by the incompetent for funds loaned, and the Court points out that status quo could not be restored. Restoration would mean paying the debt sued on. In the *Goldberg* case, the Court found that there was no evidence of incompetency, and beyond that the question of validity of the deed was not being raised by the alleged incompetent but by one who had contracted to purchase the property from a remote grantee of the incompetent and who objected to the marketability of the title. As Chief Judge Cardozo pointed out in *Hoadley v. Hoadley* (1927), 244 N. Y. 424, at 431, 155 N. E. 728, the right to avoid the transaction in which an incompetent engages "is for the personal protection of the one who is disabled".

Neither case stands for the rule contended for. We cited *Loomis & Hayden v. Spencer & Rolph* (1830), 2 Paige N. Y. 153, and *Riggs v. American Tract Society* (1881), 84 N. Y. 330, in each of which the incompetent obtained cancellation; in one upon effecting restoration, and in the other without doing so because it did not appear that the incompetent had received any benefit. To these we add *McCarthy v. Bowling Green Storage & Van Co.* (1918), 182 App. Div. 18, 169 N. Y. S. 463, wherein the incompetent had relief from a contract of purchase of personal property upon making restoration, and *Church v. Dreier* (1923), 205 App. Div. 820, 200 N. Y. S. 543, in which a settlement agreement by an incompetent was set aside.

North Carolina.

Waialua cites *West v. Seaboard Airline R. R.* (1909), 151 N. C. 231, 234, 65 S. E. 979. This case would appear to turn upon the failure of the incompetent to offer restoration. As shown by the later case of *Ipock v. Atlantic & N. C. R. Co.* (1912), 158 N. C. 445, 74 S. E. 352, cited with approval in *Wadford v. Gillette* (1927), 193 N. C. 413, 137 S. E. 314, it is the rule in North Carolina that the incompetent may cancel where restoration is effected, and beyond that the burden of proving lack of knowledge, fairness and inability to restore is upon the other contracting party if he would avoid cancellation.

Iowa.

Waialua cites *Ashcraft v. DeArmond* (1876), 44 Iowa 299, and *Farmers National Life Insurance Co. v. Ryg Co.* (1930), 209 Ia. 330, 228 N. W. 63. Both of these cases turn on the inability or refusal to offer to effect restoration, and neither of them holds that cancellation will be denied if restoration is made. The *Farmers National Life* case was another action to collect a promissory note for money loaned to an incompetent and restoration, of course, would be equivalent to confessing judgment.

In support of the rule for which the incompetent contends, we cited, and rely upon, *Nutter v. Des Moines Life Insurance Co.* (1912), 156 Iowa 539, 139 N. W. 891, wherein, after the death of the insured, his surrender of the policy of life insurance was set aside for incompetency, and a judgment entered on the policy in favor of the widow beneficiary. We add *Hicks v. Northwestern Mutual Life Insurance Co.* (1914), 166 Iowa 532, 147 N. W. 883;

Ayres v. Nopoulos (1927), 204 Iowa 881, 216 N. W. 258; and *Davidson v. Piper* (1936), 221 Iowa 171, 265 N. W. 107, all of which declare the rule that the incompetent may set aside his contracts upon effecting restoration.

Missouri.

Waialua cites *Rhoades v. Fuller* (1897), 139 Mo. 179, 40 S. W. 760. This case turns on the lack of evidence of incompetency.

We cited *McKenzie v. Donnell* (1899), 151 Mo. 431, 52 S. W. 214, and 151 Mo. 461, 52 S. W. 222, wherein the incompetent's deed was cancelled upon restoration of the purchase price although an innocent mortgagee from the grantee was deprived of his security for the loan. We add *Bruner v. Johnston* (Mo. 1921), 228 S. W. 92, and *Kelley v. United Mutual Insurance Corp.* (1938) (Kan. City Crt. Apps. Mo.), 112 S. W. (2d) 929, and submit that the rule in Missouri permits relief to the incompetent upon effecting restoration.

Pennsylvania.

Waialua cites *Beals v. See* (1848), 10 Pa. 56, 49 Amer. Dec. 573; *Rubins v. Hamnett* (1929), 294 Pa. 295, 144 Atl. 72, and *First National Bank v. Fidelity Title & Trust Co.* (1916), 251 Pa. 529, 97 Atl. 75. Of these, only the *Beals* case touches the question and the case really went off on other grounds. In the *Rubins* case, it was found that the party on whose behalf relief was sought was in fact competent. In the *First National Bank* case, the Court instructed the jury that if the maker of the note was incompetent the recovery could be only to the extent of the

benefits received by him—not the amount of the note. This case recognizes the rule contended for by us, and cites with approval the decision to which we point as announcing the law of Pennsylvania, namely, *Wirebach's Executor v. Eastern First National Bank* (1891), 97 Pa. St. 543, 39 Amer. Rep. 821, which followed *Crawford v. Scovell* (1880), 94 Pa. 48, 39 Am. Rep. 766. In view of these last three cases it cannot be said that relief is denied the incompetent in Pennsylvania, even when status quo can be restored. The contrary would appear to be the law.

New Jersey.

Waialua cites *Eaton v. Eaton* (1874), 37 N. J. L. 108, 18 Am. Reps. 716; *Mattheissen v. McMahon* (1876), 38 N. J. L. 536; and *Groff v. Stitzer* (1910), 77 N. J. Eq. 260, 77 Atl. 46. In both the *Eaton* and *Mattheissen* cases the incompetent was given relief, and in the latter the Court's refusal to instruct the jury that "nothing but imposition on an insane person will avoid his contract" was upheld. In the *Groff* case, the incompetent, who pledged shares as collateral for another's debt, was denied complete relief, but even there the Court directed that the lender first exhaust the borrower's security before resorting to the incompetent's. There is no question here of refusing relief, when restoration to status quo can be made. The discussion in the *Eaton* case to the effect that relief will be granted even when there is good faith on the other party's part, where restoration is made is, we submit, indicative of the view of the New Jersey Courts of the question under discussion.

New Hampshire.

Waialua cites *Young v. Stevens* (1868), 48 N. H. 143, 2 Amer. Rep. 202, 97 Amer. Dec. 592. This case turns upon the conclusion that restoration could not be made, and is cited by *Harriman on Contracts* (2d Ed.), Sec. 410, p. 243, in support of the rule for which we contend. Incompetents have been granted relief in New Hampshire where the other contracting party apparently had no knowledge of the incompetency. *Upton v. Conway Lbr. Co.* (1925), 81 N. H. 489, 128 Atl. 802. In fact, in one early case the contract of an incompetent was held to be void. *Flanders v. Davis* (1848), 19 N. H. 139.

Colorado.

Waialua cites *Green v. Hulse* (1914), 57 Colo. 238, 142 Pac. 416. In this case the alleged incompetent was found competent, and beyond that the Court determined that the plaintiffs, who were heirs of the alleged incompetent, were estopped to question the transaction. The decision does not support the rule for which Waialua contends, and we submit that the decision of *Elder v. Schumacher* (1893), 18 Colo. 433, 33 Pac. 175, in its approval of the trial Court's instruction, places Colorado with the great majority of States which permit cancellation upon effecting restoration.

Minnesota.

Waialua cites *Wood v. Newell* (1921), 149 Minn. 137, 182 N. W. 965, in which relief was denied an incompetent who had made a contract for the sale of real estate, but the Court pointed out, at page 139, that "no part of the money has been returned nor offered to be restored" and

also that there had been a ratification of the transaction after the grantor recovered competency. This case does not deny relief when restoration is offered and can be effected.

We rely upon *Schaps v. Lehner* (1893), 54 Minn. 208, 55 N. W. 911, where deeds of an incompetent were set aside upon paying the grantee the value of the improvements he placed upon the property in consideration of its transfer to him. See also: *Merchants National Bank v. Coyle* (1919), 143 Minn. 440, 174 N. W. 309, *Burches v. Goffstein* (1927), 173 Minn. 141, 216 N. W. 793, and *Czyrson v. Roseau County National Bank* (1927), 172 Minn. 420, 216 N. W. 224.

South Carolina.

Waialua cites *Sims v. McLure* (1856), 8 Rich. Eq. (S. C.) 286. There was no suggestion in this case of the willingness or the ability of the alleged incompetent to place the other contracting party in status quo, and the finding of incompetency was not sustained. The rule prevailing in South Carolina is expressed in the later case of *Langley v. Cease* (1922), 122 S. C. 203, 115 S. E. 230, in which the Court, although denying relief to the incompetent, said:

> "In order to set aside the solemn contract of an idiot or weak-minded person where such person received the benefits accruing from such contract, *one of two* things must appear—first, that the parties can be restored to their former status; second, that the other party of the contract had notice, either actual or constructive * * *. Neither appears in this case."

Kentucky.

Waialua cites *Phillips v. Murphy* (1920), 181 Ky. 763, 218 S. W. 250; *McVeagh v. Hicks* (1926), 211 Ky. 284, 277 S. W. 280; *Begley v. Holliday's Committee* (1933), 284 Ky. 453, 58 S. W. (2d) 654; and *Arnett's Committee v. Owens* (1901), 23 Ky. L. R. 1409, 65 S. W. 151.

We point to *Cash v. Bank of Lowes* (1922), 196 Ky. 570, 245 S. W. 137, which was cited in our opening brief, and add the later cases of *Jefferson Standard Life Insurance Co. v. Cheek's Administrator* (1935), 258 Ky. 621, 80 S. W. (2d) 518, and *Inter-Southern Life Insurance Co. v. Hughes* (1928), 224 Ky. 405, 6 S. W. (2d) 447, in each of which the cancellation of a life insurance policy by an incompetent was set aside and the policy reinstated; *Ohio Valley Fire & Marine Ins. Co. v. Newman* (1930), 232 Ky. 363, 23 S. W. (2d) 548, where the incompetent was given relief against his note and mortgage in so far as it represented the purchase of the shares of the defendant which had become worthless. None of the cases cited by Waialua refused cancellation to the incompetent where restoration was offered and could be made. The *McVeagh* case enforced a promissory note for money, but restoration, of course, would have meant paying the loan, which was all the holder sought in the action. In the *Begley* case, the Court pointed out that restoration was not offered. In the *Phillips* case, the finding was that the grantor was competent—not incompetent—hence no ground for rescission was presented. In the *Arnett* case, decided in 1901, it does not appear that restoration was offered to the defendant, who was a subsequent purchaser from the grantee of the incompetent, but if it is assumed that the case stands for the rule con-

tended for, the contrary rule has been announced in Kentucky at least four times since then, as shown by the cases to which we refer. The settled law of Kentucky is that where restoration can be effected, an incompetent may set aside his contracts regardless of their fairness.

The jurisdictions to which we point in support of our view of the rule, and as to which our position is not questioned by Waialua, are Georgia, Illinois, Indiana, Texas, Oklahoma, Mississippi, Connecticut, Kansas, Maryland, Ohio, Tennessee, Vermont and West Virginia. The jurisdictions holding the contracts of incompetents void are, in addition to the United States Supreme Court and the Circuit Court of Appeals for the Eighth Circuit, Alabama, Arkansas, California, Maine, Massachusetts, Nebraska, Oregon and Rhode Island. We submit that it is the rule in each of the ten jurisdictions from which Waialua cites cases that cancellation will be granted to the incompetent when restoration can be effected.

It can be seen from the foregoing review that under practically the universal rule of America, even though we assume that Waialua acted without knowledge of the incompetency and paid an adequate consideration, the questioned instruments will be set aside upon condition that the incompetent restore, which was offered (R. 357-8 and 365-6), and which all the Courts have found can be accomplished.

The English rule.

Waialua admits (p. 52) that "many American courts" have followed the rule contended for by us. The substance

of its attack upon that rule is what it contends is the prevailing rule in England, and Waialua boldly announces that all these American Courts have misunderstood *Molton v. Camroux* (1848), 2 Exch. 487, 4 Exch. 17,[15] and have followed a rule which "has no basis in logic or principle" (p. 52).

We know of no rule of law that an English decision of 1848 should be considered a controlling precedent for the American courts. The fact that in 1789 we adopted the English common law[16] surely does not mean that a decision rendered fifty-nine years after that date by an English Court should now, ninety years later, compel the discarding of the decisions of practically all of our state jurisdictions, as well as the changing of the law as announced in 1873 (*Dexter v. Hall* (1873), 82 U.S. 9, 21 L. Ed. 73), by the United States Supreme Court.

The statute of Hawaii declaring the common law of England, as ascertained by English and American decisions, to be the common law of the Territory (quoted in Waialua's brief, p. 55, note), does not give to English decisions, particularly those of relatively recent date, any authoritative weight superior, or indeed equal, to that of decisions in American jurisdictions. The Supreme Court of Hawaii has so declared. (*Dole v. Gear* (1903), 14 Haw. 554, at 561-4.) Statutes of similar purport have been en-

15. Waialua also cites *Imperial Loan Co. v. Stone* (L.R. 1892), 1 Q. B. 599; *Niell v. Morley*, 9 Ves. Jr. 478 (1804); *Elliot v. Ince*, 7 DeG. M. & G. 475 (1857); *Beavan v. McDonnell*, 9 Ex. 309 (1854); *Campbell v. Hooper*, 3 Sm. & G. 153, 24 L. J. Ch. 644 (1855); *Hassard v. Smith*, 6 Irish Reports, Equity 429 (1872); *Dane v. Kirkwall*, 8 C. & P. 679 (1838); *Brown v. Jodrell*, M. & M. 105 (1827); *Baxter v. Portsmouth*, 5 B. & C. 170 (1826); *York Glass Co. Limited v. Jubb*, 134 L. T. R. 36 (C.A. 1926); *Broughton v. Snook*, 158 L. T. R. 130 (1938).

16. *Gordon v. Washington* (1934), 295 U. S. 30, 79 L. Ed. 1282.

acted in at least nineteen states,[17] and none of these states has followed the English rule that denies relief to incompetents where status quo can be restored. In fact, in five of these states—Massachusetts, Alabama, Arkansas, Nebraska and Georgia—the rule of decision is that incompetents' contracts are void in the sense of being nullities (supra, fn. 14, p. 9).

We have consistently admitted that the rule now prevailing in England is as Waialua would have it here.[18] We repeat that statement now. We do not, however, agree with the logic or soundness of such a rule. As declared by a writer in the Law Quarterly Review[19], it "seems to give a shock to the most fundamental principles of contract law". The *Molton* case and the English decisions which followed it are reviewed at length in an elaborate article in the Columbia Law Review[20] written by W. G. H. Cook, an English barrister connected with the faculty of London University. It is there pointed out that the cases relied on in *Molton v. Camroux* do not support it or the later cases which rely upon the *Molton* case, and also that

17. *California Polit. Code*, Sec. 4468; *Massachusetts Const.*, Ch. 6, Art. 6 (construed as adopting common law of England: *Commonwealth v. Webster* (1850), 5 Cush. 295); *Georgia Code 1933*, Sec. 2-8501 (construed as adopting the common law of England: *Harris v. Powers* (1907), 129 Ga. 74); *Illinois Rev. Stat. 1935*, Ch. 28, Sec. 1; 1 *Burns Indiana Stats. 1926*, p. 149, Sec. 244; *Kentucky Const.*, Sec. 233 (construed as adopting the common law of England: *Nider v. Commonwealth* (1910), 140 Ky. 684); *Texas Stats. 1936*, Art. 1; *Pennsylvania, Purdon's Stats. 1936*, Title 46, Sec. 152; *Arizona Rev. Code 1928*, Sec. 3043; *Kansas General Stats. 1935*, Sec. 77-109; *Vermont Public Laws 1933*, Sec. 1234; *West Virginia Const.*, Art. 8, Sec. 21; *North Carolina Code 1935*, Sec. 970; *Oklahoma Stats. 1931*, Sec. 2; *Missouri Rev. Stats. 1929*, Sec. 645; *New Jersey Const.*, Art. 10, Sec. 1; *Alabama Polit. Code 1928*, Sec. 14; *Arkansas Rev. Stat.*, Ch. 28, Sec. 1; *Nebraska Compiled Stats. 1929*, Sec. 49-101.

18. Opposing brief of Eliza R. P. Christian to Petition of Waialua Agricultural Co. Ltd. for writ of certiorari, p. 14, fn. 4.

19. 17 Law Quarterly Review, p. 147, at 152.

20. Mental Deficiency and the English Law of Contracts, 21 Columbia Law Review, 424.

twice since the decision the Judicial Committee of the Privy Council has refused to follow the rule of the *Molton* case[21]. The article reviews the statutes and decisions of many other countries and shows that England stands alone on the proposition. It also points out the absurdity of such a rule when in the same jurisdiction infants, whose lack of capacity often is based only on a presumption, are permitted to set aside their bargains regardless of their fairness.

The English rule developed from the *Molton* case is illogical in principle, contrary to the rule announced by the United States Supreme Court and practically all of the state jurisdictions. It is recognized as being contrary to the American rule[22]. It should not be applied. The rule of decision to be applied in this case arising in the Territory of Hawaii is the rule of decision in the United States Supreme Court and the Ninth Circuit Court of Appeals, which are the Courts of Appeal from the Hawaiian Courts[23]. Surely, however, there is no occasion to go outside of all the American jurisdictions and for the first time adopt the English rule. It is the common law as developed by the American decisions, not the English decisions, which are in conflict therewith, which should apply.

We turn next to Waialua's contention that status quo cannot be restored, although the finding has been to the contrary by the trial Court, the Supreme Court of Hawaii and the Circuit Court of Appeals.

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21. *Daily Telegraph Newspaper Co. v. McLaughlin* (1904), A. C. 776, 779; *Molyneux v. Natal Land & Colonization Co.* (1905), A. C. 555.

22. *Wald's Pollack on Contracts* (3rd Ed.), p. 100, [illegible]n. 52, wherein the author points out the differences in the English and American rules.

23. Opening brief of Eliza R. P. Christian, note p. 16.

THE FINDINGS OF ALL THREE COURTS ARE THAT STATUS QUO CAN BE RESTORED IN THIS CASE—THE MEANING OF THE TERM.

ANSWER TO WAIALUA'S POINT II.

The trial Court (R. 526), the Supreme Court of Hawaii (R. 297-300 and 579), and the Circuit Court of Appeals (R. 1605) have all found that status quo, within the meaning of the rule, can be restored in setting aside the questioned instruments. The Circuit Court of Appeals said (R. 1605):

> "Both courts found that the appellant was incompetent * * *, that the company could be placed in status quo * * *. These conclusions were reached after careful consideration of the evidence. Exhaustive opinions were written considering the evidence. We accept them * * *."

Waialua seeks to avoid the force of the rule of this Court that it will not re-examine the concurrent findings of lower Courts by declaring, at page 59, that the question is a "pure question of law". We submit, to the contrary, that it is one of fact. It is a determination by the three Courts that it is possible in this case to replace the parties in substantially the positions they would have occupied had the questioned documents not been executed. The term "status quo", as used in discussing the conditions upon which one with a ground for cancellation may set aside a transaction means substantially the position occupied before the transaction. It is an equitable concept. A determination that it can be effected in a given case requires an application of the principle to a set of facts just as a determination that one is incompetent to execute an instrument involves the application of a principle of

law to facts regarding the person's understanding. The determination that status quo can be restored in this case is no less a finding of fact than the finding that Eliza Christian is incompetent, which is now conceded (p. 11) by Waialua. The fact that the three lower Courts each make slightly different provisions for accomplishing the restoration does not detract from the force of their determination that it can be accomplished, but, on the other hand, adds to the persuasive weight of the finding that status quo can be restored in this case. Which one, of different ways, is chosen is a matter largely of discretion. In our opening brief we described each method employed and commented thereon[24]. We submit that the method directed by the United States Circuit Court of Appeals is certainly well within a permissible discretion. However, we have no disposition to avoid an investigation of the question by this Court *de novo*. We refer to our opening brief, at pages 16 to 23, for the authorities which demonstrate the practical application of the rule to the specific facts in upwards of twenty cases. In each of these cases it was found that the requirement of the rule requiring restoration of status quo was satisfied and cancellation of the questioned documents was directed. We confine our discussion here to a review of the cases cited by Waialua on the point, prefacing it with a quotation which emphasizes the objective of the Courts in the cases dealing with incompetents[25].

> "In short, the fact that Mason was an innocent party and parted with his money without notice as to

24. Op. Brief Eliza R. P. Christian, pp. 6-11.
25. *McKenzie v. Donnell* (1899), 151 Mo. 461 (at p. 471); 52 S. W. 222.

McKenzie's condition is wholly immaterial. The doctrine that where one of two innocent persons must suffer, the loss must fall on him who made the condition possible has no application to cases of this character, for an insane person cannot be held responsible for consequences which he could not understand or prevent."

The cases cited by Waialua do not sustain its argument that the three lower Courts were in error in finding that status quo could be restored.

Waialua cites:

At page 64, *Yauger v. Skinner* (1862), 14 N. J. Eq. 289: Here a purchaser who had given a mortgage for the unpaid balance of the purchase price and who was called upon by the grantor's guardian to pay the note, brought an action to either (1) have his title quieted upon paying the note, if the grantor was found to be competent, or (2) to have his note cancelled and the purchase set aside if the grantor was found to be incompetent when the deed was made. Far from objecting to the validity of the conveyance, the guardian contended, and the Court found, that the grantor was competent when the conveyance was made. The ability of the grantor to restore to status quo when seeking to set aside a bargain was in no way involved.

At page 65, *Neblett v. Macfarland* (1876), 92 U. S. 101, 23 L. Ed. 471: Here it was held that the return of a bond received as consideration in a transaction which was being set aside was adequate restoration, even though the bond had become less valuable, or even unenforceable, by the running of the statute of limitations. This case, far from supporting Waialua, is direct authority for the proposition that a change in the value of the subject matter of the

sale or purchase does not alter the rule that the return of the subject matter satisfies the requirement with respect to restoration.

At page 65, *Holly v. Missionary Society* (1901), 180 U. S. 284, 45 L. Ed. 531: Here an attorney, who was an executor, misappropriated funds of the plaintiff, a client, and distributed them to the beneficiary of the estate, which was a charitable institution, in accordance with the decree of distribution. The beneficiary devoted the funds to the purpose for which they were left. The plaintiff thereafter sought to recover the moneys from the beneficiary, which had had no part whatsoever in the defalcation. The case decided only that there were no grounds for recovery and had nothing to do with status quo in the cancellation of instruments.

At page 65; *Grymes v. Sanders* (1876), 93 U. S. 55, 23 L. Ed. 798: Here the purchaser of a mine sought to set aside the purchase upon the ground of mistake, in that he believed that a shaft which he saw on neighboring property when he was inspecting the mine was in fact on the property which he purchased. The Court found (1) that the mistake was not a material one; (2) that the plaintiff did not seek to rescind promptly upon the discovery; (3) that it would not be convenient for the seller to return the purchase money which he had spent; and (4) that defendant was not at fault and stood on an equal footing with plaintiff. The case turns on the absence of grounds for rescission—not that it should be denied though grounds exist, because the aggrieved party could not restore.

At page 67, *Watson Coal & Mining Co. v. Casteel* (1879), 68 Ind. 476: This was an action for rent to which the lessee cross-complained for cancellation of the lease on the ground of fraud. A demurrer to the cross-complaint was sustained and affirmed on appeal, the Court saying at p. 482:

> "Nothing that has been received by the defendants under the lease has been returned or tendered to the plaintiff; and, as the defendant has had a full knowledge of the facts alleged for more than three years, the remedy of rescission has not been sought within a reasonable time."

The decision did not rest on the inability to restore.

At page 68, *Snow v. Alley* (1887), 144 Mass. 546, 11 N. E. 764: Here the plaintiff, a promoter and shareholder of the Postal Telegraph Company, induced the defendant to agree to advance funds to finance the company in return, among other things, for plaintiff giving the defendant certain bonds. The plaintiff alleged, and the jury in returning a verdict for the plaintiff found, that the defendant had promised to purchase additional bonds from the plaintiff and to lend him money personally. The defendant financed the Postal Company, but refused to buy plaintiff's bonds or lend money to him, and the plaintiff brought an action to recover the bonds given to the defendant. The judgment for the plaintiff was reversed, the Court saying that the plaintiff had not offered to restore, and that the defendant's requested instruction that "if it was impossible to restore the defendant to the position he occupied before the financing, plaintiff could get no relief", should have been given. It is to be observed

that there is no failure in the instant suit to return to Waialua everything with which it parted in consideration for the instruments cancelled. Beyond that, as we have heretofore shown[26], it is the rule in Massachusetts that the contracts of incompetents are void, and, accordingly, had the ground for rescission been incompetency in the *Snow* case, cancellation would have been directed by the Massachusetts Court.

At page 68, *Riggan v. Green* (1879), 80 N. C. 236, 30 Am. Rep. 77: Here plaintiffs, who were heirs of an incompetent grantor, brought an action to set aside a deed of property which had been resold to an innocent grantee. It was found that the transactions were both fair and that the price paid by the first purchaser and the second purchaser was adequate. The Court declined to grant relief because it said, at page 240:

> "Rescission of the deed would produce no benefit to the plaintiff if coupled with the duty and obligation to replace the defendant in status quo, whilst it would be a great inconvenience and an injustice to the defendants * * *."

This case is no aid in defining the term "status quo". It holds merely that where restoration would produce no benefit to the incompetent and at the same time would be a detriment to the innocent defendant, cancellation will not be ordered. This is obviously a correct conclusion. The later case decided in North Carolina, *Ipock v. Atl. & N. C. R. Co.* (1912), 158 N. C. 445, 74 S. E. 352, leaves no doubt that it is the law of North Carolina that when the incompetent can make restoration and still be advan-

26. See supra, fn. 14, p. 9.

taged in setting aside the transaction, relief will be granted to him.

At page 68, *Gill v. Dingfelder* (1923), 224 Mich. 247, 194 N. W. 974: Here the defendant, in consideration of the transfer to him of certain real property of the plaintiff, who was an elderly lady, paid her some cash, gave her his note for an additional sum, and promised to support her for life. A disagreement arose between them and plaintiff left defendant's home and sought to recover her property. She was not incompetent. It was held that rescission would be refused, but she was given judgment for the sum at which her future support had been valued in the transaction, namely, $3000. In denying relief for rescission, it was said that the defendant had spent $14,000 in making improvements on the property and that it was impossible for the plaintiff to restore the same. The case does not hold that reimbursement for the improvements and the consideration paid for the deed would not have effected restoration, but apparently that the plaintiff was not in a position to repay the sums.

At page 68, *Rice v. Wilson* (Dist. Ct. Del. 1915), 225 F. 159: This was an action to enjoin the transfer of shares by the defendant on the ground that they were the property of the plaintiff and had been procured by the defendant fraudulently. It was found that there was no fraud. Relief was denied and the only discussion of status quo is the following, at p. 163:

> "It is a general, though not universal, rule, that a court of equity will not rescind a contract even on the ground of fraud when the position of the par-

> ties has been so altered by reason of the execution of the contract in whole or in part that they cannot be restored fully or approximately to their original position and a rescission would work gross inequity * * *. It is, however, unnecessary to pursue the inquiry when, or under what circumstances, rescission of a contract may be declared and enforced by a court of equity on the ground of fraud; for on the proofs before the court * * * I am convinced that no fraud on the part of Wilson (the defendant) has been established."

There is no suggestion in the opinion that status quo could not have been restored. The case went entirely on the absence of a ground for cancellation.

At page 68, *Rickman v. Houck* (1921), 192 Ia. 340, 184 N. W. 657: Here the defense of incompetency was raised to an action for specific performance to sell real estate. The finding was that the defendant was not incompetent when the contract was made and the decision is placed on that ground. The Court said, at p. 348:

> "Since we reach the conclusion that it has not been shown that appellant's ward was incapable of making the contract involved in this case, it is not necessary that we proceed further in discussion of the case."

The Court then states it will, however, give its views on whether status quo would have been restored by merely returning the $500 paid for the property. Thereafter follows the language quoted by Waialua. It may be remarked that in the case at bar the restoration ordered is not just the return of the purchase price, but also

interest thereon and the full value of the improvements placed on the property by Waialua. As we will hereafter demonstrate, cancellation in this case will in no way disrupt Waialua's plantation activity.

At page 68, *Dent v. Long* (1890), 90 Ala. 172, 7 So. 640: Here heirs of a deceased grantor sought cancellation of a deed on the ground of incompetency and fraud. Payment for the property had been made in part by the exchange of other lands. The lands so received as consideration had been resold. It was found that the grantor was in fact competent and that no fraud had been practiced by the defendant. Beyond that, the Court pointed out that the plaintiff could not restore because the land which the defendant had transferred to the plaintiff in the exchange had been resold and it also added that the defendant had made valuable improvements to the land it had obtained from the deceased. The absence of a ground for rescission, namely, incompetency or misrepresentation, was the real ground of the decision. Had the grantor been incompetent it is clear that the deed would have been set aside, as it is the rule in Alabama that in such cases the instrument is void. (*Thompson v. New England Mortgage Securities Co.* (1895); 110 Ala. 400, 18 So. 315; *Galloway v. Hendon* (1901), 131 Ala. 280, 31 So. 603.)

At page 69, *Piedmont Land & Imp. Co. v. Piedmont Foundry & Machine Co.* (1892), 96 Ala. 389, 11 So. 332: Here the plaintiff, who was largely interested in the property and affairs of a small town, deeded a parcel of property and gave money to the defendant in return for which the defendant agreed to develop an enterprise in

the neighborhood. Construction was started, but the defendant became financially embarrassed and did not complete it. Plaintiff sought to obtain rescission and reconveyance on the theory of a resulting trust. The Court found that there had been no fraud, but only a breach of contract by the defendant, and denied the relief sought, pointing out that the plaintiff's remedy was for damages. It also stated, at page 394, that "it would not be practicable for the parties to be put in the situation they occupied when the contract was made" since the defendant had erected a plant and gone forward part way with its development as agreed, and the plaintiff in turn had secured some benefit from this in its effect on the plaintiff's other interests in the community. Here again no ground for cancellation existed. A similar case is *Buckner v. P. & G. E. Railroad* (1890), 53 Ark. 16, 13 S. W. 332, cited by Waialua at page 68. So far as any question of status quo is concerned, these two cases emphasize that it is largely a question of fact in each case for the trial Court to find whether it is practicable under the circumstances to effect a substantial restoration. Had the grantors in either of these cases been incompetent, cancellation would have been decreed, since both in Alabama (*Thompson v. New England Mortgage Security Co.*, supra, p. 29) and in Arkansas (*McEvoy v. Tucker* (1914), 115 Ark. 430, 171 S. W. 888, the contracts of incompetents are void.

The cases relied on by Waialua, we submit, are no aid in the determination of the meaning of the term "status quo" as used in the rescission cases to denote the condition to which the parties should be restored in setting

aside a transaction. For the most part, they turn on the absence of grounds in the particular case for rescission and any discussion of status quo is mere dictum. It is in the cases in which the ground for cancellation is established, be it fraud or incompetency or some other ground, that the Court's consideration of the question of status quo becomes vital and authoritative. Those cases were set out at pages 17 to 21 in our opening brief.

The death of the incompetent's father in 1922, after the purchase, with the consequent vesting of the incompetent's remainder, is no bar to restoration.

Waialua next argues (p. 70) that restoration cannot be effected in this case because after the purchase the incompetent's father died and her title ripened into a fee. In substance, the argument is that since the death of a third party has increased the value of the incompetent's interest that it, Waialua, should have this unearned increment rather than the incompetent, to whom it would belong but for the questioned instruments. Waialua says (p. 78):

> "Assuming that an equitable right of rescission arose by reason of the incompetency * * * that equitable right is lost upon the happening of the contingency upon which the estate depends."

As we will show, Waialua cites no cases in America or in England, and we know of none, which so hold.

Waialua directs the Court (p. 71) to the following authorities to support its argument:

1. *Grymes v. Sanders* (1876), 93 U. S. 55, 23 L. Ed. 798, wherein relief was denied a purchaser of a mine who

sought rescission on the ground of mistake, the Court holding, among other things, that the mistake was not a material one, and accordingly no ground for cancellation existed.

2. *Molton v. Camroux* (1848), 2 Exch. 487, 4 Exch. 17, wherein relief was denied an incompetent's estate, which sought, on the ground of incompetency, to recover the cost of an annuity purchased from the defendant insurance company by the deceased, the Court holding that in England an incompetent's contract will not be set aside if it is fair, regardless of the question of status quo. This case has already been discussed (supra, pp. 18-20) in detail. While it declares the English rule on the validity of incompetents' contracts, it by no means supports the proposition contended for in this portion of Waialua's brief. It was not the incompetent's death that cut off a right of rescission in this case, but, on the contrary, such a right under the English law never existed.

3. *Atlantic Delaine Co. v. James* (1877), 94 U. S. 207, 24 L. Ed. 112; wherein relief was denied to a creditor who had made a settlement with his debtor and who sought rescission on the ground that the financial statements furnished him by the defendant were untrue. The Court, at page 214, said:

> "The fundamental averment of fraud is not sufficiently sustained * * *. The bill must therefore be dismissed."

There is no suggestion in this case that relates to Waialua's point under discussion.

4. *Breed v. Judd* (1854), 67 Mass. (1 Gray) 455; wherein an infant was denied relief from a contract con-

sidered fair, the Court declaring that to make the defendant whole the plaintiff would be required to compensate him for a risk which he had assumed. Whatever may be the law of Massachusetts with respect to infants' contracts, contracts of incompetents, in that state, stand on an entirely different basis. Contracts of incompetents are there held to be void regardless of the ability of the incompetent to make restoration. (*Seaver v. Phelps* (1831), 11 Pick. (Mass.) 304, 22 Am. Dec. 372; *Brigham v. Fayerweather* (1887), 144 Mass. 48, 10 N. E. 735; and *Cleaveland v. Malden Savings Bank* (1935), 291 Mass. 295, 197 N. E. 14.)

5. *Mutual Life Insurance Co. v. Smith* (1911), 184 Fed. 1, wherein relief was denied the trustee of the bankrupt's estate who sought to recover the purchase price of an annuity upon the ground that the bankrupt, in paying for the policy, had made a transfer of his funds in fraud of his creditors. There was no charge of fraud against the defendant insurance company, and the Court found no ground for rescission. The question of the ability to restore to status quo was not involved in the actual decision and the Court did not pass upon it.

6. *Williams v. Penn Mutual Insurance Co.* (D. C. Fla. 1925), 6 Fed. (2d) 332; (C. C. A. 5, 1928), 27 Fed. (2d) 1; wherein relief was denied in an action brought to set aside releases given by beneficiaries of the policies to the insurance companies after the death of the insured upon the ground of fraud upon the part of defendant's agent in procuring such releases. The Circuit Court of Appeals (27 Fed. (2d) 1), in affirming the dismissal of the bills, rests its decision not upon the question of status

quo, but (a) that the plaintiff did not rely upon the alleged misrepresentations, (b) that the proof did not sustain the bill on the allegations of fraud, and (3) that the plaintiffs were guilty of laches. If the decision rested, as Waialua suggests, on the ground that the defendant, if the releases were cancelled, would under the terms of the policy have lost its right to defend for fraud in procuring the policies because of the lapse of time, the decision would in no way support the proposition contended for. Waialua has lost no rights by virtue of the death of the incompetent's father and the vesting of the incompetent's title.

If the argument, that the death of the incompetent's father cut off all rights she might otherwise have had to set aside the instruments, were sound, then no owner of an expectancy would ever be accorded relief from his bargain after the death of the party upon whose life it depends. Relief has, of course, been granted many times in such situations.[27] The same argument was advanced in the English case of *Nott v. Johnson & Graham* (1687), 2 Vern. 26, 23 E. R. 627, wherein the contingency occurred ten years after the purchase, and in an action to set aside the bargain the purchaser's argument that he should be protected because he bore the risk that the seller would not outlive the holder of the life estate was not accepted.

The fact that the incompetent in the instant case, upon the cancellation decreed by the Circuit Court of Appeals, will receive a vested title while she conveyed only a con-

27. Opening brief Eliza R. P. Christian, pp. 24 to 28 and cases cited footnote 10, p. 25; *McKinney v. Pinckard* (1830), 2 Leigh (Va.) 149, 21 Amer. Dec. 601; *Boynton v. Hubbard* (1810), 7 Mass. 112.

tingent one, this improvement in her title not being due to anything contributed by Waialua but being an additional value created without any participation by Waialua, does not prevent restoration to status quo within the meaning of the rule.[28]

Waialua's assumption of the risk that the incompetent would predecease her father is no impediment to restoration. There are many cases in which, although defendant insurance companies have taken a risk which has turned out advantageously to them, their policies are nevertheless canceled by the insured where grounds exist therefor.[29] As said in one of them,[30]

> "It is true that in the years elapsing since the exchange defendant, by the death of Green, might have been called on to pay under the new policy, but as a matter of fact it has not and the defendant's situation has not changed, but even if it has, whose fault is it? Certainly not the plaintiffs."

So in the instant case we need not speculate about Waialua's troubles if the incompetent had died before her father. She did not; she is still alive and her father is dead. Waialua is in no way injured by the happening of the event—and restoration cannot mean resurrection.

28. *Dermott Land & Lbr. Co. v. Zelnicker* (C.C.A. 8, 1921), 271 Fed. 918, cert. den. 257 U. S. 648, 66 L. Ed. 415, wherein it was held to be unnecessary to effect restoration, for the plaintiff, who was a purchaser under a contract with the defendant calling for periodic deliveries, to return a profit made by him upon a resale of some of the material.

29. *Maupin et al. v. Missouri State Life Ins. Co.* (Kansas City Ct. Apps., Mo., 1919), 214 S. W. 398; *Green v. Security Mut. Life Ins. Co.* (1911), 159 Mo. App. 277, 140 S. W. 325; *Bank Savings Life Ins. Co. v. Steiner* (Texas Civ. Apps. 1935); 81 S. W. (2d) 225; *McCarty v. N. Y. Life Ins. Co.* (1898), 74 Minn. 530, 77 N. W. 426.

30. *Green v. Security Mutual Life Ins. Co.*, supra, note 29 at page 298.

If the proposition advanced by Waialua were the law, it would also operate to bar an insurance company from contesting the validity of an insurance policy obtained through the misrepresentation of an assured who had died, if it be a life policy, or who has been disabled, if the policy contained a disability provision. The insured, or if it be a death policy the beneficiary named, can say in such a situation that a risk has turned out to his benefit, that he has won his advantage and that therefore he cannot be restored to status quo upon a cancellation of the instrument. He can point to this "fortuitous circumstance", as Waialua refers to the death of the incompetent's father (p. 70), as a bar to an action for cancellation, just as Waialua has here. The insurance company, of course, cannot bring the dead man back to life, or perhaps cure the disability, to effect restoration, any more than the incompetent can bring her father back to life to reduce her estate from a vested to a contingent one. The law does not require it. *Enelow v. New York Life Ins. Co.* (1935), 293 U. S. 379, 79 L. Ed. 440, wherein it was held that the affirmative equitable defense that the policy had been obtained by the misrepresentations of the insured was open to the insurer after the death of the insured in an action at law brought upon the policy. *American Life Insurance Co. v. Stewart* (1937), 300 U. S. 203, 81 L. Ed. 605, wherein it was held that the insurer might after the death of the insured maintain a bill in equity to cancel the policy on the ground that it had been obtained through misrepresentations of the insured.

We refer to our opening brief (p. 17, fn. 6) for the authorities defining the term "status quo" and submit that there is no force in Waialua's argument that status

quo cannot be restored here because the incompetent's title vested upon the death of her father after the purchase and before the commencement of the action. We repeat that fact in no way prejudices Waialua.

Waialua cites (pp. 46, 47, 54, 56) several text writers[31] in support of its contention that the objective theory of contracts operates to supply the lack of understanding of an incompetent and hence make his contracts valid. These authors, of course, advance no such proposition. The sections of their works referred to have nothing to do with incompetency cases. They deal with the expressions of competent persons upon which others rely in making a bargain. We refer to the portions of their several works dealing with incompetents' contracts[32] for a more accurate recital of their views on the instant subject.[33]

Waialua also cites (pp. 66, 72) text writers[34] to support its view that restoration in this case, which admittedly is one involving incompetency on the part of the grantor,

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31. *Williston on Contracts* (Rev. Ed. 1936), Vol. I, Secs. 20, 21, 22; *Holland, Jurisprudence*, 12th Ed., pp. 119-120; *Langdell, Summary of the Law of Contracts*, 2d Ed., Sec. 180; *Holmes, The Common Law*, pp. 309, 324, 325; *Story, Equity Jurisprudence*, 13th Ed., Sec. 227.

32. *Holland, Jurisprudence*, 13th Ed., p. 119; *Williston on Contracts*, op. cit. supra, n. 26, Sec. 254, at p. 750; *Langdell, Summary of the Law of Contracts*, 2d Ed., Sec. 180. At page 244, Langdell states, "The law, however, makes this intendment only for purposes of justice and convenience, and therefore it will never make it when the actual existence of the mental act would be impossible. Hence the death or insanity of an offerer during the pendency of his offer makes it impossible to complete the contract for want of a concurrence of wills."

33. It should be noted that the quotation, at page 54 of Waialua's brief, of a part of Sec. 254 of *Williston on Contracts* (Rev. Ed.) is so incomplete as to give an inadequate and incorrect impression of the learned author's views. The passage quoted omits several lines, indicated by asterisks. The omitted portion states, in effect, that *Molton v. Camroux* is not in accord with earlier decisions in English courts of law. Moreover, a reading of all the sections of *Williston* dealing with the subject, including those preceding and those following Section 254, will dispel any thought that the author considers the weight of American authority to be in accord with the English rule as laid down in the *Molton* case.

34. *Pomeroy, Equity Jurisprudence*, Vol. V, 4th Ed., Sec. 2110; *Restatement of the Law of Contracts*, Vol. II, Sec. 486.

means replacing the other party exactly where it was before the bargain was made. Again, it must be pointed out that these authors were not discussing incompetency cases but mistake cases where both parties are on an equal footing in the eyes of a Court of Equity. We refer to the sections of these works dealing with the instant problem.[35] That "status quo" means substantially or approximately the condition formerly occupied, and in incompetency cases it refers more particularly to requiring that the incompetent return what he received in the bargain to the best of his ability, is without question the prevailing rule.[36] As said in *Black on Rescission and Cancellation*,[37] at page 1484:

> "But the rule does not mean that there must be an absolute and literal restoration of the exact previous condition, but such a restoration as is substantial without material difference, and reasonably applicable, or, when fraud is involved, as nearly complete as the fraud of the opposite party will permit."

The incorporation of the land into the Waialua plantation does not prevent restoration to status quo.

Waialua devotes upwards of 18 pages of its brief[38] to a detailed description of the Waialua plantation, with the apparent purpose of demonstrating that it is a large profitable undertaking, a principality in fact. The fact is not disputed, but we definitely disagree with the conclusion which counsel draw that because thereof restoration can-

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35. *Pomeroy, Equity Jurisprudence*, Vol. II, 4th Ed., Sec. 946, et seq.; *Restatement of the Law of Contracts*, Vol. II, Sec. 349; *Story, Equity Jurisprudence*, 14th Ed., Secs. 314 to 324, especially Secs. 320, 321 and 322.

36. Opening Brief of Eliza R. P. Christian, pp. 16 to 23.

37. Black on Rescission and Cancellation Vol. III, 2d Ed., Sec. 616.

38. pp. 20-25; 31-34; 78-89.

not be effected in this case—a fact found against Waialua's contention by all three lower Courts.

The so-called "Waialua Plantation" comprises about 49,000 acres. This area is not, however, all operated by Waialua. Over 12,000 acres thereof (R. 507, 1493) are leased by Waialua to the Hawaiian Pineapple Company, which carries on its own operation in pineapple culture, paying rent to Waialua. 6476 of the 12,000 acres so leased to the Hawaiian Pineapple Company lie in the Holt tract. Of the remainder of the acreage embraced in the Waialua Plantation, namely 37,000 acres, only 7474 acres are in the Holt tract. Of this 7474 acres, only 1623 are actually cultivated by Waialua as a part of its whole plantation. This is the sugar land, which is 16% of the area actually farmed by Waialua in its sugar plantation operation. The incompetent's interest is an undivided one-third thereof, or the equivalent, in terms of acres, of 5⅓%. It is on the sugar land operated by Waialua that *practically all* the improvements made by Waialua are located. This Waialua admits in its brief, at page 80, where it says:

> "With the exception of the partial use of a plantation railroad and some of the roads which are used to reach the pineapple area, all of the improvements on the Holt land are used in connection with the cultivation, irrigation and transportation of sugar cane—that is, in connection with sugar and not with pineapples."

There is no question raised that the incompetent is not restoring to Waialua everything she obtained from it as consideration for the execution of the questioned documents. If we assume (contrary to the findings, Supreme Court R. 294, 301; trial Court R. 518) that she received the

$30,000 paid for the deed, still the decree of the Circuit Court of Appeals provides without question that Waialua will receive back everything the incompetent obtained from it. She has received nothing from Waialua for or under either the lease or the 1906 contract. Whatever maintenance she has been provided with because of the 1906 contract has come from Annie Kentwell, not Waialua, and Annie Kentwell has not appealed from the judgment. Waialua's only complaint on the question of restoration is that it, Waialua, even though it gets back all with which it parted, is inequitably dealt with in cancelling the agreements because the conduct of its enterprise will be seriously hampered. This is not true, as we will demonstrate and as the three lower Courts, in cancelling the documents, have found.

Waialua's possession and plantation operation will not be disturbed by the decree.

As heretofore shown (supra, p. 39), the Holt tract is only a part of the Waialua plantation. The area of the Holt land operated by Waialua is about 16% of its own plantation enterprise. The incompetent owns an undivided ⅓ interest therein, or 5.2%. The interest of the incompetent is only an undivided 9/27ths in the Holt area. Waialua itself has purchased 16/27ths from other Holt heirs and holds a long term lease on the other 2/27ths, and accordingly, a recovery by the incompetent will leave Waialua as the owner or lessee of an undivided two-thirds interest *and as a tenant in common in possession of the whole of the Holt tract.* Waialua's ownership of the 16/27ths and the lease of 2/27ths is not challenged in any way. Its right to possession of all of the Holt tract, with the improvements, is not challenged in any way. It may

continue its plantation operation with all the physical advantages it had in the past. It will, of course, be required to pay rent to the incompetent as it is now paying rent to the owners of the outstanding 2/27ths interest which it has under lease, but that fact in no way disturbs the operation of the "unified plantation", with its interlocking roads, water system and railways. We may point out that there is no claim by Waialua that its occupation of the Holt area has not been a profitable one. There is no claim that the enterprise will be crippled for lack of finances if it must pay rent to the incompetent for occupation of the property which it thought it had purchased. It appears from the record that Waialua has built this enterprise largely out of the profits made from this plantation (R. 1272-1278). It admitted at the trial that even after charging off the improvements to expense, there was a profit for each year. We fail to see any inequity in requiring a co-tenant who wishes to occupy the land to the exclusion of the other co-tenant to pay a reasonable rental therefor, and *this is all that the decree of the Circuit Court of Appeals exacts from Waialua.*

The possible result of a subsequent partition.

The decree attacked restores the incompetent's one-third interest, and she then will be a tenant in common with Waialua of the Holt area. She or Waialua will then have a right to seek partition of the property if either of them wishes to divide their interests. A reference to Exhibit S-3 (original transmitted with record, R. 838), a copy of which is attached to Waialua's opening brief and which consists of a map of the plantation, will show the division of the area into sugar and pineapple lands, respectively.

The sugar land is colored yellow and the pineapple land is colored red. As heretofore stated, 6476 acres of the Holt land are pineapple lands, and 1623 acres of the Holt land are sugar lands. The remainder—about 5851 acres—consists of waste, forest or water lands. All of the pineapple lands are leased to the Hawaiian Pineapple Company under a long term lease. The incompetent through her guardian has ratified this lease (R. 536) and its validity is not involved and cannot be questioned. All of the improvements made by Waialua, both on and off the Holt lands, to develop its vast enterprise, have been made either on the sugar area itself or on land owned by Waialua and not involved in this action. With minor and inconsequential exceptions, the whole $1,000,000 Waialua talks about having spent was spent for improving property other than the pineapple area. Under the law of Hawaii (Revised Laws of Hawaii, 1935, Sec. 4736), the Court may, in a partition suit, take account of the fact that one co-tenant has placed improvements on the property and

> "* * * set apart any particular portion or portions of land to any particular party or parties who by prior occupation or improvements or otherwise may be equitably entitled thereto, to make proper adjustments for equalization thereof by sale of other portions and the application of the proceeds for such purpose, or as a condition of any such partial allotment to require payment by such parties of any value of the portion so set apart to them in excess of their proportionate interest in value of the whole property * * *."

The decree attacked requires the incompetent to pay Waialua one-third of the value of all the improvements placed on the property since the date of the deed and

prior to the demand upon which this action was predicated, in addition to repaying the purchase price with interest. A reference to Exhibit S-5 (R. 1507) will show that at cost the amount to be paid for improvements (including those abandoned) will be, roughly, $150,000. The repayment of the purchase price, with interest as directed, will be in excess of $80,000. The total payment to be made by the incompetent to Waialua, if the value to her land of her share of the improvements thereon should approximate their cost, will be in the neighborhood of $230,000. She will then have an undivided one-third interest in the whole Holt tract, both land and improvements. Should a partition suit be brought in the future, it is entirely within the realm of possibilities that the Hawaiian Court would, under the statute which gives it broad powers, make an allotment to the incompetent of her one-third of the lands entirely from the pineapple area. One-third of the entire Holt area would be a little less than 4700 acres. There are, as stated, about 6500 acres of pineapple land. From the rental values fixed for these respective areas by the trial Court (sugar land $14 per acre, R. 173; pineapple land $15 per acre, R. 167, 508, 522)—and Waialua has raised no question of the correctness of these findings in any Court—it would appear that the per acre value for the two types of land is about the same. It would, of course, be necessary to compensate the incompetent in land or money for her share of the improvements on the sugar area which she will have paid for under the decree, but there is both adequate land and money for this to be done. Waialua having made its vast development on the sugar lands or on its own lands for use on the sugar lands, such a division *would*

not in any way disturb its plantation operation. Nor would it disturb the Hawaiian Pineapple Company, which, as stated, holds a lease on the pineapple area, since that lease has been ratified and approved in this case by the incompetent's guardian. It would mean only that the incompetent, and not Waialua, would receive the rents thereafter paid under that lease for her share of the property.

The restoration awarded has been complete.

We submit that not only has the decree effected restoration completely, but under the law of Hawaii Waialua is fully protected from any exercise by the incompetent, in an inequitable manner, of the rights restored to her. It must be assumed that a Court of Equity in a subsequent partition suit would do the just and proper thing. It might not believe that the division which we have referred to was proper and we do not wish to be understood as saying that complete equity could be done to the incompetent by such a division. That is for the Hawaiian Court to decide if and when the question arises. All we do say is that it lies well within that Court's power, in dealing with a division in this case, to leave Waialua's plantation operation completely untouched. There is no force, therefore, in Waialua's attempt to paint its plantation as a vast integrated domain that would all but crumble if the instruments were all canceled upon the terms directed by the Circuit Court of Appeals.

Waialua's contention with respect to restoration of status quo, when analyzed, comes merely to this: That, if the transactions are now set aside, Waialua, although fully reimbursed for everything that it has paid to or for

the incompetent, will lose the benefit or profit of its bargain. But it is not entitled to that benefit if the bargain itself cannot stand.

Inaccuracies in the discussion regarding the plantation development.

Before concluding the reply to this section of Waialua's brief dealing with the plantation development, we desire, for the purpose of accuracy, to correct certain of the statements and inferences made by Waialua concerning this subject, and therefore make the following comments:

1. Waialua, at page 22, refers to Exhibit S-3, the map attached to its brief, as being drawn to scale and depicting the Waialua property and the Holt land. In fact, the map does not show all of the Waialua plantation of 49,000 acres, but only a part of it, and thereby the Holt land enclosed in heavy green lines appears to be the greater portion of the plantation. In fact, the Holt land is only 14,000 acres out of a total of 49,000—about 28% of the whole. (Waialua Op. Br. p. 23.) The exaggeration might be confusing in considering the question of status quo, and we therefore point it out.

2. Waialua states, at page 31, that it "increased its work of improvement * * * after the death of Mrs. Christian's father in 1922". There is no support for this statement in the record if it is meant to imply that the rate of expenditure for improvement was increased relying on the title purchased from the incompetent. The record shows (Exh. S-5; R. 1507) that the average annual expenditure before Waialua bought the incompetent's interest, and after it took possession under the 1905 lease, was about $36,000, and that the average annual expendi-

ture after it bought the interest to the date of the demand upon which this suit was brought was about $25,000.

3. In reciting the cost of the improvements made, Waialua, at page 32, and again at page 79, refers to the Wahiawa Reservoir and Ditch, and the impression is created that the expenditure for this improvement was made on the strength of the purchase from the incompetent. This is not so. Its own testimony (R. 1242) is that the reservoir was originally completed in 1906. It could hardly have been relying on the purchase from the incompetent in 1910 of an undivided one-third interest in the Holt land in making this expenditure, which was made on a parcel of property lying outside the Holt area. Incidentally, the Wahiawa Dam was in course of construction before the lease of 1905 was made (R. 1242, 1515), and so this enterprise can hardly be said to have been undertaken in reliance on the lease.

4. Waialua states, at page 36, that it made a lease in 1923 to the Hawaiian Pineapple Company covering some 6476 acres of the Holt land, believing that it was the owner of the incompetent's one-third interest. If this statement is designed to suggest that this lease is an impediment to restoration to status quo, there is no merit in it because the incompetent has in this suit elected to ratify and adopt that lease (R. 536). The Hawaiian Pineapple Company will in no way be disturbed. As to the further suggestion that Waialua purchased a one-third interest in the Hawaiian Pineapple Company believing it owned the incompetent's undivided one-third interest in the Holt land, the record will show (R. 518) that the incompetent attempted to trace the funds obtained by

Waialua in the form of a paid-up rental from the Hawaiian Pineapple Company for this lease and to accept the incompetent's proportion of these shares instead of her proportion of the paid-up cash rental. Waialua successfully resisted this attempt before the trial Court. Apparently Waialua considered it had made a good trade in buying shares of the Hawaiian Pineapple Company with its paid-up cash rental; otherwise it would have been glad to let the incompetent have her share in stock instead of cash.

5. Waialua states, at page 37, that the twenty-two persons listed at page 977 of the record would have given "valuable testimony" in this case, but that they were dead or otherwise unavailable at the time of trial. The stipulation to which reference is made is merely that the named persons "who otherwise might have been witnesses", were unable to testify (R. 976). There is no agreement, or evidence, that their testimony would be valuable.

6. Waialua, at page 36, states that it abandoned improvements costing $16,800 to make the lease to the Hawaiian Pineaple Company. It fails to state that it made a fair lease, which the incompetent has been glad to ratify. It by no means lost on the transaction, and under the decree of the United States Circuit Court of Appeals, if the trial Court believes that the improvements enhanced the value of the Holt land the incompetent is required to pay her share thereof.

7. Waialua refers, at pages 37 and 38, to missing documents. Some of them are referred to apparently to cast doubt on Eliza Christian's incompetency. This, how-

ever, is now conceded by Waialua. As to the writings having to do with this case, it is quite interesting to realize that in large part the transaction involving the 1910 purchase, including a copy of the agreement between Castle and Holt dated April 15, 1910, providing that Holt should undertake the purchase of the incompetent's share for Waialua, was developed from documentary evidence obtained on subpoena from Waialua's own files (R. 905, 1011).[39] Surely these documents must have been authentic, since they were obtained from Waialua's own records.

8. Waialua, at page 79, states that it is obvious that it would not have made the improvements on the Holt land if it had not believed it owned the incompetent's undivided one-third interest. It is not obvious at all, or perhaps even the truth, because regardless of the questioned instruments Waialua was a co-tenant in possession during the period up to 1922, holding a lease on or owning, independent of the incompetent's interest, the complete existing interest in possession, and from 1922 to the date of the commencement of the action holding under lease or owning, independent of the incompetent's interest, an undivided 18/27ths interest. Having such title and such rights in possession, it is, we submit, not at all obvious that they would not have developed the property, but, on the contrary, we believe it is obvious that they would have been interested in improving it.

9. Waialua, at page 89, refers to the cost of clearing the land. This was done prior to the date of the deed of 1910 and pursuant to the terms of the lease of 1905, and

39. See Opening Brief of Eliza R. P. Christian, at pp. 30 to 47.

Waialua has had the benefit of occupying the land and using it in its cleared condition for the whole of the lease term, which expired in 1930.

The fluctuation in land values is no impediment to cancellation.

Waialua contends, at pages 89 to 96, that the land has increased in value and that this fact makes it impossible to effect restoration. We do not doubt that land values in Hawaii, as elsewhere, have increased since 1910. Moreover, as heretofore pointed out, the improvement in the incompetent's title by the death of her father in 1922 has, of course, increased the value of her interest. There is, however, no support in the record, or out of it, so far as we know, for Waialua's statement that "her counsel says (it) is worth millions". The Supreme Court of Hawaii (R. 294), as Waialua points out, decided, and correctly, that fluctuations in values of the subject matter of a sale is no impediment to restoration on cancellation.[40]

In support of its argument, Waialua cites several cases.[41] Such of these cases as touch the question of changing values turn upon the proposition that the recovery is barred by laches. As we pointed out earlier in the brief (supra, p. 5), all question of laches is out of this case for two reasons: (a) that laches is a question of fact,[42] which has been decided in favor of the incompetent by

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40. *Neblett v. Macfarland* (1876), 92 U. S. 101, 23 L. Ed. 471; *Cohen v. Ellis* (1885, N. Y.), 16 Abbott's N. C. 320.
See also: *Felt v. Bell* (1903), 102 Ill. App. 218, 68 N. E. 794.

41. *Felix v. Patrick* (1892), 145 U. S. 317, 36 L. Ed. 719; *Wetzel v. Minnesota R. R. Transfer Co.* (1898), 169 U. S. 237, 42 L. Ed. 730; *Grymes v. Sanders* (1876), 93 U. S. 55, 23 L. Ed. 798; *Capps v. Clark* (1923), 196 Iowa 758, 195 N. W. 372; *Hanner v. Moulton* (1891), 138 U. S. 486, 34 L. Ed. 1032; *Twin-Rock Oil Co. v. Marbury* (1876), 91 U. S. 587, 23 L. Ed. 328.

42. *Townsend v. Vanderwerker* (1895), 160 U. S. 171, 40 L. Ed. 383.

each of the three lower Courts (trial Court, R. 157-8; Supreme Court of Hawaii, R. 308; Circuit Court of Appeals, R. 1605); and (b) the point was not made in Waialua's petition for certiorari. To this we add that laches *never* operates against an incompetent,[43] and Eliza Christian admittedly has been incompetent all of her life.

The cancellation of the lease of 1905 presents no difficulties with respect to restoration.

The substance of Waialua's argument (pp. 96 to 102) is that since the lease was fair and Waialua had no knowledge of the incompetency, cancellation should not be ordered. From the facts within the record, we accept the statements that the lease was fair, and that Waialua did not have knowledge of the incompetency when it made the bargain in 1905. However, we do not concur in the conclusion of law that Waialua reaches. It is again asking for the application of the English rule to the exclusion of the whole body of American common law. The quotation (pp. 98-99) from the opinion of the Supreme Court of Hawaii shows clearly that that Court applied the English rule in so far as the lease was concerned. The important question is not whether the lease was fair, but, Eliza Christian being incompetent, whether status quo within the meaning of the term can be restored in its cancella-

43. *De La Nux v. Houghtailing* (C.C.A. 9, 1921), 269 Fed. 751; *Bradley v. Singletary* (1912), 178 Ala. 106, 59 So. 58; *Taylor v. Colley* (1912), 138 Ga. 41, 74 S. E. 694, 696 et seq.; *People v. Johnson* (1914), 161 App. Div. 625, 146 N. Y. S. 977, 979; *Holman v. Randolph Nat. Bank* (1924), 98 Vt. 66, 126 Atl. 500, 502; *Van Buskirk v. Van Buskirk* (1893), 148 Ill. 9, 35 N. E. 383, 386; *Crowther v. Rowlandson* (1865), 27 Cal. 376; see also: *Pomeroy's Equity Jurisprudence* (4th Ed.) § 1451; 6 *A. L. R.*, at p. 1689; *Hervey v. Rawson* (1895), 164 Mass. 501, 41 N.E. 682; *Finney v. Speed* (1893), 71 Miss. 32, 14 So. 465; *Bourne v. Hall* (1872), 10 R. I. 139; *Funk v. Wingert* (1919), 134 Md. 523, 107 Atl. 345, 6 A. L. R. 1686; *Wolf v. U. S.* (S.D. N.Y. 1935), 10 F. Supp. 899; *Shambegian v. U. S.* (D.R.I. 1936), 14 F. Supp. 93.

tion. As heretofore pointed out, all three Courts so found, and it appears clearly that they were correct.[44] Waialua paid nothing to the incompetent for or under the terms of the lease. Her title was merely contingent until 1922, and before that date the 1910 deed was obtained from her. The lease term had about two years to run when the suit was filed in 1928. It had expired before the entry of the judgment of the trial Court in 1932, from which judgment the appeals were taken which have now reached this Court. Waialua then has had possession of the property for the full twenty-five years of the lease term. The only changes which are brought about by cancellation is that Waialua must pay as rental for the incompetent's interest the fair value of its use and occupation for the period of her ownership, namely, 1922 to 1930, instead of the rental called for under the lease. Waialua, in turn, is relieved of its commitment to the incompetent in the lease (R. 376-377) that all of the improvements placed on the Holt tract become the property of the lessors at the expiration of the lease in 1930. Restoration, as it relates to the lease, is simple.

Waialua suggests, at pages 100 and 101, that the incompetent seeks only to cancel a part of the lease as it relates to her, and cites *Goin v. Cincinnati Realty Co.*, 200 Fed. 252, as authority that she cannot do so. Waialua's premise is incorect, so its conclusion must fall. The incompetent seeks to cancel her commitments to Waialua, and Waialua's commitments to her under the lease in their

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44. The trial Court, with respect to the lease as well as the deed and the agreement of 1906, said (R. 526): "It is the conclusion of this court * * * that the equities in the case at bar are in favor of ordering a cancellation of * * * the lease of 1905 * * *. Substantial adjustment of the status quo is possible under the facts."

entirety. The decree of the trial Court and that of the Circuit Court of Appeals in directing a cancellation of the lease as to the incompetent sets the document aside completely. There is no force in Waialua's contention.

Cancellation of the 1906 contract presents no difficulties with respect to restoration.

Waialua argues, at page 102, that the 1906 contract was beneficial to the incompetent and that in cancelling it "no attempt is made to restore status quo". It will be noted that Waialua does not claim that the other contracting party was ignorant of the incompetency. The finding, which is confirmed by both Appellate Courts, is that Annie Kentwell, to whom this agreement ran, knew of Eliza's incompetency when she made the contract (R. 482-3; 491; 573; 1609). Clearly, the instrument is void. (*Kendall v. Ewert* (1922), 259 U.S. 139, 66 L. Ed. 862; *Kailikia v. Hapa* (1901), 13 Haw. 459.)

With respect to restoration, the only consideration received by the incompetent for or under this document was support from Annie Kentwell. Waialua does not claim that it provided any such consideration. The incompetent's liability to restore upon cancelling this agreement would, as the Circuit Court of Appeals pointed out (R. 1610) be to Annie Kentwell, if to anyone—not to Waialua. So far as Annie Kentwell is concerned, the judgment is final as to her and she is not complaining. The 1906 instrument cannot stand for two reasons: (1) it was made with one who had knowledge of the incompetency and is therefore void. Waialua accordingly took nothing thereunder (*German Savings & Loan Society v. DeLashmutt* (1895, 67 Fed. 399), and (2) even though it were not

void, but only subject to being set aside upon the incompetent effecting restoration, nothing passed from Waialua to the incompetent thereunder and the incompetent's duty to reimburse Annie Kentwell is not Waialua's concern and beyond that is out of the case.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS AMPLY SUSTAINED ON VARIOUS GROUNDS.

ANSWER TO WAIALUA'S POINT III.

In the brief in opposition to Waialua's petition for certiorari, three points, not two, were made in support of the decision upon grounds in addition to those upon which it was placed. They were: 1. That Waialua, through its agent Holt, had knowledge of the incompetency; 2. That the price was inadequate and that it was not received by the incompetent; and 3. That the questioned instruments were nullities. Waialua now seeks to answer the first two points. We accordingly confine our reply to those propositions.

Waialua, through its agent Holt, had knowledge of the incompetency in making the purchase of 1910.

Waialua states, pages 103-104, that in advancing this proposition we seek to overthrow the findings of the lower Courts. This is not correct. In our brief we rested our argument squarely on the findings, coupled with Waialua's stipulation made at the trial. Our only criticism of the lower Courts was, and is, that they failed to apply a recognized principle of law to the facts either admitted or found and abundantly supported by the record. The view expressed by the Supreme Court of Hawaii that Waialua did not have knowledge of the incompetency,

which was accepted by the Circuit Court of Appeals (R. 1605) is inconsistent with the conclusion of law which must follow from the findings of specific facts. The view of the Circuit Court of Appeals on the point is more accurately expressed in its opinion denying Waialua's petition for rehearing when it said (R. 1637):

> "Our opinion was reached on the assumption that the company did not have such notice. We treated it in that manner because both the court below and the trial court required restoration of the amount paid. This could not have been made under any theory of the law other than that the company did not have notice."

We will not repeat the argument made in our opening brief (pp. 30-47) that Holt was Waialua's agent, that he knew of the incompetency and that Waialua therefore had notice of the incompetency, but refer to that portion of our brief wherein the record is carefully referred to and the authorities collected. This is not a "technical" point, as Waialua suggests, unless that term is used to mean one legally sound. It stands on the well-established proposition that a principal cannot claim the benefits of his agent's acts and at the same time escape their burdens. (*Veazie v. Williams* (1849), 8 How. 134, 12 L. Ed. 1018.)

Waialua is not entirely accurate in saying (p. 105) that the trial Court interpreted its decision to include a finding that Waialua had no knowledge of the incompetency. The trial Court interpreted the remand order of the Supreme Court of Hawaii to foreclose the issue because that Court's finding was that Waialua did not have knowledge (R. 1478, 1479).

As to the burden of proof, we stand upon the cases cited in our opening brief.[45] It should not be forgotten that in addition to being incompetent Eliza Christian was selling an expectancy, and it is the rule, even in England, that the burden of proving fairness in this class of case is upon the purchaser if he would sustain the transaction.[46]

The incompetent has consistently taken the position that the burden of showing lack of knowledge is on Waialua if it would seek to avoid cancellation without restoration.[47] Waialua, in its third answer (R. 409), pleaded that it was a bona fide purchaser, but it offered absolutely no proof thereof. To the suggestion (p. 106) that "all Waialua's representatives were either dead or permanently incapacitated from testifying", may we point out that the president of the company, Mr. Tenney (R. 1479), Mr. Castle's associate attorney, Mr. Greenwell (R. 1349), and Waialua's General Manager who was in direct charge of land purchases during this period, Mr. Goodale (R. 1238), all testified in this case and none of them was asked whether he knew of Eliza Christian's incompetency.

45. Opening Brief Eliza R. P. Christian, p. 29, fn. 13.

46. Opening Brief Eliza R. P. Christian, p. 25, fns. 9, 10, 11.

47. Before the trial Court, "Petitioner's Opening Argument on the Facts", page 6, "to become entitled to receive back its purchase money with interest, this respondent must, however, do more than show it paid an adequate consideration. It must further show that the moneys paid were actually received by and enjoyed by the incompetent herself and that it had no notice or knowledge, constructive or actual, of her incapacity";

Before the Supreme Court of Hawaii, Brief for Petitioner Appellee, at page 153: "On the other hand, after mental incompetency has been shown and established, the burden is upon the other party to the transaction to establish all matters urged in an effort to avoid concellation such as perfect good faith, complete adequacy of consideration, that the benefit has been received and enjoyed by the incompetent, that there cannot be restoration to status quo, and the like";

Before the trial Court, on the remand proceeding (R. 1478): "Prior to the testimony of the following witnesses counsel for petitioner stated that he did not object to the reception of any evidence which might bear on the question of notice as to the mental condition of Eliza R. P. Christian."

Perhaps Waialua considered it to be the lesser of two evils to refrain from putting the question.

As to the evidence on the question of Holt's agency, we confidently refer to our opening brief[48] for a complete resume of the record which can lead to no other conclusion. It was admitted in Waialua's answer (R. 65-66) when it alleged that it "entered into an arrangement with said James L. Holt for the acquiring of a two-thirds interest in said lands * * * including the share and expectancy of said Eliza * * * and the interest owned by said James L. Holt and understood that said * * * Holt would and did * * * secure the conveyance of the interest of said Eliza * * * so that said interest might be united with those which he had acquired from his father * * *." The findings are clearly that Holt was the agent. The trial Court said (R. 112):

> "Stripped of verbiage and incidental issues * * * the amended petition, in the light of admissions made during the trial, alleges that on May 2, 1910 respondent Waialua Agricultural Company, Ltd. * * * procured a conveyance to be executed for its benefit by the petitioner * * *."

and again (R. 147):

> "What the suggestion would now be if Waialua Company had been content to deal with James L. Holt at arms' length after he, Holt, had acquired the rights of Eliza, is not the question before this court."

and again (R. 147-8):

> "In fact, the company * * * closed the transaction * * * using James L. Holt merely as a 'dummy' grantee."

48. Opening Brief Eliza R. P. Christian, pp. 30-47.

and again (R. 155):

> "The fact is that Waialua Company, in its haste to close the purchase, took direct charge of the transaction, and while attempting to preserve the form of a secondary position it in substance became the purchaser in fact. It does not qualify as a 'subsequent grantee'."

and again (R. 473):

> "It was nominally a deed to James L. Holt but he was simply an instrument in the securing of title by Waialua Company."

and again (R. 482):

> "That is, the May 2, 1910 transaction must always be considered with the fact that Waialua Company took over and completed as their own the negotiations of James L. Holt * * *."

Neither the Supreme Court of Hawaii nor the Circuit Court of Appeals in any way criticized these findings. They simply did not apply the legal principle of imputed notice to these facts and to the additional finding that Holt had knowledge of the incompetency. However, the stipulation made by Waialua at the trial is clearly an admission that James L. Holt was acting for it in the purchase. The record states (1061):

> "Counsel for Waialua then admitted that the purchase of May 2, 1910 was made originally for the benefit of Waialua Company and that the series of transactions subsequent thereto gave the respondent no different status than it had by virtue of the deed of May 2, 1910 * * *."

Counsel state the force of only the second half of the stipulation in their brief (p. 107).

There can be no question that Holt had knowledge of the incompetency during the very time he was arranging the purchase for Waialua, and accordingly the cases cited by Waialua,[49] that knowledge acquired by an agent long before the agency was created will not be imputed unless it is clearly shown that at the time he acted for his principal the knowledge was present in his mind, are not in point. Holt testified (R. 1014, 1009) that at the time of the transaction he knew she was incompetent. The trial Court so found, stating (R. 133):

> "Eliza's incompetency was known to James L. Holt * * *."

and again (R. 147):

> "Both he (Lawrence Kentwell) and James L. Holt at Honolulu must have known of Eliza's incompetency in fact * * *."

and again speaking of the 1906 contract (R. 481):

> "Approach this indenture from the fact that * * * Annie Kentwell transferred (if it could be transferred) to James L. Holt with knowledge of its infirmity."

and again (R. 482):

> "That is, the May 2, 1910 transaction must always be considered with the fact that Waialua Company took over and completed as their own the negotiations of James L. Holt * * * knowing and concealing a

49. 2 *Mechem on Agency* (2d Ed.), Sec. 1809; *Constant v. University* (1889), 111 N. Y. 604, 19 N. E. 631; *Equitable Securities Co. v. Sheppard* (1900), 78 Miss. 217, 28 So. 842; *The Distilled Spirits* (1871), 11 Wall. 356, 366, 20 L. Ed. 167.

> secret profit to James L. Holt and John R. Colburn, while these two at the same time knew of the mental condition of Eliza Christian."

and again (R. 492):

> "Also in May, 1910 Waialua Company * * * adopted the negotiations of James L. Holt, who knew of Eliza's incompetency * * *."

There was nothing "constructive" about Holt's knowledge of the incompetency, as suggested by Waialua (p. 109). These findings are in no way disturbed by the Supreme Court of Hawaii or the Circuit Court of Appeals.

Waialua seeks to avoid the force of these two unquestioned facts, namely, Holt's agency and his knowledge of the incompetency, by arguing (pp. 107-8) that Holt had "an adverse interest", which, it contends, excepts Waialua from the operation of the rule that it is charged with his knowledge. As we pointed out in our opening brief, Holt was compensated for his services, but this circumstance does not bar the operation of the rule. Agents always make a profit of some kind, and it is frequently contingent. Waialua does not cite a single case indicating that a contingent profit for the agent in the bargain has any such effect. The contingent benefit does not so operate.[50] We fail to see anything "dangerous", as Waialua argues (p. 110) in holding that it cannot claim the benefit

50. Restatement of the Law of Agency, Vol. I, Sec. 282, p. 627, wherein it is said:

> "b. *Meaning of 'acting adversely'.* The mere fact that the agent's primary interests are not coincident with those of the principal does not prevent the latter from being affected by the knowledge of the agent if the agent is acting for the principal's interests. The rule as stated herein is substantially similar to the rule stated in Secs. 235-236, dealing with the liability of a principal or master for the torts of his agent, and the Comment on those Sections is applicable.
>
> Illustration:
>
> 4. P appoints A to negotiate for Blackacre, agreeing to pay him a commission of 10 per cent. if he succeeds in persuading the owner to

of Holt's acts without accepting the burdens incident thereto, and believe the decisions of this Court in *Veazie v. Williams,* supra, and *Curtis v. United States* (1923), 262 U. S. 215, 67 L. Ed. 956, laid down the proper rule. Waialua's cases[51] do not impair the authority of those decisions.

Waialua is in error when it says (p. 106) that the agency point was not raised in the Supreme Court of Hawaii. It was pleaded in the complaint (R. 84-86), admitted in the answer (R. 103-104), stipulated to by Waialua (R. 1061), urged to the Supreme Court on Appeal, and even argued by Waialua in the Supreme Court.[52] Clearly, the point was raised in the Supreme Court of Hawaii.

The price was not adequate.

Waialua points (p. 111) to the finding by the Supreme Court that the price for the deed was adequate. We referred[53] to the finding of the trial Court (R. 159) that it was inadequate and submit that the trial judge who heard the evidence is better able to judge its probative value than the intermediate Appellate Court. Beyond that we submit that the reasoning of the trial judge is definitely

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sell it. In investigating the title, A discovers an equity held in it by T and, believing that the transaction will not be consummated if he reveals this equity to P, conceals his knowledge from P, who buys Blackacre upon A's favorable report. P is affected by A's knowledge."

51. *Allen v. Seckham,* 11 C. D. 790; *Bailey v. Barnes* (1894), 1 Chan. 25; *Wittenbrock v. Parker* (1894), 102 Cal. 93, 36 Pac. 374; *Trentor v. Pothen* (1891), 46 Minn. 298, 49 N.W. 129; *U. S. v. Detroit Lbr. Co.* (1906), 200 U.S. 321, 50 L. Ed. 499.

52. Brief for Petitioner-Appellee at p. 278:

"* * * nevertheless the knowledge of James L. Holt who, on the evidence was unquestionably acting for Waialua throughout the whole transaction of 1910, would be imputed to his principal."

Reply Brief of Waialua Agricultural Company, Ltd., p. 53:

"Nor is there the slightest foundation for the claim that James L. Holt, who with John F. Colburn was Waialua's vendor of the various interests in the property, was acting as its agent in the transaction of 1910."

53. Opening brief of Eliza R. P. Christian, p. 23.

better (R. 139, et seq.). Between 1899 and 1910, Waialua purchased seven undivided 1/27th interests from the various Holt heirs. Some were purchased at foreclosure sales—others were acquired in arms' length transactions. The trial judge refers to them in his discussion of values (R. 139, et seq.). We rest on his finding that the interest of the incompetent in 1910 was fairly worth $71,778.20, whereas Waialua paid only $30,000 therefor.

The incompetent did not receive the consideration paid by Waialua.

It was the incompetent's position in her cross-petition for the writ of certiorari, and was repeated in her opening brief herein, that Waialua should not recover the $30,000 paid for the deed, with interest, as directed by the Circuit Court of Appeals, because the finding is that she never received it.[54] Waialua answers this argument by saying (pp. 113-117) that the trial Court found that the incompetent did receive the consideration. The transcript references which Waialua gives do not bear it out. The trial Court found only that Waialua paid the money "to those who then had and continue to have charge of the petitioner" (R. 159); and later, referring to the consideration, said "which she never received" (R. 518). The Supreme Court said (R. 294) "that the grantor did not receive the consideration paid by the grantee"; and again (R. 301):

> "There are other considerations which confirm us in the view that it would be inequitable to permit the deed in question to remain uncancelled. One of these is that we believe from the evidence that Eliza never received the money that was paid for her interest. Another is

54. Cross-petition for Writ of Certiorari, p. 9.

that we also believe from the evidence that the disposal of her interest was not for her benefit."

Waialua states (p. 114) that the deed bearing the incompetent's signature recites a consideration and that that is a receipt showing payment of the purchase price. The incompetent's "receipt" is as invalid as the other instruments. She had no capacity to give a receipt. Without going into an involved discussion of the circumstances of the alleged payment, we concede that Waialua parted with the money, but we believe that the finding of the two Courts was correct that the incompetent never received it.[55] Before Waialua can recover the purchase price paid it must appear that the incompetent received it, and the finding is to the contrary regardless of any question of any difficulty that Waialua might have had with its proof. Such being the case, it should not be a condition to the cancellation that restoration of the $30,000 with interest, which now totals over $80,000, be paid to Waialua.[56]

CONCLUSION

We respectfully submit that as to the incompetent the lease of 1905, the contract of 1906 and the deed of 1910 should all be cancelled without requiring restoration of the purchase price paid by Waialua or the payment of the value of the improvements placed upon the property, and without any additional finding of incompetency in 1905.

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55. See offer of proof (R. 1343, and R. 1195, 1196).

56. *McKenzie v. Donnell* (1899), 151 Mo. 431, 52 S.W. 214, 151 Mo. 461, 52 S.W. 222; *Jordan v. Kirkpatrick* (1911), 251 Ill. 116, 95 N.W. 1079; *Hughes v. Cream* (1929), 178 Minn. 545, 227 N.W. 654; *Doty v. Mumma* (1924), 305 Mo. 188, 264 S.W. 656; 46 A.L.R. 416, at 429; 95 A.L.R. 1442, at 1446 and 1447.

and 1906 by the trial Court. We submit further that this Court should direct the entry of judgment herein in favor of the incompetent for the reasonable rental value of her interest since her title vested in 1922, which value has been found[57] by the trial Court (and the finding is not disturbed by either the Supreme Court of Hawaii or the circuit Court of Appeals nor questioned by Waialua) to be $677,005.75 for the period ending on the date of its decree, September 6, 1932, together with interest thereon from said date at the legal rate. We further submit that the direction of judgment for rents, as aforesaid, should be made without prejudice to the incompetent to proceed as she may be advised to recover in any later action for rents accruing for the occupation of her interest in the land from and after said September 6, 1932.

Dated, San Francisco, California,
September 29, 1938.

M. C. Sloss,
Charles M. Hite,
Attorneys for Eliza R. P. Christian,
An Incompetent Person.

Ed. D. Turner, Jr.,
Charles E. Finney,
Sloss, Turner & Finney,
Of Counsel.

57. Amount found due on September 6, 1932, after deducting $30,000 with interest at 6% from May 2, 1910 (R. 535) $606,785.75
Add: $30,000 with interest at 6% from May 2, 1910 to September 6, 1932 (R. 527) 70,220.00
Total $677,005.75

In the Supreme Court

OF THE

United States

Office - Supreme Court, U. S.
FILED
NOV 28 1938
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1938

No. 15

WAIALUA AGRICULTURAL COMPANY, LIMITED,
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, et al.

No. 17

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian,
Petitioner,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED.

PETITION OF ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON, BY HERMAN V. VON HOLT, HER GUARDIAN, FOR A REHEARING.

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In the Supreme Court
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United States

October Term, 1938

No. 15

Waialua Agricultural Company, Limited,
Petitioner,

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Eliza R. P. Christian, an incompetent person, by Herman V. Von Holt, her guardian, et al.

No. 17

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Petitioner,

vs.

Waialua Agricultural Company, Limited.

PETITION OF ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON, BY HERMAN V. VON HOLT, HER GUARDIAN, FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Eliza R. P. Christian, an incompetent person, by Herman V. Von Holt, her guardian, petitioner in No. 17 and respondent in No. 15, hereby, pursuant to Rule No. 33, makes application and petition for a rehearing of said causes and for a stay of the issuance of mandate pending action on the application for rehearing.

INTRODUCTION.

We do not seek to reopen any question regarding the scope of review by the Circuit Court of Appeals on appeal from the Supreme Court of Hawaii. In the opinion handed down on November 7, 1938, this Court lays down definitely and clearly the limits which shall confine Circuit Courts of Appeals in reviewing asserted errors of the Supreme Court of Hawaii, or the highest Court of any territory. It is declared that although, by virtue of the statutory right of appeal, the Circuit Court of Appeals "had complete power to reverse any ruling of the territorial Court on law or fact" (Op. p. 13), "this power should be exercised only in cases of manifest error" (Op. p. 13), or where there has been "clear departure from ordinary legal principles". (Op. p. 13.) This rule of federal action on appeals from territorial Courts has heretofore been deemed to apply only to questions of local law.[1] The extension of the rule to questions of gen-

1. *Matta v. Alonso Hermanos*, 300 U. S. 430, 432, cited at p. 13 of the Opinion.

eral law is recognized in the opinion (p. 13) as novel. It is rested on grounds of policy which are here applied to appeals from territories in analogy to the action of federal Courts on questions of state law, although the opinion notes (p. 13) that the 34th Section of the Judiciary Act, which was involved in *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, and which gives legislative sanction to the policy, is not applicable to territories.

Since we are not asking the Court to reconsider or to modify the enlarged or altered rule of decision on appeals from territorial Courts, we accept as final the determinations of the Supreme Court of Hawaii:

(1) That the lease of 1905 should not be set aside.

(2) That the incompetent should repay, or secure the repayment of, the purchase price of her one-third interest in the Holt lands as a condition to the cancellation, as to her, of the deed of May 2, 1910.

(3) That certain lands occupied by improvements, and certain other lands and rights-of-way should be reserved to Waialua.

Our sole attack is with respect to the instrument of 1906—to the holdings that the right to rents (other than under the lease of 1905) for Eliza's life passed to Annie Kentwell under that instrument and, more specifically, that such right was transferred by the deed of May 2, 1910 to James Lawrence Holt and through him to Waialua. The rulings of the Supreme Court of Hawaii on these points, and their acceptance by this Court, lead

to the result that the incompetent, while recovering an estate in fee in one-third of the Holt lands, can enjoy neither possession nor any beneficial fruits of her title during her entire life, and her recovery, therefore, gives her only an empty shell, without substance. If this follows the application of sound, or even tenable, rules of law, she must submit to the result, however unfortunate. If, however, as we contend, the conclusion rests on manifest and palpable error by the Supreme Court of Hawaii, she can be given relief, without in the slightest degree departing from the rule which this Court has laid down with respect to the weight, on appeal, of the rulings of the territorial Court.

We respectfully submit that we have not had an opportunity to show by argument that the holding of the Supreme Court of Hawaii that the right to rents during Eliza's entire life was transferred to Waialua through the deed of May 2, 1910 was manifestly wrong, indeed inconsistent with the holding of the Supreme Court of Hawaii that the instrument of 1906 did not assign or transfer "any interest in the land." We did not argue this point here—as we did in the Circuit Court of Appeals—because we relied on the repeated decisions of this Court that, on certiorari to the Circuit Court of Appeals, no questions other than those raised in the petition would be considered.[2] The rule was clearly restated as recently as May of this year in *Crown C. & S. Co. v. Ferdinand Gutmann Co.*, 82 L. ed. Adv. Op.

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2. *Washington V. & M. Coach Co. v. National Labor Board*, 301 U. S. 142, 146; *Morehead v. New York*, 298 U. S. 547, 604, 605; *Clark v. Williard*, 294 U. S. 211, 216; *Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240, 242.

835, and in *General Talking Pictures Corporation v. Western Electric Company*, 82 L. ed. Adv. Op. 843.[3]

A glance at the petition of Waialua for certiorari will show that the statement "of the matter involved and the reasons relied on for the allowance of the writ"[4] was directed exclusively to the holdings below with respect to the lease of 1905 and the deed of May 2, 1910. The instrument of 1906 is not mentioned in the petition or in the supporting brief.

We make two points:

1. That if this Court is free to review the decision of the Circuit Court of Appeals on a question not raised in the petition for certiorari, the Supreme Court of Hawaii committed clear and manifest error in holding that the incompetent has lost, and Waialua has acquired, the right to all rents to accrue from the land during the life of the incompetent.

2. That, under the rules and decisions of this Court, the decision of the Circuit Court of Appeals on the construction of the instrument of 1906 is not open to review here.

Either of these points would lead to the same result, i. e, the establishment of the right of the incompetent to recover rents from and after April 1, 1930.

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3. The order for rehearing in the *General Talking Pictures* case was expressly limited to "the first two questions presented in the petition", 82 L. Ed., Adv. Op. 1045.

4. Rule 38.

I.

THE HOLDING OF THE SUPREME COURT OF HAWAII THAT THE DEED OF MAY 2, 1910 TRANSFERRED TO HOLT, AND THROUGH HIM TO WAIALUA, THE RIGHT TO RENTS TO ACCRUE FROM WHATEVER SOURCE FOR ELIZA'S LIFE IS MANIFESTLY WRONG.

In presenting this point (which, as stated above, we have had no opportunity to argue before) we assume, for the purpose of the argument, the correctness of the holdings of the Supreme Court of Hawaii regarding the construction and the legal effect of the instrument of 1906. We insist that, if those holdings are right, it inevitably follows that the further holding that the right to rents after 1930 passed to Holt by the deed of May 2, 1910 is clearly wrong.

The decision of the Supreme Court of Hawaii with respect to the instrument of 1906:

The Supreme Court decided not one, but three, important questions with respect to the instrument of 1906.[5] They were:

(1) That, in the words of this Court (Op. p. 9) "The construction of the contract for maintenance of 1906 was that it covered rents, issues and profits, payable to the incompetent not only from the lessee under the 1905 lease but also 'the rents accruing thereafter from whatever source' ".

(2) That "if the instrument of 1906 was a conveyance of any interest of Eliza's in the land, it was invalid for lack of her husband's written consent", under Section 2993, R. L. of Haw. 1925 pro-

5. *Christian v. Waialua Agricultural Company, Limited*, 33 Haw. 34, 50-51.

viding that "no sale or mortgage of" a wife's "real estate shall be valid without the written consent of her husband".[6]

(3) That the transfer of the right to rents during the lifetime of the transferor did not transfer any interest in land.[7]

Only the first of these holdings is mentioned in the opinion of this Court. The other two are vital to a consideration of the point urged by us.

Granting that the construction placed on the instrument was correct, or even tenable, it is clear that holding (3), i.e., that the instrument conveyed no estate or interest in the land, was essential to the upholding of its validity. Without that holding the instrument would, as the Supreme Court itself declared, have necessarily been invalid for want of the husband's consent. The conclusion that the incompetent is not entitled to rents after 1930 can only rest upon the determination that the instrument of 1906 transferred no estate or interest in the land.

Accepting as controlling, for the purposes of the present argument, the determination that no interest in the land passed to Annie Kentwell by the instrument of 1906, we look to the deed of May 2, 1910 to ascertain whether the right to rents (other than under the lease of 1905) could on any possible interpretation have properly been

6. The declaration that the instrument is not valid as a conveyance of an estate or interest in the land is incorporated in the decree also. (R. 655.)

7. The Supreme Court of Hawaii (33 Haw. 34, 50-51; R. 568-9, argues this proposition at considerable length, and states, at least four times, that the instrument of 1906 does not evidence an intention to convey, and that it did not convey or transfer any interest in the land.

held to have been included in the description or designation of what was conveyed or transferred by Annie Kentwell to Waialua.

The only document through which Waialua claims to have succeeded to Annie Kentwell's rights is the deed of May 2, 1910. There is no other instrument of transfer purporting to carry with it any rights assigned by Eliza to Annie Kentwell. Starting with the necessary premise that the instrument of 1906 assigned to Annie Kentwell all rents to accrue from the land during Eliza's life, *but did not transfer or convey any interest in the land,* the question, then, is what, if anything, other than an interest in the land, did the deed of May 2, 1910 convey or transfer? We submit that the only tenable answer is that the deed transferred Eliza's right to rents under the lease of 1905, and nothing more.

The deed of May 2, 1910:

We have attached hereto an Appendix, containing a copy of the deed (omitting certificates of acknowledgment), and for more convenient reference have numbered the lines of the copy.

We venture, with all deference, to suggest that, in considering the language and effect of the deed, this Court apparently did not have in mind the vital circumstance that, under the unassailed, and now unassailable, ruling of the Supreme Court of Hawaii, the instrument of 1906 did not convey (and consequently Annie Kentwell did not own) any interest in the land. The omission to consider this ruling was, as we have pointed out, due to the fault (if fault it was) of counsel in assuming that the construction

placed by the Circuit Court of Appeals on the instrument of 1906 was final on certiorari here, and to the consequent failure to argue the point now presented.

The deed of May 2, 1910 has all the familiar characteristics of an instrument conveying an interest in real estate. We find in it the designation of the parties as "grantors" and "grantee", recital of the consideration, operative words of grant ("give, grant, bargain, sell and convey"), description of the land conveyed, habendum and tenendum clause, and covenants of good title, of right to convey, against encumbrances, of warranty, and for further assurance.

By the deed, the grantors grant, bargain, sell and convey to the grantee a one-third interest in the Holt lands, that interest being the one-third devised by the will of R. W. Holt to John D. Holt for life with remainder to his heirs.[8] The conveyance is declared to be "subject" to two instruments, (a) the deed of trust from James L. Holt to Colburn, and (b) the lease of 1905 to Waialua.[9]

So far, the instrument is unquestionably a conveyance of interests in land, and nothing else. It did not purport to carry, and did not carry, any right which was not an interest in land, such as the right to rents (after the term of the lease, from any source, during Eliza's life).

Following the declaration that the conveyance is subject to the deed of trust and the lease, the deed declares that the grantors assign and set over to the grantee

8. Deed, lines 40 to 43, lines 86 to 89.
9. Deed, lines 46 to 52.

"all claims and demands which they may have arising out of either of said instruments or in any other way" against James L. Holt, Colburn, or Waialua Agricultural Company, Limited.[10]

The question under consideration is whether, by this language—and there is none other in the deed which bears upon the question—Annie Kentwell assigned to Waialua "all rents, issues and profits from the land * * * which have accrued or will accrue to Eliza R. P. Christion * * *, from whomsoever due * * * until the end of the natural life of * * * said Eliza * * *", as held by the Supreme Court of Hawaii in its opinion[11]—and decree[12]—a holding sustained by this Court.[13]

In this inquiry the references to the deed of trust and to claims or demands against James L. Holt, or his trustee, may be disregarded as entirely irrelevant because (a) the deed of trust covered only the life estates of James R. Holt, father of James Lawrence, and of John D. Holt, Eliza's father, both of whom died during the term of the lease of 1905, and (b) neither James L. Holt nor Colburn had any interest whatsoever in rents to accrue to Eliza after the vesting of her one-third remainder on the death of her father, and Annie Kentwell did not, and could not, have or assert any claim or demand against either of them with respect to such rents. The clause ("assigning and setting over to the said grantee all claims or demands which they may have

10. Deed, lines 56 to 61.
11. 33 Haw. 34.
12. R. 655.
13. Opinion, p. 14.

* * *") should therefore be considered as if the lease of 1905 were the only instrument to which it makes reference, and the only claims and demands assigned were claims and demands against Waialua.

The clause in question, under any possible interpretation, purported to assign only claims and demands existing against Waialua at the date of the deed—May 2, 1910. No such claims and demands then existed except claims and demands under the lease of 1905. What the grantors assigned was claims and demands arising under the lease, or in any other way, "which they may have" against Waialua. The phrase "which they may have" is in the present tense. It describes claims and demands then in existence, and those only. Any claim for rents, issues and profits which might arise in the future, independently of existing contractual or other relations between the parties, was not included in "claims and demands which they may have".

Waialua had, in 1910, no claim or right to the possession of this one-third interest in the Holt lands except under the lease of 1905. Any claim of Eliza or of Annie Kentwell, as her assignee, against Waialua, or any other possible occupant, for rents after the expiration of the lease, would be a new and after acquired claim, springing into existence from an occupancy or possession originating for the first time after the rights of Waialua under the lease should have terminated.

Without wishing to labor the obvious, we suggest an illustration to demonstrate that the words "claims which they may have" do not cover claims which may come

into being in the future. If A should execute a paper releasing B from all claims and demands of every nature which A "may have" against B, or should execute an assignment to C of all such claims, and B should, one or five years thereafter, borrow money from A, giving his promissory note therefor, or if B should negligently injure A or his property, could it conceivably be held that the right of A to maintain an action on the note, or to recover damages for the tortious injuries, had been released or assigned?

There is abundant and uniform authority to the effect that after acquired property or rights are not transferred by an instrument where there is no intention apparent from the instrument to convey such property or rights.[14]

That the words "which they may have" do not indicate any such intention is not only apparent on their face, but is demonstrated by comparison with other parts of the deed, where, when it was intended to convey interests in the land which might be acquired in the future, language was used which expressly declared the intention to convey such after-acquired interests. Thus, the deed declares[15] the intention of the grantors to convey all their interest in, or which they or either of them may acquire, in said lands, and particularly every interest which they or either of them "may now have or may hereafter acquire * * *". The draftsman of this deed was evidently familiar with the distinction between

14. 18 C.J. 292, and many cases cited.
15. Deed, lines 34 to 38.

words of present transfer and words necessary to transfer an after-acquired interest. In the clause last referred to, declaring the intent to convey the interest of the grantors in the land, we find not only words of present transfer, substantially identical with the words defining the claims and demands transferred, but a declaration, twice repeated, of an intention to convey the interest which the grantors or either of them "may hereafter acquire". Under familiar and well-settled rules, the words of assignment of "all claims and demands which they may have" could not, without "clear departure from ordinary legal principles", be held to transfer any rights beyond those which the grantors or any of them then had against Waialua.

In another particular, the holding of the Supreme Court of Hawaii that the deed of May 2, 1910 transferred the right to rents, issues and profits "from whomsoever due" is manifestly unwarranted by the language of the instrument. The only rights, claims and demands assigned are claims and demands *against Waialua*. The transfer cannot cover claims for rent against a future occupant other than Waialua. It is quite possible that Waialua may, during Eliza's life, part with or lose its right of possession, through partition, sale or otherwise.

The necessary conclusion, then, is that rents after 1930 did not pass by the deed of May 2, 1910, because that deed does not purport to transfer anything but (a) the interests of the grantors in the land—and these rents were not an interest in the land—and (b) rights against Waialua under the lease of 1905.

The conclusion just expressed not only rests on the plain language of the deed, but it is in harmony with the true intent of the parties to that instrument. The deed of May 2, 1910 refers several times to two specific instruments—the Colburn deed of trust and the 1905 lease. It does not mention the 1906 instrument. The omission is significant. Holt, in purchasing, and the Kentwells in selling, Annie's rights and claims for $5,000, had no thought or intention of transferring any right to rents for Eliza's life. Negotiations between these parties were entirely by letter or cable. The correspondence shows clearly that the right for which Annie demanded and received $5,000 was her asserted right to monthly payments from Colburn, as owner in trust of the life estate which had been conveyed by John Dominis Holt to James Lawrence Holt and by the latter to Colburn, trustee.[16].

We may assume that, in reviewing a decision of the Supreme Court of Hawaii, whether it involves the interpretation of a writing or some other question of law, the Circuit Court of Appeals or this Court will, in determining whether there has been "manifest error", view the determination of the territorial Court with liberality, but we submit that that liberality should not be stretched to such an extreme limit that the right of appeal given by the statute is rendered futile or virtually abrogated.

It should be added that, if the rights to rents after 1930 did not pass from Annie Kentwell to Waialua, that

16. Exh. D-5, R. 913; Exh. D-6, R. 915, at 916; R. 148, 151.

right now belongs to Eliza. Annie Kentwell was a party to the suit; the judgment of the trial Court declared the instrument of 1906 void and of no effect as between Eliza and her[17]; Annie Kentwell did not appeal from the judgment and it is final as against her. Furthermore, as between Eliza and Annie, Annie's position as assignee under the instrument of 1906 is devoid of any equity. She took with knowledge of Eliza's incompetency[18], and both Hawaiian Courts agreed that a transfer by an incompetent to a transferee with notice of the incompetency should be set aside as against the transferee.[19]

II.

THE CONSTRUCTION PUT UPON THE INSTRUMENT OF 1906 BY THE CIRCUIT COURT OF APPEALS WAS NOT QUESTIONED BY WAIALUA IN ITS PETITION FOR CERTIORARI, AND IS THEREFORE NOT A SUBJECT FOR REVIEW HERE.

We have already[20] cited a few of the many decisions of this Court holding that it will not, on certiorari, review any questions other than those specifically presented in the petition for the writ. Under the preceding heading of this petition, we pointed out that, because of our reliance on these decisions, we had not argued to this Court the questions which would arise if the instrument of 1906 were construed as purporting to assign to Annie Kentwell anything more than rents to accrue to Eliza under the lease of 1905. These questions are argued under heading I of this petition.

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17. R. 537.
18. R. 133, 481, 491.
19. R. 274, 537, 573.
20. Supra, pp. 4-5.

We now go further and respectfully ask this Court to apply here, as it has done so often, its practice of limiting the review on certiorari to questions raised in the petition for the writ.

The practice (which as indicated in *General Talking Pictures Corporation v. Western Electric Co.*[21] is an application of, or deduction from, Rule 38 of this Court) has not perhaps the force of an absolute rule of law. It is a rule established to facilitate the disposition of the Court's business. It may be described as a rule of policy, a policy closely analogous to that declared in the opinion in this case to govern the action of Circuit Courts of Appeals in reviewing decisions of territorial Courts. But, we submit, the rule should not be disregarded in a particular case unless there is strong reason for so doing and no such reason appears here. Adherence to the rule in this case would in no way weaken the effect of the opinion in defining the limits of the scope of review on appeals from the Supreme Court of Hawaii. It would merely apply the general doctrine that a party is bound in an Appellate Court by rulings below which he has not attacked. This Court has said, in a case coming to it on certiorari to a Circuit Court of Appeals: "This Court has the same power and authority as if the case had been carried here upon appeal or writ of error. A party who has not sought review by appeal or writ of error will not be heard in an appellate Court to question the correctness of the decree of the lower Court. This is so well settled that citation is

21. Supra, p. 5.

not necessary."[22] The application in this case of the rule contended for would merely apply the policy underlying Rule 38, without any departure from the policy which is held to require affirmance of the decision of the Supreme Court of Hawaii on the points brought to this Court for review.

The writ of certiorari is directed to the Circuit Court of Appeals, and it is the judgment of that Court which is here for review. The Circuit Court of Appeals held that the correct construction of the instrument of 1906 was that it transferred rents under the lease of 1905 only. In this respect it reversed the decision of the Supreme Court of Hawaii. That it had "complete power" so to do is declared by this Court.[23] It may have exercised this power or jurisdiction erroneously, but, if it committed error, its determination was still effectual, unless attacked by appropriate means of review.

Just as the petitioner for certiorari is not entitled to a review of questions not presented in his petition, so the adverse party will not be heard on additional and independent questions, unless he has also petitioned for certiorari.[24] This is a corollary to the rule limiting the scope of review on certiorari granted on the petition of one party alone. It is interesting to note that in the very recent case of *Kellogg Co. v. National Biscuit Co.*, Nos. 2 and 56, decided on November 14, 1938, after the

22. *Federal Trade Commission v. Pacific States P. T. Association*, 273 U. S. 52, 66.

23. Opinion, p. 13.

24. *Federal Trade Commission v. Pacific States P. T. Ass'n.*, supra; *Lloyd Sabaudo, etc. v. Elting*, 287 U. S. 329; *Alexander v. Cosden Pipe Line Co.*, 290 U. S. 484.

decision in the instant case, the Court applied the rule that on certiorari, where one of the parties did not petition for a writ, a question which that party sought to raise in this Court "is not here for review".

If the construction of the instrument of 1906 as a transfer of no more than rents under the lease of 1905 is final and conclusive here, the instrument of 1906 has no significance except as an assignment of rents under that lease. The lease having been held valid and all rights under it having been held to have passed to Waialua, nothing further is left upon which the instrument of 1906 can operate, and the incompetent is clearly entitled to rents from the date of the expiration of the lease, i.e., April 1, 1930.

CONCLUSION.

This petition, limited as it is to the single question whether the right to rents after April 1, 1930 has passed from Eliza to Waialua, may be granted, and the question determined, without the necessity for any reconsideration of the major rule of decision announced in the opinion herein, or of any of the propositions decided by the Supreme Court of Hawaii other than the single one affecting the operation or the effect of the instrument of 1906. Relatively minor amendments of, or additions to, the opinion already filed, would be sufficient to make the determination conform to what we, in all sincerity, maintain are the settled and proper rules to be applied. We ask

therefore that a rehearing, limited as above stated, be granted.

We further respectfully ask that, pending action on this petition, the issuance of a mandate be stayed.

Dated, November 25, 1938.

Respectfully submitted,

M. C. SLOSS,

CHARLES M. HITE,

Attorneys for Eliza R. P. Christian, An Incompetent Person, by Herman V. Von Holt, her Guardian.

SLOSS, TURNER & FINNEY,

Of Counsel.

Certificate of Counsel on Petition for a Rehearing.

I, M. C. Sloss, one of counsel for Eliza R. P. Christian, an incompetent person, by Herman V. Von Holt, her guardian, petitioner in the foregoing petition for a rehearing, herewith certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

M. C. Sloss,
Counsel for Petitioner.

Dated, November 25, 1938.

(Appendix Follows.)

Appendix

DEED OF MAY 2, 1910. (R. pp. 953-7.)

Know all men by these presents:
That we, John Dominis Holt, Widower, Eliza R. P. Christian, wife of Albert Christian, daughter
R.W.—V.C.
and of
of sole heir ~~and~~ said John Dominis Holt, Annie Holt Kentwell, and Lawrence K. Kentwell, husband of the said Annie Holt Kentwell, all now commorant at Oxford, in the County of Oxford, in the United Kingdom of Great Britain and Ireland, hereafter termed the Grantors, in consideration of the sum of Thirty-five thousand dollars ($35,000.00) to them in hand paid by James Lawrence Holt of Honolulu, in the Territory of Hawaii, in the United States of America, hereafter termed the Grantee, the receipt of which sum is hereby acknowledged, have given, granted, bargained, sold and conveyed and by these presents do give, grant, bargain, sell and convey unto the said James Lawrence Holt, the said Grantee, one undivided third part of interest in and to the following parcels of land and each of them namely:

1. Ahupuaa of Paalaa, being Apana 34 of L. C. A. 7713, R. P. 4475 to V. Kamamalu, containing an area of 12237 acres, more or less.

2. Ahupuaa of Wahiawa, being R. P. (Grant) 973, containing an area of 1942 acres, more or less.

3. R. P. (Grant) 235 to Jerome Topliffe and Louis Johnson, containing an area of 36 acres, more or less.

4. R. P. (Grant) 238 to J. F. Anderson and F. Davis, containing an area of 25.8 acres, more or less.

5. R. P. (Grant) 431, containing an area of 100 acres, more or less.

All of said lands being situated in the District of Wāialua, in the Island of Oahu and Territory of Hawaii aforesaid; intending hereby to convey all the interest of the said Grantors, whether present, prospective or in remainder, vested or contingent, of every name and descrip-

tion in and to said lands or which they or either of them may hereafter acquire in and to the said lands, and particularly every interest which the said Grantors or either of them may now have or may hereafter acquire under the Will of R. W. Holt, deceased, the father of said John Dominis Holt, and grandfather of said Eliza R. P. Christian and

R.W.—V.C.

not including Makaha

Annie Holt Kentwell,/ subject, however, to a certain Deed of Trust made by said James Lawrence Holt, the Grantee, to John F. Colburn, and to a certain lease dated the First day of April, one thousand nine hundred and five made by Carlos A. Long, Administrator and others including the Grantors herein, to the Waialua Agricultural Company, Limited, both of which instruments are of record in the Registry Office of said Territory but intending to convey all the rights of the Grantors and each of them against said Trustee and said Company and under said Deed and Lease the said Grantors assigning and setting over to the said Grantee all claims and demands which they may have arising out of either said instruments or in any other way against the said James Lawrence Holt the said Waialua Agricultural Company, Limited, or the said John F. Colburn, said Trustee, save and except the right to the personal estate of the said R. W. Holt which may be in the hands of said John F. Colburn, Trustee, it being the intention to convey all the interests of the Grantors in the estate left by said R. W. Holt or the property into which it

R.W.—V.C.

not including Makaha

has been converted/ with the exception of the said personal estate.

To have and to hold to the said James Lawrence Holt, the Grantee, his heirs and assigns, to his and their use and behoof forever.

The said Grantors, for themselves, their heirs, executors and administrators covenant with the said Grantee, his heirs, executors, administrators and assigns, that they have good title in and to the described premises; that they have good right to convey the same; that the same are

free from incumbrances, except as aforesaid; and that they will warrant and defend the same against the claims and demands of all persons, except as aforesaid; and that they and their heirs, executors and administrators will on demand of said Grantee, his heirs, executors, administrators or assigns, execute to him or them such instruments or instrument as may be necessary or by him or them deemed advisable at any time to perfect the title in the Grantee, his heirs, executors, administrators and assigns, in and to that portion of the estate of R. W. Holt devised by his Will to John Dominis Holt, and at his death to his heirs and assigns.

In witness whereof, the Grantors have set their hands and seals this second day of May one thousand nine hundred and ten, the said Albert Christian, husband of said Eliza R. P. Christian, joining in consent thereto by a separate instrument executed within said Territory of Hawaii.

John D. Holt
Eliza R. P. Christian
Annie Holt Kentwell
Albert Christian
Lawrence K. Kentwell

Witness David L. Withington
Witness to signature of Albert Christian
W. H. Chickering
Robert L. Coburn.

Due service and receipt of a copy of the within is hereby admitted

this _____ day of November, 1938.

_____

_____

Attorneys for Waialua Agricultural Company, Limited.

P. 13.

SUPREME COURT OF THE UNITED STATES.

Nos. 15, 17.—October Term, 1938.

Waialua Agricultural Company Limited, Petitioner, 15 *vs.* Eliza R. P. Christian, an Incompetent Person, etc., et al.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
Eliza R. P. Christian, an Incompetent Person, etc., et al., Petitioner, 17 *vs.* Waialua Agricultural Company, Limited.	

[November 7, 1938.]

Mr. Justice Reed delivered the opinion of the Court.

These cases concern the validity of a lease, a contract for maintenance and a deed, conveying or assigning rights of Eliza R. P. Christian, an incompetent, to a one-third undivided interest in land on the Island of Oahu, Territory of Hawaii.

The Supreme Court of the Territory of Hawaii in two opinions on separate appeals set aside the deed and refused to set aside the contract or lease. A decree was entered directing the reconveyance to the incompetent of her previously conveyed interest in the tract with adjustments for improvements.[1] The Circuit Court of Appeals for the Ninth Circuit refused to review the first decree on the ground that no final order had been entered.[2] Appeals were taken from the second decree by the incompetent and, after severance, by the Waialua Agricultural Company, Limited. The Circuit Court of Appeals reversed the Supreme Court of Hawaii and remanded the cause to that court with directions to remand to the trial court, with instructions to grant relief against the deed upon restitution of the consideration and to take further proceedings in

[1] Christian *v.* Waialua Agricultural Company, 31 Haw. 817; same *v.* same, 33 Haw. 34.

[2] Waialua Agricultural Company *v.* Christian, 52 F. (2d) 847.

respect to the issues concerning the validity of the lease and contract.[3] The petition for rehearing was denied. 94 F. (2d) 806. Certiorari and cross-certiorari were sought by the respective parties and granted by this Court to review the questions presented because of the action of the Circuit Court of Appeals in reversing conclusions of the Supreme Court of Hawaii as to applicable principles of law.[4]

The incompetent, Mrs. Christian, was born at Makaha in the Hawaiian Islands on December 30, 1885. She was brought to Honolulu by her father in the early 1890's. By 1901 they had gone to live with Mrs. Annie Holt Kentwell, a cousin and one of the nine children of Owen J. Holt. Except for short periods when the incompetent was in boarding school, they lived with her continuously thereafter. The incompetent's grandfather, R. W. Holt, had died in 1862 leaving a will which devised an equal undivided portion of the real estate involved in these cases to each of his three sons for life and then to the heirs of each in fee simple. One of these sons was John Dominis Holt, the father of the incompetent. The father was living at the time of the execution of the documents here questioned, dying in 1922.

That portion of the grandfather's estate involved in these cases consisted of approximately fourteen thousand acres of land. At the time of the first transactions here considered, one of the sons, Owen J. Holt, had died leaving nine children, each entitled to a one-twenty-seventh interest in fee simple in the tracts. A second son, James R. Holt, was living but had conveyed his life estate to his son, James Lawrence Holt. This son had also purchased the contingent remainder of his brother, Robert Holt and the life estate of the incompetent's father, John Dominis Holt. Subject to whatever risk there was that his father, James R. Holt, born in 1838, would have other children after 1905, James Lawrence Holt was, in the year last mentioned, the owner of a one-third interest in the property, plus the life estate of his uncle, John Dominis Holt, in another third. James Lawrence Holt had transferred all these interests to John F. Colburn as Trustee. The property in 1905 was "wholly uncultivated and covered with noxious weeds, including such well-known pests as lantana and *klu*. The taxes at that time were four years in arrears."

[3] Christian v. Waialua Agricultural Company et al., 93 F. (2d) 603.
[4] Matos v. Hermanos, 300 U. S. 429.

On March 17, 1905, the administrator *de bonis non* with the will annexed of R. W. Holt, several of the heirs of his son, Owen J. Holt, and the Hawaiian Realty and Maturity Company, Limited, executed a lease to the Waialua Agricultural Company, Limited, for twenty-five years at an annual rental of $9,000. The administrator was treated in this lease as having title to two-thirds of the whole. The owners of the contingent remainders, one of whom was the incompetent, joined with the lessors in covenanting that the lessee while paying said rent "shall peaceably and quietly hold and enjoy the use and possession of said demised premises . . ."

On the 31st day of August, 1906, the incompetent entered into a contract for maintenance with her cousin, Annie Holt Kentwell. This instrument evidenced an assignment of her title and interest in and to any and all rents, issues and profits due or payable under the above lease or "by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to demand, receive, collect and receipt for all such rents, issues and profits from whomsoever due during the term of" her natural life. The consideration for the contract was the assumption by Mrs. Kentwell of the support and maintenance of the incompetent. The instrument appears in a footnote.[5]

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[5] "THIS INDENTURE—made this 31st day of August A. D. 1906, by and between—ELIZA R. P. CHRISTIAN—(the only child and heir of John Dominis Holt, the elder) of Honolulu, Island and County of Oahu, Territory of Hawaii, of the first part, and—ANNIE HOLT KENTWELL—of the same place, party of the second part.

"WITNESSETH—Whereas the party of the first part has for many years last past been supported and maintained at the home of the party of the second part, and at the cost and expense of the said party of the second part, and

"WHEREAS—the said first party is the only child and heir of John Dominis Holt, the elder, being also a devisee under the Will of R. W. Holt, deceased, and is entitled in expectancy to a certain undivided interest or moiety in certain lands situate at Waialua, Oahu, now leased to the Waialua Agricultural Company, Limited, by lease dated the 17th day of March, 1905, and recorded in the Hawaiian Registry of Deeds in Liber , Folio, and

"WHEREAS—by virtue of being such heir of John Dominis Holt, the elder, and such devisee under the will of R. W. Holt, deceased, aforesaid, she, the said party of the first part, shall upon the death of him, the said John Dominis Holt, the elder, be entitled to her share of the rents reserved in said lease aforesaid, which share of said rents aforesaid is now enjoyed by her father, the said John Dominis Holt, the elder, and

"WHEREAS—the party of the second part has agreed to support and to maintain the party of the first part for and during the period of the natural life of her, the said party of the first part,

"NOW THEREFORE THIS INDENTURE WITNESSETH—That the said—ELIZA R. P. CHRISTIAN—in consideration of the premises and of One Dollar to her in hand paid by—ANNIE HOLT KENTWELL—of Honolulu aforesaid, the receipt whereof is hereby duly confessed and acknowledged and for other and

A deed was executed on May 2, 1910, in which the incompetent and her husband, Albert Christian, her father, John D. Holt, and Annie Holt Kentwell, and her husband, were parties grantor and James Lawrence Holt was grantee. This deed, in consideration of $35,000 conveyed "one undivided third part of interest" subject to the grantee's interest and to the lease of 1905. The deed evidenced the intention "to convey all the interest of the said Grantors, whether present, prospective or in remainder, vested or contingent, of every name and description in and to said lands or which they or either of them may hereafter acquire in and to the said lands." The deed further declared that the grantors assigned and set over to the grantee "all claims and demands which they may have arising out of either said instruments [i. e., the ones dealing with James Lawrence Holt's interests and the lease] or in any other way against the said James Lawrence Holt, the said Waialua Agricultural Company, Limited, or the said John F. Colburn, said Trustee" with exceptions not material here. The grantors further agreed to warrant the property conveyed against the claims and demands of all persons.

The grantee, James Lawrence Holt, and his trustee, John F. Colburn, conveyed the interest and rights acquired by this deed together with the other one-third undivided interest then belong-

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valuable consideration to the said—ELIZA R. P. CHRISTIAN—moving from said—ANNIE HOLT KENTWELL—, she, the said—ELIZA R. P. CHRISTIAN—, does hereby give, sell, assign, release, transfer and set over unto the said—ANNIE HOLT KENTWELL—, her heirs, executors and administrators, all her title and interest in and to any and all rents, issues and profits to which she may hereafter be entitled or which may be due and payable to her by, through or under the lease to the Waialua Agricultural Company, Limited, dated the 17th day of March, 1905, and recorded in said Liber Folio or by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to demand, receive, collect and receipt for all such rents, issues and profits from whomsoever due during the term of the natural life of her, the said—ELIZA R. P. CHRISTIAN—.

"AND—it is expressly agreed and understood between and by the parties hereto that the party of the second part shall support and maintain her, the party of the first part, for and during the natural life of said first part.

"AND—it is further agreed and understood by and between the parties hereto that in case the party of the first part shall survive the party of the second part, the heirs of said second party shall be entitled to perform the covenant of this agreement on the part of said second party to be kept and performed, and they shall during the life of said first party be entitled to the benefit or benefits thereof.

"IN WITNESS WHEREOF—the said—ELIZA R. P. CHRISTIAN—and—ANNIE HOLT KENTWELL—have hereunto set their hands and seals the day and year first above written.

ELIZA R. P. CHRISTIAN
ANNIE HOLT KENTWELL"

ing to James Lawrence Holt to other grantees. By successive conveyances the incompetent's property, covered by the deed of 1910, came into the ownership of the Waialua Agricultural Company, Limited, a defendant in the trial court.

Beginning at about the time when the tract came into the possession of Waialua under the lease, Waialua acquired, through various conveyances, fee simple interests of seven of the nine children of Owen J. Holt. When this action began in 1928, Waialua held in fee simple by color of title twenty-five twenty-sevenths of the property. Under the lease of 1905 it began to improve the property. The lease provided that the improvements would revert to the lessors. After the conveyances in 1910 of the life and remainder interests, covering two-thirds of the fee, Waialua made further important installations. Besides the fourteen thousand acres of the Holt lands, the Waialua plantation includes an additional thirty-six thousand acres. The properties are developed and operated as a unit,—9,904 acres in sugar cane, 11,625 acres in pineapple, the balance uncultivated or used for servicing the crop lands. The record shows a total expenditure of $630,722.12 for improvements on the Holt lands between April 1, 1905, and April 5, 1928, when Waialua was notified the deed was questioned. In addition reservoirs, ditches and other improvements, off the Holt lands but necessary for their use, have cost Waialua $514,594.94. No description is necessary other than to say that the improvements consist of reservoirs and ditches, roads, pumps, communication systems, camps, overseers' houses, and the other usual fixtures and appurtenances necessary for the operation of a large irrigated plantation.

After the lease had been in operation for a few years, it was found that some sixty-five hundred acres of the Holt lands were suitable for the growing of pineapples. After trying multiple subtenancy, an agreement was made in 1922 with the Hawaiian Pineapple Company giving it an option to lease all the Waialua pineapple lands at $15 per acre. Under the option Waialua invested over three million dollars in the Pineapple Company stock and the Pineapple Company leased 6,475 acres of the Holt lands for seventeen and one-half years from January 1, 1923, to June 30, 1940, with optional extension, at a paid up rental, reached by a 5% discount, of about two million dollars.

The mechanized scientific farming of the sugar cane and pineapple lands was profitable. The trial court found that $14 per

acre was a reasonable ground rent for the Holt land used for sugar production and that $15 per acre was a reasonable ground rent for the pineapple lands after the lease to the Hawaiian Pineapple Company of January 1, 1923. A less sum per acre was found as a reasonable ground rent for the pineapple lands prior to that time.

In 1926 the ward was for the first time declared incompetent and Annie Holt Kentwell was appointed her guardian in England. In 1927 Mrs. Kentwell's brother, George H. Holt, became guardian of the estate of the ward in Honolulu. The present guardian, Herman V. VonHolt, succeeded him *pendente lite*. On May 9, 1928, a petition was filed against Waialua and James Lawrence Holt in the Circuit Court of the Territory by the guardian alleging the incompetency of the ward on the date of the execution of the deed; and that the purported consideration was inadequate and was never received by the ward. No complaint was made of the execution of the lease or the contract for maintenance. It was alleged that Waialua induced James Lawrence Holt, the grantee in the deed, to secure the conveyance of the property through Holt's connection with Annie Holt Kentwell, the dominating influence over the incompetent. The guardian prayed for the cancellation of the deed and an accounting for the rental value of the undivided one-third interest from April 10, 1922, the date of the death of the ward's father. James Lawrence Holt appeared and admitted the facts relating to his part in the transaction.

The trial court on adequate evidence found that Eliza Christian was incompetent at the time of the execution of the deed of 1910; that her incompetence had not been adjudicated by a proper protective proceeding, was not "clearly self-evident to an entire stranger" but "was known to James L. Holt, to her father, John Dominis Holt, to the Kentwells and to others who were familiar with her dependency upon the Kentwells." The court found the price inadequate and that it was not clearly shown that Waialua Company had actual notice of the incompetency of Eliza. The decree set aside the deed and entered an award for $540,906.07 in rentals, after deducting the purchase price of $30,000 and interest.

On appeal the Supreme Court of Hawaii sustained the determination of the trial court as to the capacity of the incompetent at the date of the execution of the deed, finding that "she was a congenital imbecile." It assumed that the Waialua Company "had

no knowledge of Eliza Christian's incompetency." It held that the consideration was adequate; that there was no laches; and that limitation did not bar the proceeding. It affirmed the action of the trial court in setting aside the deed of May 2, 1910, upon a repayment to Waialua by the incompetent of the purchase price, with interest from May 2, 1910, on a balance of equities, a consideration of the advantages to the incompetent and a suggestion that the consideration did not reach the grantor. The decree of the trial court as to the recovery of the rentals was reversed on the ground that Waialua had succeeded to Annie Kentwell's rights under the contract of 1906 to receive and keep the incompetent's rentals during the term of the lease. Rentals beyond the termination of the lease were not involved in the first appeal. The case was therefore remanded to the trial court to determine the validity of the lease of 1905 and the contract of 1906.

On the remand the trial court found that Eliza was incompetent at the time of the execution of the contract, that Mrs. Kentwell knew of the incompetency and that Waialua was not an innocent purchaser from Mrs. Kentwell, since it knew of a secret profit, received by James Lawrence Holt and John F. Colburn in connection with the various conveyances by which Mrs. Kentwell's interests passed to Waialua, "while these two, at the same time, knew of the mental condition of Eliza Christian." In considering the lease of March 17, 1905, the court found that Eliza was incompetent when she gave her assent; but that while the "Waialua Company, . . . is not shown to have had any knowledge of this incompetency", a balance of equities required a conclusion against the validity of the lease. The decree again set aside the deed of May 2, 1910; awarded rentals in the total sum of $606,785.75; annulled the lease of March 17, 1905, in so far as it affected the incompetent; annulled the contract for support and maintenance of August 31, 1906, and gave to Waialua the right to continue in the exclusive use and occupation of reservoirs, pumping stations, irrigation ditches and other improvements until partition or other arrangements were agreed upon. Appeal was taken from this decree.

In its second hearing, the Supreme Court of Hawaii maintained its finding as to the incompetency of Eliza at the time of the execution of the deed of May 2, 1910. It assumed that the trial court was correct in finding Eliza incompetent at the time of the execution of the lease of 1905 and the contract for maintenance of 1906,

and accepted the finding of the trial court that Waialua was not shown to have any knowledge of Eliza's incompetency at the time it took the lease of 1905. It determined that the deed of May 2, 1910, passed the contract rights assigned to Annie by Eliza and that Waialua succeeded to these rights as an innocent purchaser for value. It further held that the incompetent received an adequate consideration for the lease of 1905. In effect it held that the assignment of 1906 was also for an adequate consideration already largely received. The contract "was beneficial to Eliza." "Eliza had no income or other means of support." "In entering into this contract (1906) neither of the parties knew or could know how long a period of time would elapse before Eliza would become entitled to a share of the rents under the lease . . . ."[6]

In the final decree the deed of May 2, 1910, was set aside; the lease of 1905 and the contract of 1906 were sustained; the incompetent was required to pay or secure the payment to Waialua of the purchase price; Waialua was required to convey to the incompetent the one-third interest in fee simple which passed by the deed, with reservations by Waialua of certain portions occupied by its improvements and certain lands and rights of way for ditches, pipes, service, and roads necessary to maintain and distribute water and operate the plantation, and with provisions to insure to the incompetent rights of way for the operation of her properties, if and when the same were partitioned and set off.

We might summarize the factual situation arising from the two trials in the lower court and the two reviews in the supreme court of Hawaii as follows: Eliza Christian was found or assumed to have been incompetent at the time of the execution of the lease of 1905, the contract of 1906 and the deed of 1910. Waialua was not found to have known of this incompetency at the time it received any rights flowing from any of the instruments. It was determined that the status quo was restored in so far as the deed was concerned by the repayment of the purchase price with interest and that the Holt land could be separated from the rest of the plantation with proper adjustment for improvements.

Upon these facts the Supreme Court of Hawaii determined applicable principles of law. Those considered by the Circuit Court of Appeals were the following:

I. The rule of law in Hawaii is that the deed, lease or contract of an incompetent executed prior to a judicial declaration of in-

[6] Christian v. Waialua Agricultural Company, 33 Haw. 34, 51.

competency is voidable. A mere showing of incompetency will not avoid it. In determining whether it should be canceled, "all of the equities must be considered, including those in favor of the grantee or lessee as well as those in favor of the grantor or lessor."[7]

"It is our view of the law that a lease made by an incompetent, who has not been judicially declared insane, to a lessee without knowledge of the incompetency, for an adequate rental and upon other terms that are reasonable and fair, which is beneficial to the incompetent and is in effect a provision in favor of the incompetent for necessaries for his sustenance and comfort,—a lease which has been fully performed and is accompanied by no fraud or other circumstances of inequity to the incompetent,—should not be canceled,—even though the lessee can be restored to the *status quo ante.*"[8]

In its first opinion the court had said: "When the grantee can be restored to the position it occupied immediately prior to the conveyance the deed of the incompetent should be canceled even though it was taken in ignorance of the incompetency and even though the consideration paid was adequate."[9]

It did not refer in the second opinion to any conflict between the statements but found the distinction between the canceled deed and the confirmed lease and contract, in the relative advantages to the incompetent.[10]

II. The construction of the contract for maintenance of 1906[11] was that it covered rents, issues and profits, payable to the incompetent not only from the lessee under the 1905 lease but also "the rents accruing thereafter from whatever source."[12] This ruling was embodied in the language of the final decree set out in the note below.[13]

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7 Christian *v.* Waialua Agricultural Company, 33 Haw. 34, 40.

8 Christian *v.* Waialua Agricultural Company, 33 Haw. 34, 43.

9 Christian *v.* Waialua Agricultural Company, 31 Haw. 817, 888.

10 Christian *v.* Waialua Agricultural Company, 33 Haw. 34, 53.

11 Footnote 5.

12 Christian *v.* Waialua Agricultural Company, 33 Haw. 34, 52.

13 "That said instrument dated August 31, 1906, referred to in Paragraph VII hereof, conveyed all rents, issues and profits from the land described in the deed of May 2, 1910 . . . , which have accrued or will accrue to Eliza R. P. Christian, whether under the lease dated March 17, 1905, . . . or otherwise, and from whomsoever due, from August 31, 1906, the date of said instrument, until the end of the natural life of her, the said Eliza R. P. Christian, and that the respondent-appellant, Waialua Agricultural Company, Limited, is the owner of all said rents, issues and profits so conveyed; provided, however, Waialua Agricultural Company, Limited, shall pay all taxes and lawful assessments upon or against said land during the lifetime of the said Eliza R. P. Christian."

"By the deed of May 2, 1910, Annie Kentwell, a mentally competent person, transferred all of her rights under the instrument of 1906 to" Waialua.[14]

III. A court of equity may permit a grantee without notice of the incompetency, who has placed improvements on the land of an incompetent in reliance on a conveyance subsequently canceled, to reserve the improvements together with such land and rights of way over the incompetent's lands as may be necessary for their proper use under suitable conditions to be prescribed by the court.[15]

While the Circuit Court of Appeals accepted the findings of fact in the trial and appellate courts of Hawaii,[16] it took direct issue with some of the legal conclusions of the supreme court of the Territory and held as follows:

I. The general rule of law is that the deed, lease or indenture[17] of an incompetent, executed prior to a judicial declaration to that effect, is void. "Relief against such a contract should not be granted, however, on proof of incompetency only." "So, in the case of a contract made by an incompetent, after proof of the incompetency, relief will be granted against the contract, or refused, depending upon the situation of the parties at the time relief is asked; in other words, the situation of the parties is the controlling factor."[18] "This . . . does not mean that the court should balance all equities of the parties, as was done by the trial court."[19] "The rule as stated means that if the parties can be placed in statu quo, the relief will be granted."[20] This rule was held applicable to Hawaii.

Apparently in reliance on this rule, the lower court determined relief should be granted against the lease as to the lessor, Eliza Christian, or against the contract or against both, if she were incompetent at the time of the execution.[21] The territorial supreme court had denied relief "irrespective of the subject of status quo" and of competency.[22]

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14 Christian v. Waialua Agricultural Company, 33 Haw. 34, 52.

15 Christian v. Waialua Agricultural Company, 33 Haw. 34, 57.

16 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 609, 612; 94 F. (2d) 806, 807.

17 Christian v Waialua Agricultural Company, 93 F. (2d) 603, 611.

18 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 610.

19 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 611.

20 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 612.

21 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 613.

22 Christian v. Waialua Agricultural Company, 33 Haw. 34, 63.

II. The construction of the contract of maintenance of 1906 is that the incompetent assigned to Mrs. Kentwell her rents, issues and profits under the lease of 1905 only; that later rents, issues and profits were retained.[23]

III. The action of the territorial supreme court, in adjusting equities as to improvements by cross conveyances between the incompetent and the subsequent grantees, is incorrect.

"Here, if the company is entitled to an allowance for improvements at all, it is entitled to an allowance of one-third of the enhanced value of the land, due solely to the addition of improvements since May 2, 1910. That amount may be made a lien against the land, or may be set-off against the rentals, if any, which are found due to the ward."[24]

Status of the Supreme Court of Hawaii.—The lower court acquired jurisdiction of the appeals under Judicial Code, section 128.[25] When the Hawaiian Organic Act was passed in 1900, no provision was made for appeals from the territorial supreme court. In 1905, for matters involving more than $5,000, a direct appeal to this Court was provided.[26] In 1911 review of the territorial supreme court was placed upon the same basis as review of the highest court of a State, with a continued right of review, generally, where the amount involved $5,000.[27] Certiorari from this Court was provided by the Act of January 28, 1915, and for the first time review by circuit courts of appeals for cases involving $5,000 or over.[28] In each of these successive enactments the Congress has recognized, to some degree, the autonomous position of the Supreme Court of the Territory.

This recognition is natural. The territorial court has general appellate jurisdiction of cases involving the mores and statutes of an archipelago, the first known compilation of whose laws appeared

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23 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 615.

24 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 617.

25 "Fourth. In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000, and in all habeas corpus proceedings." 43 Statutes at Large 936.

26 33 Statutes at Large 1035.

27 36 Statutes at Large 1158.

28 38 Statutes at Large 804.

in 1842.[29] Isolated until the day of electrical communication and aerial transportation from continuous contact with other peoples, and inhabited by diverse stocks of Oceanica, Asia, Europe and America, it developed, as an independent kingdom, a jurisprudence adapted to its needs. The constitution of Kamehameha III established a Supreme Court of the Kingdom in 1840 and defined its jurisdiction.[30] The common law and the civil law were sources of information but not of authority.[31] Until 1892,[32] lacunae were filled by the judges.[33] The laws developed were largely left in force by the Organic Act.[34] These now include a declaratory statute on the source of Hawaiian law.[35] This judicial tradition gives present

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[29] Preface to the Translation of the Constitution and Laws of the Hawaiian Islands.

[30] "Their business shall be to settle all cases of difficulty which are left unsettled by the tax officers and common judges. They shall give a new trial according to the conditions of the law. They shall give previous notice of the time for holding courts, in order that those who are in difficulty may appeal. The decision of these shall be final. There shall be no further trial after theirs. Life, death, confinement, fine, and freedom, from it, are all in their hands, and their decisions are final." Translation of the Constitution and Laws of the Hawaiian Islands, 1842, p. 20.

[31] "The reasonings and analogies of the common law, and of the civil law, may in like manner be cited and adopted by any such court, so far as they are deemed to be founded in justice, and not at conflict with the laws and usages of this kingdom." Statute Laws of the Hawaiian Islands, 1845-47, Vol. II, p. 5.

[32] Hall *v.* Kennedy, 27 Haw. 626, 629.

[33] "Section 14. The Judges have equitable as well as legal jurisdiction, and in all civil matters, where there is no express law, they are bound to proceed and decide according to equity, applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good conscience. To decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries." Hawaii Civil Code, 1859, p. 7.

[34] "Sec. 1. That the phrase 'the laws of Hawaii,' as used in this Act without qualifying words, shall mean the constitution and laws of the Republic of Hawaii, in force on the twelfth day of August, eighteen hundred and ninety-eight, at the time of the transfer of the sovereignty of the Hawaiian Islands to the United States of America." 31 Statutes at Large 141.

"Sec. 6. That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States." 31 Statutes at Large 142.

[35] "*Common law applies except when.* The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; *provided*, however, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or by the Territory." Revised Laws of Hawaii, 1935, Ch. 1, Sec. 1, p. 73.

Cf. Kake *v.* Horton, 2 Haw. 209; Rex *v.* Tin Ah Chin, 3 Haw. 90, 95.

substance to the rule of this Court that deference will be paid the understanding of territorial courts on matters of local concern.[36]

Review of its Decisions.—While the determinations made by the territorial court upon the validity of instruments executed by incompetents, the interpretation of the contract of an incompetent, and the adjustments of equities concerning improvements after cancellation of a conveyance, partake of general law, as well as of local law,[37] we see no reason for not applying the rule as to local matters to these circumstances. While the [redacted]th section of the Judiciary Act is not applicable to territories, the arguments of policy in favor of having the state courts declare the law of the state are applicable to the question of whether or not territorial courts should declare the law of the territories with the least possible interference.[38] It is true that under the appeal statute the lower court had complete power to reverse any ruling of the territorial court on law or fact[39] but we are of the opinion that this power should be exercised only in cases of manifest error. The differentiations, implicit and explicit, in the opinions of the Supreme Court of Hawaii, as to the rules of law applicable to the proceedings to set aside the deed of 1910 and those applicable to similar proceedings as to the lease of 1905 and the contract for maintenance of 1906, do not furnish occasion for reversal by the lower court.[40] In so far as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii.

Decision of the Supreme Court of Hawaii.—To adopt the legal principles applied by the territorial supreme court in these cases as rules of decision in that jurisdiction, or to construe instruments as it interpreted them, is not manifest error.

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[36] Matos *v.* Alonso Hermanos, 300 U. S. 430, 432; Kealoha *v.* Castle, 210 U. S. 149, 154; Lewers & Cooke *v.* Atcherly, 222 U. S. 285, 293; Ewa Plantation *v.* Wilder, 289 Fed. 664, 669.

[37] Black & White Taxi Co. *v.* Brown & Yellow Taxi Co., 276 U. S. 518, 526, 530.

[38] Cf. Swift *v.* Tyson, 16 Pet. 1; Erie R. R. *v.* Tompkins, 304 U. S. 64; Lewers & Cooke *v.* Atcherly, 222 U. S. 285, 294.

[39] Cf. Philippine Sugar Co. *v.* Philippines, 247 U. S. 385, 390.

[40] Cf. Sioux Remedy Co. *v.* Cope, 235 U. S. 197, 201; Fidelity and Columbia Trust Company *v.* Louisville, 245 U. S. 54, 59.

Whatever may be the better rule as to the voidableness of the transfer documents of an incompetent, it is not clearly wrong to select the one here chosen.[41]

The construction of the contract of maintenance by the territorial court of last resort is likewise defensible. The lower court, itself, said the assignment of rents due to the incompetent "by virtue of being . . . devisee under the will . . . during the term of the natural life of her" the incompetent (see note 5, *supra*), might mean "that the ward assigned all rents including those to which she might be entitled under the lease to the company and any other lease."[42] The minority opinion reached this conclusion.[43] Although on consideration of the entire contract the majority reached a different answer, the interpretation of the Supreme Court of Hawaii is not manifestly erroneous. Nor do we see any occasion to reexamine the interpretation that the deed of May 2, 1910 (the relevant portions of which are set out above, [page 4]), conveyed the rents, issues and profits, assigned to Mrs. Kentwell.

The lower court considered it necessary to apply here the rule that the occupant of the land of another was entitled to be paid, as compensation for improvements, a sum equal to the amount by which the improvements increased the value of the property, not exceeding the cost. It is not always necessary so to penalize an innocent improver. If he is a tenant in common, partition may be made so as to set apart to him the portion improved.[44] Under the circumstances here disclosed, the action of the Hawaiian court in awarding to Waialua the realty and improvements described in the decree need not be set aside.

Decree of the lower court reversed and decree of the Supreme Court of Hawaii affirmed.

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41 2 Black, Rescission and Cancellation (2nd Ed.), §§ 255-258; 1 Williston, Contracts (Revised Edition, 1936-38), § 254; Imperial Loan Co., Ltd. v. Stone, (1892) 1 Q. B. 599; Casebier v. Casebier, 193 Ky. 490.

42 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 615.

43 "In my opinion the agreement of August 31, 1906, from Eliza Christian to Annie Kentwell, in consideration of her support and maintenance during the balance of her life, purported to convey not only all the rents accruing to Eliza Christian under the lease of 1905 after the contingent remainder of Eliza Christian became vested in 1922 upon the death of her father, as held by the majority opinion, but also all the rents, issues, and profits after the expiration of the lease and until her death." Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 618.

44 See Highland Park Mfg. Co. v. Steele, 232 Fed. 10, 34, modified 235 Fed. 465; Cochran v. Shoenberger, 33 Fed. 397, 398; Ford v. Knapp, 102 N. Y. 135, 140.